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Recommendations and Reports

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Administrative Conference of the United States

The Administrative Conference of the United States was established by statute as an independent agency of the federal government in 1964. Its purpose is to promote improvements in the efficiency, adequacy and fairness of procedures by which federal agencies conduct regulatory programs, administer grants and benefits, and perform related governmental functions.

To this end, the Conference conducts research and issues reports concerning various aspects of the administrative process and, when warranted, makes recommendations to the President, Congress, particular departments and agencies, and the judiciary concerning the need for procedural reforms. Implementation of Conference recommendations may be accomplished through direct action on the part of the affected agencies or legislative changes.

Administrative Conference of the United States

Recommendations and Reports

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RECOMMENDATIONS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

84-1 THROUGH 84-7

RECOMMENDATION 84-1: PUBLIC REGULATION OF SITING OF INDUSTRIAL DEVELOPMENT PROJECTS

Major industrial development projects often have significant environmental effects and require permit approvals and preparation of environmental reviews by agencies under legislation such as the National Environmental Policy Act (NEPA) and the Clean Air Act. Although governmental permitting and review processes—aimed at protecting the environment, reducing safety risks, and assisting the planning of livable communities—necessarily extend the time required to complete projects, unnecessary delays associated with the complexity of lengthy processes can have serious negative consequences. Project costs can rise dramatically over initial estimates, resulting in increased costs to consumers for the products or services eventually delivered. Project approval delays have led to pressure to circumvent environmental laws by means of special legislation for particular projects or types of projects. The consuming public can further suffer from process delay by being deprived for substantial periods of time—and, in cases of project abandonment caused by delay, forever—of the benefits of emerging new technology. The Administrative Conference[1] believes that, when many agencies at different levels of government must approve a project proposal, the complexity and uncertainty of the process can be reduced through an appropriate degree of interagency coordination and the use of adequate procedures.

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[1] Congress requested that the Administrative Conference (ACUS) work cooperatively with the Advisory Commission on Intergovernmental Relations (ACIR) toward resolving regulatory conflicts and overlap among federal, state, and local agencies. ACUS and ACIR were specifically asked to address the issue of streamlining the permit process based on approaches that lead to improved intergovernmental cooperation. Congress was concerned with the complexity and costs associated with the permit process in the review of energy and port development projects. Congress expects ACIR and ACUS to work together to assess alternative ways to resolve intergovernmental problems and conflicts in permitting. In conducting this joint effort, the agencies have sought and will continue to seek the input of business, government, and environmental experts. House Committee on Appropriations, (Continued)

Interagency Coordination

Many federal, state, and local agencies must review environmentally sensitive industrial projects. Project developers need assistance in determining which agencies must be consulted for project approval, what permits are required, what applications must be completed, and what information is needed for each application. Developers' informational needs could be met by a clearinghouse established at the level of government closest to initial project review.

When relatively few agencies must consider a project application, agreements can be worked out among the agencies to coordinate agency review or to resolve jurisdictional or interpretative conflicts. These agreements can facilitate more timely project review, reduce overlapping review, decrease uncertainty, and provide for joint state-federal agency review of a project.

When many agencies with different responsibilities, distinct agency missions, and different governing statutes must approve a project proposal there is a strong need for coordination. Selection of a coordinating agency early in the application process is desirable to facilitate the permitting process. The coordinating agency can facilitate the exchange of information, can encourage more efficient review, and can reduce mistrust by scheduling regular face-to-face meetings among the project developer, governmental agencies, interest groups, and residents of the community in which a project is to be located. The coordinating agency often will have permitting duties but may be a non-permitting body such as the Colorado Joint Review Process.[2] To

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Report on Treasury, Postal Service, and General Government Appropriation Bill, 1983, H.R. Doc. No. 854, 97th Cong., 2nd Sess. 39 (1982). ACIR has cooperated in the development of this recommendation, but has not formally adopted the recommendation at this time.

[2] The Colorado Joint Review Process (JRP) is an innovative new approach to coordinating governmental review of energy projects. Originally part of the Colorado Department of Natural Resources, it is now a wholly separate body, fully supported by the Governor and other key state officials. The JRP has no permitting responsibilities but performs a coordinating role and operates on a voluntary basis. A developer must choose to (Continued)

be effective a non-permitting body must be supported by key governmental leaders in the jurisdiction. The coordinating agency may be a body different from the clearinghouse agency or the lead agency for environmental review preparation.

Public Participation

Citizens of the community in which a project is to be sited have a strong interest in the project and will seek information about the project particularly when it has major environmental effects. Environmental groups and other members of the public also have similar interests. Severely limiting legitimate public participation can unnecessarily increase opposition to a project and can lead to lawsuits to stop a project. Facilitating public participation can reduce fears and concerns, can mitigate the not-in-my-backyard attitude of a community, and can lessen public mistrust of the developer and government. The public can also contribute useful information to a project. Developers can allay concerns by sharing information about their project with the public and can work more effectively by cooperating with the community in which a project is to be sited. Public participation at an early stage of agency review ensures that changes can be made before substantial developer funds are committed to a specific project design. Public participation can be enhanced when meetings or hearings are held in the project community and when the agency designates a public advisor to help citizens understand the process.

Environmental Review

Under the provisions of NEPA and similar state legislation, environmental reviews often must be prepared by agencies prior to approving a project application. When both federal and state environmental review statutes apply to a project application, preparing a joint review can reduce duplication and overlap. The approach taken in the regulations of the Council on Environmental Quality—in which a "lead agency" is designated to coordinate the preparation of an environmental impact statement--provides an excellent model adaptable even when there is no major federal

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have its project application accepted into the JRP. The JRP works with the developer, the public, and all levels of government to identify affected agencies and permit processes, to determine what environmental and other issues must be addressed, to clarify what information is necessary, and to establish a decision schedule for all governmental review processes that must be completed for that project. The JRP sponsors periodic meetings with all affected actors and otherwise seeks to ensure a smoother and more organized review.

interest in a project. Early identification of environmental impacts through the "scoping of issues" process facilitates statutory compliance and allows project changes by a developer when they are least expensive. Identifying commenting agencies early in the process ensures that the concerns of every agency are addressed in the review. Face-to-face meetings of all participants in the review process are useful for identifying impacts, exchanging information, and getting to know the other participants in the process and their concerns. The lead agency can ensure a more timely review process by negotiating a decision schedule—in which a completion date for each step of the process is agreed upon—with the project proponent, other agencies, and representatives of other identified interested groups. The lead agency can play a major coordinating role by identifying other agencies, setting up meetings, organizing the stages of review preparation, and negotiating decision schedules for each stage.

Permit Approvals

Developers must file applications in which they provide information about their project. Developers and agencies may disagree as to what information is required and how much information is adequate for a complete application. There may also be uncertainty over procedural and substantive requirements that must be met. Agencies can assist developers by specifying in advance the information needed for an application to be complete and the standards that must be met for a permit to be approved. The agency can clarify what is required by holding pre-application meetings with developers. The agency can resolve informational, procedural, and substantive problems by holding post-application meetings with the developer. Agencies need adequate information and full cooperation from developers to make permitting or compliance decisions. Duplication, overlap, and paperwork can be reduced if agencies with joint permit responsibilities for a project adopt common application requirements, standardized information requirements, and common procedures such as joint hearings. Sharing of staff and budgetary resources can make these approaches easier to implement.

Time Limits for Decisionmaking

Legitimate concerns are expressed by developers and others that too much time is required by agencies to review and permit major industrial projects. Legislatures have reacted by passing time limit statutes that mandate an agency's preparation of an environmental review or action on a permit application within a set period of time.[3] When setting a time limit by statute, a legislature must be sensitive to the agency's needs by allowing in the statute sufficient time to complete the decision—including time that may be required for action by other agencies that have concurrent review responsibilities, by giving the agency adequate resources, and by allowing the agency flexibility to extend the deadline for good cause. Agencies often have the most knowledge about how long a particular type of decision can take, and agencies can specify by regulation an appropriate time limit. Agency compliance with time limit statutes can be monitored if the legislature requires agencies periodically to report their performance under the statute and to identify any problems encountered in meeting the time limits.

An alternative to mandated statutory time limits is a requirement that agencies establish decision schedules which set deadlines for the completion of specific actions (e.g., comment periods, drafting of required agency reports) within each phase of project review. A decision schedule is desirable because it is individualized for each project and because it requires the developer and all responsible agencies to make commitments to meet the agreed schedule. Commitment by the developer is crucial since developers can speed up or slow down development of a project depending upon internal or external economic considerations. Also some agencies may not be sufficiently committed to timeliness; if agencies are required to agree to a schedule, they are more likely to make that commitment.

RECOMMENDATION

These recommendations are directed primarily to federal, state, regional, and local agencies that have permitting and environmental review responsiblities. In addition, many of the time limit recommendations are directed to Congress and state legislatures. To the extent statutory changes are necessary to implement the other recommendations, they are also directed to the appropriate legislative bodies.[4]

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3. In Recommendation 78-3 the Conference stated: "Congress ordinarily should not impose statutory time limits on an agency's adjudicatory proceedings. Statutory time limits may be appropriate, however, when the beneficial effect of agency adjudication is directly related to its timeliness, as may be true in certain licensing cases or in clearance of proposed private activity where a delayed decision would deprive both the applicant and the public at large of substantial benefit." 1 CFR 305.78-3, para. 3. These concerns for timeliness are particularly pertinent here.

4. See statement regarding joint ACUS—ACIR effort in (Continued)

A. Interagency Coordination

1. Clearinghouses should be established at the level of government closest to initial review of a particular project to provide information to project developers about applications, agencies to be consulted, and permitting requirements.

2. Agencies should make agreements to coordinate review of a particular project, or to resolve jurisdictional or interpretive conflicts.

3. A coordinating agency should be selected to coordinate governmental review of projects when many agencies are involved. The coordinating agency may be either a permitting or a non-permitting agency.

4. The coordinating agency should schedule regular face-to-face meetings among developers, agencies, and the public.

5. The Colorado Joint Review Process approach (note 2, supra) in which a non-permitting agency coordinates project review by all agencies is one possibility that should be considered.

B. Public Participation[5]

1. In order to facilitate approval processes, agencies with permitting and environmental review responsibilities should solicit and consider the views of public participants, including citizens of the community in which a project is to be sited.

2. To make public participation more meaningful, agencies should develop procedures such as holding local meetings or hearings and designating public advisors who can provide assistance on procedural aspects of agency proceedings to participants.

3. Agencies should encourage developers to provide information to the community about a project application and to be responsive to legitimate community concerns.

4. Agencies should ensure that public participation occurs at an early stage of project review and developer planning so that changes in project design can be made before substantial funds are committed to a specific project design.

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note 1.

[5] This part does not overrule or supersede Recommendation 71-6: Public Participation in Administrative Proceedings (1 CFR 305.71-6).

C. Environmental Review

1. When several agencies are involved in environmental review preparation for a single project, a lead agency (federal, state, regional, or local, as appropriate) should be designated to coordinate the activities. The approach taken in the regulations of the Council on Environmental Quality (40 CFR Parts 1500-1508) is recommended, even when a formal environmental impact statement is not required.[6]

2. The lead agency should identify commenting agencies and should schedule face-to-face meetings of all participants in the review process.

3. The lead agency should utilize the scoping of issues process to identify environmental impacts early in the review process before a draft review is prepared.

4. The lead agency should negotiate decision schedules—setting deadlines for completion of scoping, draft review preparation and comments, final review preparation and comments, and issuance of a review—with the developers, all affected agencies, and representatives of other identified interested groups.

5. When appropriate, agencies should agree to prepare joint state-federal environmental reviews.

D. Permit Approvals

1. Whenever feasible permitting agencies should specify in advance what informational, procedural, and substantive requirements will apply to a particular permit application.

2. Agencies should be available for pre-application meetings with the project developer to clarify informational, procedural, and substantive requirements.

3. Within a short period of time after the filing of an application, agencies should determine whether the application is complete. Agencies should hold post-application meetings with developers to discuss procedural, informational, and substantive deficiencies in an application, and should promptly advise developers of any deficiencies throughout the pendency of the permitting process.

4. Agencies should make clear to developers that the developers must supply necessary information in an application and

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[6] The Conference is not suggesting that an environmental impact statement be prepared when none is required by law, but only that, if environmental review is to involve several agencies, a lead agency be selected.

that their cooperation will greatly assist in the permitting process.

5. Whenever feasible, agencies with joint permitting responsibility for a project should be encouraged to reduce duplication and paperwork by accepting common applications, by standardizing informational requirements, by using in one agency proceeding relevant information developed in the proceeding of another agency, and by adopting common procedures such as joint hearings.

E. Time Limits for Decisionmaking[7]

1. Agencies should negotiate a decision schedule with the project developer and all affected agencies within existing statutory deadlines. The schedule should set a deadline for the completion of specific stages of project review. The schedule should be contained in an agreement in which the developer, the agencies, and representatives of other identified interested groups make a commitment to meet the deadlines.

2. If a legislature[8] adopts a time limit statute, it is preferable that the time limit be established through rulemaking by the agency itself, rather than by statute.

3. A legislatively mandated time limit should allow an appropriate amount of time for the type of decision involved, should specify the consequences of not meeting the time limit, and should provide the agency with the option of extending the time limit for good cause explicitly stated.

4. Legislatures should provide adequate resources for agencies to meet time limit requirements and should periodically review agency compliance with time limits.

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[7] See generally, Recommendation 78-3: Time Limits on Agency Action (1 CFR 305.78-3), which is consistent with this part.

[8] As used here, "legislature" includes Congress, as well as state, regional, and local legislative bodies.

RECOMMENDATION 84-2:

PROCEDURES FOR PRODUCT RECALLS

Each year manufacturers recall millions of consumer products—ranging from toys and household appliances to drugs and autos--under an array of federal health and safety statutes. Most recalls are undertaken voluntarily, either on the manufacturer's own initiative or at the urging of a federal agency with recall authority. The recall remedy, while a valuable enforcement tool, is also one that is difficult to implement. A recall must be undertaken promptly if it is to serve its purpose of preventing injury. Further, to be effective, it must be implemented in a way that encourages public responsiveness.

For purposes of this recommendation, the term "recall" encompasses a variety of post-sale remedial actions by manufacturers and sellers of products, including: (1) notifying consumers of problems or potential problems with products; (2) offering to repair products; and (3) offering to refund the cost or to replace products. The recommendation is based, in part, on a study of the recall programs of three federal agencies that account for the great majority of recalls—the National Highway Traffic Safety Administration (NHTSA), the Food and Drug Administration (FDA) and the Consumer Product Safety Commission (CPSC).[1] Each of the three agencies studied has the authority to order at least one of the post-sale remedial actions noted above. Each is actively involved in recalls of consumer products that pose health or safety risks to the general public, instances where the need for effective use of the recall remedy is the greatest and its implementation is the most difficult. However, these recall programs differ with respect to standards for ordering recalls, the scope of the remedy, and administrative procedures. Some of the differences are statutorily based; others grow out of varied methods of implementing the programs.

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1. Other agencies that engage in product recalls include EPA, FAA, HUD and USDA.

Although all three agencies make extensive use of recalls to implement their statutes, recalls have certain inherent limitations as enforcement tools. Consumers can, and sometimes do, render them ineffective by failing to respond. Further, recalls generally work well only if they are undertaken promptly and after a minimum of agency prodding. Recalcitrant firms can often thwart the effectiveness of the remedy merely by invoking available administrative procedures. There are a number of reasons for firms to be recalcitrant when faced with a possible recall. Companies may not enjoy much protection against product liability claims by recalling defective products—indeed, recalls can stimulate additional law suits. Recalls often bring adverse publicity, and they can be very expensive, requiring refunds or replacements of products that have already been produced and marketed.

Because recalls often work better than other remedies, however, they are a major enforcement tool of the three agencies studied. There are a number of reasons for their popularity. From the agencies' standpoint:

— Recalls do promote safety. Although response rates are lower than agencies would like, consumers in significant numbers do return or discard recalled products or use them more safely.

— Recalls establish precedents for what constitutes an unacceptably hazardous product.

— Recalls operate more quickly and efficiently than most standard setting. In recall cases, government and industry often share a sense of urgency that a hazardous product should be removed from the marketplace. This has led agencies to adopt informal, flexible settlement procedures which have made it easier for companies to agree to undertake recalls.

Industry also may prefer recalls to standards as an enforcement tool because recalls generally affect only the makers of unsafe products rather than all product manufacturers. Recalls, unlike many standards, do not impose across-the-board certification requirements and may impose fewer recordkeeping requirements.

Agencies must reconcile several interests in implementing their recall programs. They must be sensitive to the potential for consumers to disregard recalls if the remedy is overused. They must stress voluntary agreements to achieve prompt—and therefore effective—recalls, yet be willing to use their enforcement powers if voluntary efforts stall. They must be flexible in negotiating the terms of recalls to encourage voluntarism, yet assure that the notice and remedy are adequate to inform and protect product owners.

In general, agencies should work together to develop a more uniform approach to recalls. Despite the differences in the agencies' programs, they share common characteristics and goals, and they must all deal with the general public. Agencies could benefit from sharing with each other what they have learned about recalls, and the public could benefit from more consistency in the recall programs.

Agencies should also consider publicly classifying their recalls according to risk to help the public assess the hazards of recalled products. While this approach may present some problems in negotiating recalls, it recognizes the important role that the consumer plays as a partner with government and business in the recall process and the need to provide that partner with adequate information.

Moreover, additional enforcement tools are warranted for some agencies. As a practical matter, agencies cannot bring many enforcement actions, but the availability of these additional powers, and their occasional use when necessary, can assist agencies in negotiating voluntary recalls and in carrying out the overall aims of the recall programs. Even a relatively small number of enforcement actions ultimately serves the broader aim of encouraging voluntary compliance by others, and should therefore be streamlined where possible.

Three procedural reforms are recommended for the consideration of agencies with recall programs. First, such agencies should consider seeking broader statutory authority to require manufacturers to report safety defects. A provision similar to Section 15(b) of the Consumer Product Safety Act, which requires reporting of defects that "could create" a potential hazard, would give agencies earlier warning of defects and reduce their information gathering burden, without changing the standard for recalls.

The second recommended change would give agencies additional authority in cases involving serious or imminent safety problems. In general, if a case must be taken through both administrative and judicial proceedings, the process may be so lengthy that the recall could be ineffective, since most of the injuries will have occurred and the response rate will be low. Therefore, agencies should consider asking for authority in especially hazardous cases to bypass the administrative hearing and to seek court-ordered recalls.

The third general reform is based on the premise that the availability of a variety of enforcement tools, such as court-ordered seizures and civil penalties, helps to induce voluntary cooperation with an agency's recall program. Seizure is not always an effective tool, however, unless the agency is able to detain products administratively at the point of distribution prior to filing a seizure action. CPSC and FDA, which have authority to seek court-ordered seizures, should consider the desirability of detention authority where it would aid their use of this enforcement tool. FDA should also consider seeking civil penalty authority for statutory violations where it now only may seek criminal penalties.

Paragraph B.4 of the recommendation is addressed specifically to the CPSC. The CPSC enforces four significant safety statutes: the Consumer Product Safety Act (CPSA), the Federal Hazardous Substances Act (FHSA), the Flammable Fabrics Act (FFA), and the Poison Prevention Packaging Act (PPPA). Both the CPSA and the FHSA give the agency the authority to order recalls, and this has become a favored enforcement tool of the agency. Under these two Acts, if a voluntary recall is not achieved, the agency must conduct a formal administrative hearing prior to ordering a recall. Under the CPSA, the agency may go directly to court to seek a recall if the product involved is "imminently hazardous." Under the FHSA, the agency may proceed administratively against imminently hazardous products. Neither Act contains a judicial review provision, with the result that "non-statutory" review of agency recall orders occurs in the United States District Courts. The absence of a judicial review provision for recall orders under the CPSA and FHSA should be corrected. Congress should provide for judicial review in the United States Courts of Appeals under 5 U.S.C. §706.[2] This would eliminate the existing, lengthy, two-tiered judicial review procedure. The FFA and PPPA omit recall provisions entirely, causing uncertainty as to the Commission's ability to use recalls against unsafe products governed by either of these Acts. It would promote recall uniformity and reduce delay if the Commission could address the risks posed by all products under its jurisdiction under the procedures of Section 15 of the CPSA.

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[2] See ACUS Recommendation 75-3, The Choice of Forum for Judicial Review of Administrative Action, 1 CFR 305.75-3.

RECOMMENDATION

A. Coordination of Recall Activities

1. Interagency recall liaison group. A group consisting of representatives from all agencies with recall programs should be established to inform each other about their programs and to share research in areas of common interest, such as how to improve consumer response rates and how to use new technology to improve recall notification.

2. Recall notices. Recall notices should clearly describe the nature of the defect and the nature and extent of the risk of harm that prompts the recall. Individual agencies should consider whether their mission would be advanced by classifying recalls according to risk. The interagency liaison group could explore the possibility of coordinating the classification systems so that the agencies use similar terminology to designate levels of risk.

3. Improved handling of consumer inquiries and complaints. Consumers do not always know which agency takes complaints or has information about recalls. Agencies with recall programs should establish a central interagency switchboard to take all calls and refer them to the appropriate agency. As an alternative, agency personnel designated to receive inquiries or complaints relating to product defects should be made aware of the recall programs of other agencies, so that inquiries or complaints will be referred to the proper office.

4. Publicizing recalls. Each agency should seek to develop a method of publishing periodically an up-to-date list of active recalls within the agency's jurisdiction.

B. Procedural Improvements

1. Agencies with recall programs should consider whether to ask Congress for authority to require manufacturers to give such agencies information in their possession about potential safety-related defects in their products which could create a substantial risk of injury to the public. Such authority, if granted, should be accompanied by appropriate incentives for compliance.

2. Agencies with recall programs for defective products should consider whether to ask Congress for authority to bypass administrative hearings and to seek court-ordered recalls in cases of serious safety problems as defined by the relevant statute.

3. Agencies authorized to seek seizures should consider whether to ask Congress to augment their seizure authority by giving them the power to detain defective products

administratively prior to seizure.

4. Congress should streamline the Consumer Product Safety Commission's recall authority by amending the Consumer Product Safety Act (a) to give the Commission specific authority under that Act to seek recalls of all products within its jurisdiction, including those now subject to the Federal Hazardous Substances Act, the Flammable Fabrics Act and the Poison Prevention Packaging Act; and (b) to provide for judicial review of agency ordered recalls in the United States Court of Appeals under 5 U.S.C. §706.

5. The Food and Drug Administration should consider whether to ask Congress for civil money penalty authority as an option where only criminal penalties are now available.[3]

6. The foregoing recommendations are not intended to encourage agencies to use recalls as a substitute for rulemaking, but merely to streamline the process of obtaining recalls where appropriate.

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[3] See ACUS Recommendation 72-6, Civil Money Penalties as a Sanction, 1 CFR §305.72-6.

RECOMMENDATION 84-3:

IMPROVEMENTS IN THE ADMINISTRATION OF THE GOVERNMENT IN THE SUNSHINE ACT

A. **Periodic Agency Review of Sunshine Practices.** Members of the public voice several criticisms of the manner in which agencies employ the Government in the Sunshine Act and conduct open meetings. Among the most significant are that meetings are often closed on technical legal grounds without substantive reason for doing so, that at times discussion in meetings is inadequate to allow those in attendance to understand fully the proceedings, and that frequently members of the public have insufficient access to explanatory materials and underlying documents to allow them to follow the discussion and comprehend the content of meetings. At issue is not so much compliance with the letter of the law as progress toward fuller realization of its general objective of enlarged, meaningful public access to information. To the extent that problems exist, they are a function of agency practice and are appropriately addressed in their particulars on an agency-by-agency basis.

B. **Impact of Sunshine on the Collegiality of Agency Decisionmaking.** The desirability of the collegial form of agency organization, as opposed to the agency headed by a single executive, has long been the subject of debate. Congress has, however, chosen to delegate certain administrative functions to collegial bodies.

One of the most frequently offered justifications for collegial decision making is that stated by the First Hoover Commission's Committee on Independent Regulatory Commissions:

> A distinctive attribute of commission action is that it requires concurrence by a majority of members of equal standing after full discussion and deliberation. At its best, each decision reflects the combined judgment of the group after critical analysis of the relevant facts and divergent views. This provides both a barrier to arbitrary or capricious action and a source of decisions based on different points of view and experience. . . . The member of the commission must expose his reasons and judgments to the critical scrutiny of his fellow

> members and must persuade them to his point of view. He must analyze and understand the views of his colleagues if only to refute them.

Though no generally accepted standard for measuring the quality of agency decisions under the Government in the Sunshine Act has been devised, one of the clearest and most significant results of the Government in the Sunshine Act is to diminish the collegial character of the agency decision making process. The open meeting requirement has generated reluctance to discuss certain important matters; and discussions, when they occur, may not contribute to achieving a consensus position. In some agencies the pattern of decision making has shifted from collegial exchanges to one-on-one encounters, transmission of views through staff, and exchanges of memoranda or notation procedure. The inhibition of collegial exchanges, in turn, impedes the members in the collective exercise of their responsibilities, and tends to weaken the role of the collegium vis-a-vis that of the staff and the agency chairman.

Congress was aware of the inherent and unavoidable tension between the values of openness in government and collegiality in decision making when it enacted the Government in the Sunshine Act, and it consciously chose a result that would maximize openness. Concessions were made in the statute to the need for maintaining the confidentiality of certain categories of information under discussion, but few if any concessions were made to the needs of the deliberative process as such. Although the legislative history indicates Congress believed that, after the initial period of adjustment, sunshine would not have a significant inhibiting effect on collegial exchanges, unfortunately this has not been the case.

RECOMMENDATION

1. Agencies should continually strive to reflect fully in their activities the basic purpose of the Government in the Sunshine Act, which is to enlarge public access to information about the operations of government. Agencies are strongly encouraged to review periodically their sunshine policies and practices in light of experience and the spirit of the law for the purpose of making adjustments that would enlarge public access to meaningful information, such as (a) invoking the exemptions of the Act to close meetings only when there is substantial reason to do so; and (b) making open meetings more useful through comprehensible discussion of agenda items and provision of background material and documentation pertaining to the issues under consideration.

2. Under the Government in the Sunshine Act the degree of collegiality in the multi-member agencies has diminished. Congress should consider whether the present restrictions on closing agency meetings are advisable, and, if not, how they might best be revised without undercutting the basic principle of the Act that "the public is entitled to the fullest practicable information regarding the decision making processes of the Federal Government."

If a new balance is to be struck between the values of collegiality and openness, the Administrative Conference suggests that agency members be permitted some opportunity to discuss the broad outlines of agency policies and priorities (including enforcement priorities) in closed meetings, when the discussions are preliminary in nature or pertain to matters, such as budget or legislative proposals, which are to be considered in a public forum prior to final action.

RECOMMENDATION 84-4:

NEGOTIATED CLEANUP OF HAZARDOUS WASTE SITES UNDER CERCLA

By enacting the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) in 1980, Congress undertook to provide a federal solution for the problem of abandoned and inactive hazardous waste disposal sites. Approximately 2,000 sites will require action, at a cost of tens of billions of dollars. CERCLA created a $1.6 billion revolving "Superfund" for direct federal action to clean up these sites and respond to hazardous waste emergencies. The act supplements this public works authority with provisions for negotiating cleanups by "potentially responsible parties"—site owners and operators and users of sites such as transporters and waste generators. It also empowers the federal government to sue such parties for the cost of cleanups paid for out of the Superfund and, if waste disposal may present an "imminent and substantial endangerment," to sue for orders directing responsible parties to clean up sites themselves. The act is administered by the Environmental Protection Agency (EPA).

By early 1984, although EPA had responded to hazardous waste emergencies at many sites, only a handful of sites listed on a statutory national priority list by the agency had been completely cleaned up by the federal government. A few more sites had been cleaned up by private parties. The causes of delay were varied: uncertainty about the extent of the problem and the efficacy of technical remedies; start-up problems inherent in a new program; and a two-year long effort to negotiate cleanups so that no Superfund revenues would have to be spent. By mid-1983, the strategy of conserving the Superfund had fallen apart amidst a major leadership crisis within the EPA. In a policy reversal, Superfund expenditures for cleaning up sites then took priority over other means available under the statute for effecting cleanups.

The current agency approach to CERCLA emphasizes cleanups paid for out of the Superfund coupled with actions to recover the expenditures but also relies to a limited extent on negotiated cleanups and on lawsuits to compel responsible parties to act under CERCLA's imminent endangerment provision. This strategy has resulted in a CERCLA implementation effort that is slow and expensive.

Congress, the EPA, responsible parties, and other critics have suggested several means of speeding up and economizing on site cleanups. These include enlarging the Superfund, setting program deadlines, expanding the EPA program offices, empowering citizens to sue, and encouraging voluntary cleanup by industry. Although enlarging the Fund, providing more staff, and setting program deadlines would tend to accelerate the CERCLA effort, the Administrative Conference believes that a properly designed site cleanup negotiation process, through which responsible parties or third parties would agree to act directly to clean up sites, would also hasten cleanup while reducing its expense by tapping the technical and financial resources of the private sector. Involvement of the federal government and affected citizens in this process would ensure adequate protection of public health and the environment.

Although current EPA policy permits the negotiation of cleanups, the agency puts too little stress on negotiations and has adopted a series of procedural and substantive requirements that unnecessarily constrict the number of negotiated cleanup agreements that the agency might beneficially conclude. The Conference recognizes, of course, that successful negotiations can only occur when private parties as well as the federal government are willing to respond to the problem of hazardous waste cleanup in good faith. The Conference intends no criticism of aggressive EPA enforcement efforts where responsible parties refuse to cooperate.

In this recommendation the Administrative Conference suggests a series of steps that the EPA might take to encourage and facilitate greater reliance on negotiated private party cleanups, in those situations where negotiations have a realistic chance of success.

RECOMMENDATION

1. The Environmental Protection Agency (EPA) should emphasize the negotiation of voluntary cleanups at hazardous waste dump sites. The negotiation process for any site should include, at an appropriate time and in an appropriate manner, the key interests, such as federal, state and local governments, parties potentially responsible for cleanup (including site users, site owners and operators, and waste transporters), and local citizens. Whenever possible, efforts to negotiate a cleanup agreement should begin well before the commencement of litigation concerning a site. To increase the likelihood that negotiations will succeed, the Administrator and other leading EPA officials, both at headquarters and in the regional offices, should support the

negotiation process, follow its implementation, and be available to explain specific negotiated agreements before congressional oversight committees if necessary.

2. Citizens living in the vicinity of or otherwise directly affected by a site have a substantial interest in some issues related to the cleanup process—for example, medical diagnostic testing, relocation of public service facilities, measures to isolate the site, and the overall adequacy of the cleanup effort. Their interest in other aspects of the process, such as the allocation of costs among potentially responsible parties (or between potentially responsible parties and the government) is more problematic. EPA should consider means beyond complete reliance on local political institutions for involving these citizens, including the negotiation of collateral arrangements, participation of citizens' groups in negotiations over the type and scope of the remedy, and the like. Even if not participants, local citizens ordinarily should be permitted to observe those aspects of the negotiations that concern them.

3. Many negotiations can be conducted by EPA without outside assistance. In other cases, where outside assistance is desirable, EPA should encourage efforts by independent mediating organizations or individuals to convene negotiations. This can be accomplished by asking such a convenor at an early stage—no later than the commencement of "remedial investigations and feasibility studies" (a statutory cleanup stage)—to determine whether conditions are favorable for negotiations at a site. Favorable conditions include: issues that are ripe for decision; absence of fundamental conflict about values among those with a stake in the outcome; adequate representation and organization of key interests; opportunity for mutual gain for those with a stake; a balance of power among participants; willingness to bargain in good faith and share information; and willingness of units of government to participate as equal parties. Where negotiation appears feasible, the convenor should attempt to organize a site negotiation group from among the parties with a stake in the site cleanup. If an initial meeting of the parties is successful, the participants should consider retaining the convenor or another person to serve as mediator for the duration of negotiations. EPA should consider using Superfund resources to support an entity, such as a non-profit corporation or another agency, that would undertake this initial convening effort and provide mediation services if the parties desired them. Alternatively, EPA should consider providing these services through personal service contracts with skilled mediators.

4. In order to take advantage of private funds and expertise while they remain available, EPA should encourage and

participate in negotiations for cleanup of sites where there is a high likelihood of successful negotiations, even if they have not yet been allocated federal funding for remedial investigations or been added to the National Priority List, unless such negotiations will distort the agency's priorities by diverting substantial agency resources or causing undue delay.

5. EPA should avoid wasting agency resources on unproductive negotiations by establishing, with the concurrence of other negotiating parties, reasonable deadlines for the conclusion of negotiations.

6. Successful negotiation requires that participation by all interests be through persons who, if not principals, have the confidence of, and easy access to, principals with the authority to make binding commitments. For EPA, the negotiators or persons readily accessible to the negotiators should have explicit, broad delegated authority to commit the agency to a negotiated outcome. To the extent that peer review and approval of agreements within the agency are nonetheless required, EPA should provide expedited means for obtaining them. One method of achieving this end would be for EPA headquarters to consolidate review of negotiated cleanups in a single panel of key officials.

7. The final agreement should take the form of an administrative consent order under section 106 of CERCLA or a judicial consent decree. Like other parties to the agreement, EPA should bind itself to undertake appropriate actions and follow agreed-upon schedules.

8. Negotiations undertaken in the context of litigation require procedures and standards different from the procedures and standards applicable to negotiations occurring before a matter reaches litigation. EPA should acknowledge that existing agency guidance memoranda on "case settlement policy" are appropriate for use only in litigation situations; to implement the proposed negotiation process, the agency should prepare new guidance memoranda that bring more appropriate factors to bear on pre-litigation negotiations.

9. The Conference recognizes EPA's need to maintain a strong litigation posture in CERCLA cases in order to strengthen its ability to negotiate agreements in the public interest. However, the Conference also urges the agency to consider the possible advantages of greater flexibility in situations where cleanup arrangements are being negotiated rather than litigated. For example, in some cases it might be desirable for EPA to begin to negotiate even if 80% of cleanup costs has not been offered or to agree with the parties about the amounts of their individual responsibilities to pay cleanup costs even if the total responsibility

adds up to less than 100 percent of cleanup costs (allocating Superfund resources to pay for the rest), as an incentive for cooperating parties to join promptly in an agreement. The intransigence of a few responsible parties should not be permitted to block agreement with others prepared to accept reasonable shares of responsibility; moreover, such partial agreements may free agency resources to pursue the intransigent parties.

10. Although the Conference believes that its recommendation can be implemented without additional legislation, it acknowledges that the effectiveness of expanded reliance on negotiated cleanups would depend upon the degree of support or opposition from relevant congressional committees. If EPA undertakes efforts to clean up dump sites through a negotiation process like that described in this recommendation, congressional committees should support and encourage these efforts, recognizing that negotiated solutions inevitably involve compromises.

11. To promote achievement of its site cleanup management objectives, EPA should publish statements of its CERCLA policies, such as conditions for undertaking voluntary cleanup negotiations, procedures for public involvement in site cleanup decisions, and site study criteria, in the Federal Register and allow for public comment.

RECOMMENDATION 84-5:

PREEMPTION OF STATE REGULATION BY FEDERAL AGENCIES

States have the power to regulate many forms of conduct. Each state must have broad power to regulate in ways that it believes to be in the best interests of its citizens, subject to the limitations stated in the federal and state constitutions. The nature and magnitude of the problems that require regulatory action vary substantially among the states, and state governments are normally in a better position than the federal government to determine the types of regulations that will serve the interests of the states' citizens. States sometimes have an incentive, however, to impose regulations that advance state interests at the expense of other states' interests or of national interests.

Federal courts have applied the Commerce Clause to limit state power to affect national interests only in those few cases where the state action clearly discriminates against interstate commerce or protects in-state economic interests from out-of-state competition. Institutionally, however, courts are ill-suited to attempt to limit state power to harm national interests when state regulation furthers in-state interests of one type while it simultaneously frustrates a national interest of a different type.

Congress can limit state power to harm national interests by (i) expressing in a statute a congressional intent to occupy a field completely, (ii) explicitly preempting the specific type of state regulation at issue, or (iii) imposing a federal regulatory duty directly in conflict with a duty imposted by the state. The conflict, delay, and uncertainty of outcome that occur when preemption questions must be resolved by the judiciary can be avoided if Congress addresses preemption issues clearly and explicitly when enacting regulatory statutes. The congressional agenda is so crowded, however, that Congress cannot be expected to consider explicitly and in detail all of the forms of state regulation that may harm the national interest. Congress experiences particular difficulty anticipating and resolving directly the many arguable conflicts between the national interest and new state regulations issued in the aftermath of a federal decision to deregulate an area of conduct.

Because of the limited ability of Congress and the judiciary to act as checks on state regulation that harms the national interest, states possess, in practice, the power to make regulatory choices that produce net benefits within the state but that produce substantial net detriments on a national level. Without an additional federal constraint on state regulatory power, states can be expected to regulate in this manner frequently.

Federal agencies can play a valuable role in supplementing judicial and congressinal constraints on state regulation. Courts regularly affirm federal agency actions that preempt state regulations when the preemptive effect of the federal action is no broader than can be justified by the evidence of need for preemption. Federal agencies sometimes consider preemption of a state law or regulation, however, without providing affected states notice and an opportunity to participate effectively in the agencies' proceedings.

A federal agency considering a regulatory action—whether to expand or reduce regulatory constraints—should be sensitive both to the need to preempt state laws that seriously disrupt the federal program, and to the need to take into account the states' special needs and circumstances.

RECOMMENDATION

1. Congress should address foreseeable preemption issues clearly and explicitly when it enacts a statute affecting regulation or deregulation of an area of conduct.

2. Each federal agency should establish procedures to ensure consideration of the need to preempt state laws or regulations that harm federally protected interests in the areas of regulatory responsibility delegated to that agency by Congress, and each agency should clearly and explicitly address preemption issues in the course of regulatory decision-making. Particularly in the circumstances where a federal regulatory program is being reduced or eliminated (deregulation), an agency needs to be alert to the form and magnitude of state regulation that may exist—or may be quickly adopted to fill a perceived void left by the diminished federal regulation.

3. When a federal agency foresees the possibility of a conflict between a state law or regulation and federally protected interests within the federal agency's area of regulatory responsibility, the agency should, when practicable, engage in informal dialogue with state authorities in an effort to avoid such a conflict.

4. When a federal agency proposes to act through agency adjudication or rulemaking to preempt a state law or regulation, the agency should attempt to provide all affected states, as well as other affected interests, notice and an opportunity for appropriate participation in the proceedings.

REDCOMMENDATION 84-6

DISCLOSURE OF CONFIDENTIAL INFORMATION UNDER PROTECTIVE ORDER IN INTERNATIONAL TRADE COMMISSION PROCEEDINGS

This recommendation concerns the protective orders practice of the United States International Trade Commission in antidumping and countervailing duty proceedings. Under the Trade Agreements Act of 1979, the Commission has authority to release to counsel, under protective order, certain confidential business and financial information that is submitted to it by parties in such proceedings.

The export to the United States of goods at less than their fair value (called "dumping") and the subsidization by foreign governments of exports of their countries' products to the United States are treated by American law as unfair methods of international trade. If dumped or subsidized imports are found to cause or threaten material injury to an industry in the United States, the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, provides for imposition of a duty in an amount intended to offset the margin of dumping or subsidy. There must be two determinations: (1) whether the imports in question have been dumped or subsidized, which is decided by the International Trade Administration of the Department of Commerce ("ITA"), and (2) whether the imports are causing or threatening injury to an industry in the United States, which is decided by the International Trade Commission ("ITC").

The injury proceeding at the ITC is substantially the same for both types of cases, known respectively as antidumping and countervailing duty proceedings. The ITC conducts a preliminary investigation in which it must determine within 45 days whether there is a "reasonable indication" that the injury test will be met. If its determination is negative, the entire antidumping or countervailing duty proceeding (including the portion conducted by the ITA) is terminated. If the ITC's determination is affirmative, and the ITA has made an affirmative determination that the imports are being dumped or subsidized, the ITC conducts a final investigation to reach a determination, which usually must be made within 120 days, whether the imports are threatening or causing injury to an industry in the United States.

In both stages of the proceeding, the ITC gathers extensive information from American producers, importers, and purchasers of the products in question. The Trade Agreements Act of 1979 authorizes the ITC to make available, under protective order, confidential business information that it has received in these proceedings. Under this authority, the ITC releases the confidential data of one party to counsel for other parties. In almost all cases those other parties, to whose counsel the confidential information is disclosed, are business competitors of the party that submitted the information. The only companies whose confidential information is disclosed are those American companies that complain of injury from the alleged unfair import practices. Confidential data concerning their prices and cost of production can be released to counsel for both their domestic competitors and their foreign competitors. In addition, all confidential information submitted to the ITC, regardless of the submitter's identity, may ultimately be disclosed, under judicial protective order, in proceedings to review ITC determinations before the Court of International Trade ("CIT").

Throughout its proceedings, the ITC devotes great care to maintaining the security of confidential business information which is submitted to it or is gathered in its investigations. Agency regulations provide procedures for requesting confidential treatment of proffered information, and the staff in practice accords confidential treatment without specific request to information acquired in response to questionnaires and other investigative inquiries. The record of each antidumping and countervailing duty injury proceeding is divided into public and nonpublic sections. Pleadings, staff documents, and ITC opinions are prepared and submitted under procedures designed to avoid the public disclosure of confidential information.

The principal concern here is not with the agency's internal procedures, but with the potential misuse of parties' information which has been received under protective order by lawyers for other parties. A particular concern is that such information will, wilfully or inadvertently, be passed along by a lawyer to his client, who then can make competitive use of it against the American company that submitted it. Though there is little hard evidence of such improper disclosure, there is much suspicion that it occurs. It is believed that the perceived risk of wrongful disclosure generates a chilling effect which, by discouraging voluntary submission of essential information, hampers the International Trade Commission's ability to do its job. The ITC's responsibility is to determine whether the allegedly unfair imports are threatening or causing "injury" — not simply injury to individual American companies as such, but injury to the entire "industry" affected by competition from the imports. If American companies fear that their confidential business data will leak to their competitors, and for that reason refuse to submit such information, the Commission will be unable to assemble the complete industry figures it needs for a soundly-based determination of injury. Although the agency has the power to subpoena the necessary information, the short statutory deadlines it must meet and its own limited resources to procure enforcement of subpoenas make heavy reliance on voluntary cooperation a practical necessity.

Another area of concern arises from the circumstance that existing ITC practices do not adequately inform submitters of information of the high likelihood that confidential price and cost of production information will be disclosed, nor of the possibility that other confidential information may be disclosed, without further warning, in review proceedings before the CIT.

These recommendations propose that the ITC (and, in one case, the CIT) establish a series of measures intended to reduce the risks of disclosure, protect submitters and safeguard the process of making disclosure of price and cost of production data. In some circumstances, these measures would preclude disclosures that are now permitted. No recommendation is made to reduce the categories of information that are required by statute to be disclosed. Indeed, the ITC might appropriately consider some enlargement of the classes of information it will release under protective order to facilitate more meaningful analysis of the information now disclosed. Any broader disclosure should be accompanied by the safeguards herein recommended, and should be provided only if the Commission's investigative and decisional processes will clearly be improved thereby.

RECOMMENDATIONS

A. Limiting the Exposure of Confidential Information

1. The International Trade Commission should provide for the disclosure of confidential information during the preliminary investigation phase of its antidumping and countervailing duty injury proceedings only in circumstances in which disclosure is important to achieving the limited purposes of the preliminary investigation itself.

2. Confidential information submitted by a domestic producer party should not be disclosed to counsel for any other domestic party (except a United States importer which is an interested party within 19 U.S.C. §1677(9)(A)).

3. The Commission by regulation or policy statement should define and specify the kinds of data which are disclosable as "information concerning the domestic price and cost of production of the like product."

B. Protection Of Submitters' Interests

1. The Commission's questionnaires should more clearly inform petitioners and supporters of the petition about the likelihood that their confidential price and cost of production information (whether submitted in response to the questionnaire or otherwise) will be disclosed by the Commission under protective order to counsel for competitors of the submitter.

2. The Commission's questionnaires and other inquiries, by which confidential information is requested from parties and nonparties, should be accompanied by a statement that all such information of whatever kind (not merely that in the price and cost of production categories) is subject to disclosure by the Court of International Trade, under protective order, to counsel for any party to a judicial review proceeding involving such information.

3. Although in practice the Commission does not require the submitters of responses to questionnaires and follow-up inquiries to make specific request that the information submitted be treated as confidential by the Commission, its regulations (19 C.F.R. §201.6) do require such a specific request. The regulations should be modified to reflect the practice.

4. The Commission's regulations should be conformed to 19 U.S.C. §1677f(b), which requires the Commission to treat as confidential any information so designated by the submitter, unless the Commission requests an explanation and is unpersuaded by it, in which event it must return the information to the submitter.

5. The Commission should establish by regulation an informal procedure whereunder the submitter may object to disclosure of its information under protective order, except in cases of extraordinary urgency. Commission regulations should also provide that, when the submitter is given notice of an application for disclosure of its information, it also be advised specifically of the procedures whereunder it may object.

6. With respect to a requirement that the requester show a need for confidential information before it can be released under protective order, for the ordinary case the Commission should continue its present practice whereunder a simple statement of need, rather than a showing of need, suffices. Where extraordinary

sensitivity or other unusual considerations are demonstrated by the submitter, the Commission should require an actual showing of substantial need before releasing the information. The Commission's regulation (19 C.F.R. §207.7(a)), which purports to require the requester to "demonstrate[] a substantial need for the information in the preparation of his case" in all instances, should be modified accordingly. In all cases the statement of need should be accompanied by a statement of the requester's intent to participate actively in the proceeding.

7. The Court of International Trade should seek to provide in proceedings for judicial review of ITC injury determinations in antidumping and countervailing duty cases, that nonparty submitters be given notice and a meaningful opportunity to object to the release under protective order of any confidential information which they had submitted to the International Trade Commission.

C. Counsel's Responsibilities Under Protective Orders

The Commission's regulations and protective orders should provide by specific language that the attorney who has received information under protective order may be personally liable to sanctions (1) for a breach of the protective order by other persons — such as attorneys, experts, and support staff working on the case — to whom the attorney, under the authority of the protective order, has divulged the confidential information or (2) where the attorney has been shown to have been negligent in the custody of such information and unauthorized disclosure has resulted.

D. Possible Broader Disclosures

1. Confidential price and cost of production information submitted to the Commission by importer and foreign parties to the investigation should be made available under protective order to counsel for domestic parties to the investigation, or at least to those who support the petition.

2. The Commission should consider disclosing under protective order further kinds of confidential information pertaining to price and cost of production, beyond what is now disclosed, to the extent such further information can facilitate more meaningful analysis of the kinds of information that are now disclosed.

3. The Conference takes no position on whether or not the Commission should consider disclosing confidential information in

categories other than price and cost of production. If the Commission does consider such disclosure, it should make such disclosure only (a) in categories where party analysis of such information is likely to assist the Commission's investigation without impeding its fulfillment of statutory deadlines, (b) in cases in which the requester shows a substantial need for access to the information and (c) under additional safeguards including as appropriate those recommended herein.

RECOMMENDATION 84-7

ADMINISTRATIVE SETTLEMENT OF TORT AND OTHER MONETARY CLAIMS AGAINST THE GOVERNMENT

In the Federal Tort Claims Act and dozens of other statutes,* Congress has authorized agencies to provide compensation for losses occasioned by a variety of agency actions. The FTCA, the centerpiece of this array, essentially waives the government's sovereign immunity to damage actions arising out of the negligent or otherwise wrongful acts committed by federal employees while acting within the scope of their employment. Previously Congress had been burdened by numerous private bills to redress government torts. The FTCA sought initially to shift to the courts primary responsibility for determining whether redress was warranted. In 1966 the FTCA was amended to transfer much of that load to agencies. At that time, Congress required claimants to present claims to the responsible agency as a prerequisite to suit and gave the agency a minimum of six months in which to act upon them. The agencies were also given an unprecedented degree of settlement autonomy. The FTCA requires that the exercise of this authority be "in accordance with regulations prescribed by the Attorney General," but does not subject it to detailed procedural mandates apart from the requirement that the Department of Justice approve large settlements.

This relatively inconspicuous administrative process has taken on considerable significance in dealings between agencies and individual claimants, and could gain even more if Congress acts to displace suits against individual federal officials by an expansion of the government's liability under the FTCA.** Available information suggests that the administrative process resolves a high proportion of claims worth paying at the same time as it exposes the unmeritorious character of many of the thousands of claims filed annually. In both ways, it effectively replaces litigation with a largely informal, relatively open, and potentially nonadversarial means of dispute resolution.

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* "Meritorious claims" statutes allowing agencies to entertain some kinds of claims even where no fault can be shown, include the Military and Foreign Claims Acts and statutes covering certain actions of the Departments of Agriculture and Justice, NASA, the NRC, the Peace Corps, and the Postal Service. Other ancillary statutes, like the Suits in Admiralty Act, Public Vessels Act, Copyright Infringement Act, Trading with the Enemy Act, and Swine Flu Immunization Act, complement the FTCA, for instance by addressing claims likely to be exempt from that Act.
(Continued)

Although the present system seems generally to be serving Congress' purposes, it has not been without difficulties. In particular, the extent to which administrative settlement should be taken as an autonomous dispute resolution process, is unclear. In some agencies the claims officer approximates a neutral decisionmaker, objectively appraising something in the nature of an inchoate entitlement. Other agencies view their claims officers as adversaries of the claimant engaged in tactical maneuvers that are preludes to litigation or to bargaining for a financially advantageous settlement of sustainable claims.

The Conference, though not recommending any radical restructuring of the agency claims process, believes that this ambiguity has sometimes produced undesirable results. Inappropriately adversarial responses to technical deficiencies, restrictive policies on information disclosure in connection with a pending claim, and less than fully fair and objective approaches to determining the merits and monetary value of a claim do not serve the purposes of the FTCA, nor do they enhance confidence in claims officers' determinations. Claimants, who may obtain a trial de novo before a federal judge after a wait of only six months, are finding the judiciary to be increasingly sympathetic, perhaps in part because some of the judges doubt the fairness and efficiency of some of the agencies' claims handling. To further administrative effectiveness, the Conference recommends the following fine-tuning of the FTCA, of certain agency practices, and of the Department of Justice's regulations.

RECOMMENDATION

A. Agency Exercise of Settlement Authority

1. Providing Guidance to Claimants.

(a) Agency claims officers, as part of their duties, should take reasonable steps to save a claimant who has come forward with a potentially deserving claim from innocently failing to perfect a valid statutory demand, committing technical error, or running afoul of a statute of limitations. Among other things,

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** See ACUS Recommendation 82-6, Federal Officials' Liability for Constitutional Violations.

claims officers should promptly advise claimants of formal deficiencies so as to give claimants an opportunity to cure them. Further, in the case of deficiencies relating solely to the requirements of the Attorney General's or agency's regulations, as opposed to jurisdictional requirements of the FTCA itself, the agency should consider extending the claimant an opportunity to cure such deficiencies for a reasonable time beyond the ordinary limitations period.

(b) Each agency General Counsel's office should compile and publish in the CFR a list briefly describing statutes under which the agency is authorized to entertain monetary claims and the name and telephone number of the agency personnel in charge of each program. In appropriate circumstances, claims officers should make a copy of the list available to claimants.

2. Filing the Claim.

(a) The Attorney General should amend his regulations to treat an FTCA administrative claim as still timely though received after expiration of the statute of limitations, provided that the claimant can demonstrate that he or she sent it by an ordinarily effective means of delivery before expiration of that period.

(b) Agencies should require claims officers to advise claimants that the absence of a sum certain for all categories of claims may preclude their consideration by both agency and court, and that, subject to timely amendment and the existing statutory exceptions, the amount of the administrative claim constitutes a ceiling on the damages that may later be sought in court.

3. Substantiation of Claims. Where exchanges with a claimant reveal an insufficiency of information submitted in support of the claim, agency claims officers should promptly and clearly advise the claimant whether the continued nonproduction of designated information will, in the officer's view, warrant dismissal of the claim as invalid because of incomplete documentation.

4. Access to Information. Agencies should endeavor, particularly when a claimant seeks access to his or her claim file or to other information relating to a pending claim, to promote a mutually free and open exchange of relevant information. Agencies should consider release even when applicable statutes would not require it if more extensive disclosure might advance settlement. Specifically, agency claims officers should not routinely regard the information they assemble in connection with an administrative tort claim as falling within the government's executive privilege for deliberative materials, or the attorney-client, expert witness, or qualified attorney work product privileges, and in appropriate circumstances claims officers should be prepared to disclose information falling within those privileges.

5. Claims Decisions.

(a) Agencies should give a brief statement of the grounds for denial whenever an FTCA or other claim is rejected.

(b) An agency claims officer's ultimate goal should be a fair and objective assessment of the merits of a claim and of its monetary worth. In addition, the Department of Justice should not exercise its statutory approval authority over large administrative settlements in a manner that would tend to discourage claims officers from making serious efforts to reach a fair and objective settlement with a deserving claimant.

6. Reconsideration.

(a) Claim denial letters should inform claimants that they may request the agency's reconsideration of its denial, and that such a request extends the six month waiting period before suit may be filed in federal district court.

(b) In cases where the claimant communicates with the claims officer following final denial, the officer should promptly indicate whether or not, in his or her view, the communication constitutes a request for reconsideration and state specifically the procedural implications of that determination.

B. Statutory Changes

1. Congress should conduct a comprehensive reexamination of the meritorious and other ancillary claims statutes in force to ensure that each is warranted and that, together, they form a coherent whole both on their own terms and in relation to the FTCA. Congress should systematically raise ceilings on all agency authority to settle claims where inflation has rendered obsolete the present levels.

2. Congress should amend 28 U.S.C. §2401(b) to provide that, where a claim has been filed with the wrong agency in a timely manner and transferred to the appropriate agency, the original date of filing will be used for determining timeliness. To help ensure that agencies have an adequate and predictable length of time to investigate and consider claims, Congress should provide that the six-month period given the agencies for that purpose not commence until the claim has been received by the appropriate agency.

3. Congress should further amend 28 U.S.C. §2401(b) to provide that, where an otherwise timely damage action against a person for whose tortious conduct Congress has made the federal government exclusively liable is converted into a suit against the government under the FTCA and then dismissed for failure to file a prior administrative claim, the plaintiff shall have 60 days from

the date of such dismissal or two years from the date the claim arose, whichever is later, in which to file such a prior claim.

BACKGROUND REPORTS
FOR
RECOMMENDATIONS
84-1 THROUGH 84-7

BACKGROUND REPORT FOR RECOMMENDATION 84-1

Report on Public Regulation of Siting of Industrial Development Projects

by
Gregory L. Ogden
Professor of Law
Pepperdine University School of Law

July 1984

for the

Administrative Conference
of the United States
2120 L. Street, N.W., Suite 500
Washington, D.C. 20037

This report was prepared for consideration by the Administrative Conference of the United States. It represents only the views of the author, not necessarily those of the Conference. The report should not be quoted or attributed without reference to this disclaimer.

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Public Regulation of Siting of Industrial Development Projects

by Gregory L. Ogden*

I. INTRODUCTION

Industrial development projects pose complex problems for the government officials who must conduct reviews, issue permits, and approve the siting of projects. Most of these projects have significant environmental effects. Many of them raise difficult issues of safety and technical complexity. Review responsibility for these projects cuts across a variety of single-purpose agencies and across three levels of government, federal, state, and local.[1] The administrative agencies that review these projects face problems very different from those faced by an official reviewing a single matter before a single agency.[2] These problems include coordinating environmental reviews, delineating the role of each agency, resolving conflicts between agencies, and working out agreements between agencies sharing responsibility for a type of review. In addition, the agencies must carry out the substantive review within their authority.

This article examines the question of what should be the optimal decisionmaking model for regulatory review of industrial development projects. A number of procedural reforms will be discussed. Also two alternative approaches will be examined, the so called single-stop permitting agency, as exemplified by the California Energy Commission,[3] as well as similar agencies elsewhere, and the coordinating body model, as exemplified by the Colorado Joint Review Process.[4] In the former approach, the review process is consolidated in one agency, the commission, which serves as a common forum but which has override authority over any state or local single purpose agency.[5] In the latter approach, the coordinating body brings together the project developer, interested members of the community in which the project will be built, other interested groups, and all the various single purpose agencies that have review responsibility for the project. These groups work together throughout the review process facilitated by the coordinating body which possesses no permitting authority.[6] These two examples illustrate the major alternative approaches adopted in recent years to deal with the complex issues posed by major projects.

These two approaches will be analyzed and evaluated using criteria developed by the author based on a case study of the SOHIO Pactex pipeline terminal case[7] and based on a survey conducted by the author in which he interviewed about 110 persons having experience in siting of industrial development projects. These persons included agency officials at all levels of government, public interest group members, and individuals who worked for project developers.[8] The analysis focuses on not only the illustrative agencies but also on the various stages of the review process. Reforms are suggested for each stage.

The article proceeds from several basic assumptions. The first is that there are common problems in the reviewing of all industrial development projects regardless of the location of the site, the type of technology used, and the state in which the project is to be placed.[9] The second assumption is that these projects are complex enough to require a different decisional process and structure than is used in the less complex "single case before a single agency" model on which much of our current administrative procedure law is based. The final assumption is that a model can be developed for review of large-scale projects that is efficient, thorough, and provides accurate high quality review that is sensitive to environmental concerns.[10]

A variety of facilities are included within the definition of industrial development project. They include energy facilities such as nuclear power plants, conventional coal, gas, and oil fired power plants, oil refineries, oil pipelines and ocean terminals, mining and extraction of natural resources, new energy technologies such as geothermal, oil shale, coal slurry pipelines, and LNG terminals. They also include chemical manufacturing plants, metals, mining, and pulp and paper plants. These industries have the most environmental effects and raise the most troublesome siting issues. The article will differentiate among types of projects when necessary. However, the common themes in reviewing all projects will be emphasized. Furthermore, the recommendations that will be made will not apply to nuclear power facilities. Although nuclear power siting issues will be discussed somewhat, the special problems posed in regulating those facilities are unique enough to be excluded from this paper.[11]

The article will start with a discussion of the average permitting and construction time for selected projects. It will then set forth the factors affecting permitting times. These will include the statutory requirements for agency environmental and permit reviews at the federal, state, and local levels that a large project must satisfy before construction may commence and the project begin operation. The survey results and case study insights will be integrated into that discussion. Problems with environmental and permitting reviews will be discussed. Solutions to those problems will be evaluated and recommendations will be made as to which solutions are better. The two alternative approaches, as exemplified by the California Energy Commission and the Colorado Joint Review Process, will be evaluated. Proposed recommendations will be made to improve the procedures for regulatory review and permitting of these projects.

II. Regulatory Review and Permitting Processes for Industrial Development Projects

A. Permitting and Construction Time

Industrial development projects require several years to proceed from conception of an idea for a project to on-line operation. One study of 39 coal-fired electric power plant projects exceeding 100 megawatts in capacity estimated that the average total permitting timeline was 38 months or slightly over three years in length.[12] This is broken down into a mean time of 23 months for federal permits (with two or three permits required) and 15 months mean time for state permits.[13] The mean construction timeline for these projects was approximately 46 months.[14] Combining the two time periods, it should average seven years from the date of first permit application to on line operation for a typical coal-fired electric power plant.

This study focused on three types of federal permits, the Prevention of Significant Deterioration (PSD) permit procedures under the Clean Air Act;[15] the National Pollutant Discharge Elimination System (NPDES) permits under the Federal Water Pollution Control Act Amendments of 1972;[16] and § 404 or other permit requirements enforced by the Army Corp of Engineers.[17] The study foun that these permits were critical to power plant siting. The study also noted that there were other federal statutes that affected power plant siting, as well as state power plant siting laws, which explained the 15 month state permit extension to the timeline.[18]

This study is significant for several reasons. It is one of the few analyses of timelines for permitting and construction of a large enough number of power plants (39) for the mean or average times to be reliable.[19] More frequently, the discussion of power plant siting timing issues focuses on a particular project which encountered problems specific to that project but which problems are not generally applicable to other projects.[20] The project specific nature of problems makes it difficult to develop generalized solutions. Second, the timeline study shows that there is a direct correlation between the number of permit processes and the time needed for review. The more permits that are required, the more time that is required to process those permits. The mean permit time for facilities with only one federal permit to be obtained was 7.36 months. The mean permit time for facilities with 2 or 3 federal permits to be obtained was 22.85 months.[21] Finally, including state permit reviews added a mean time of 15 months to the total time.[22] This adds an additional factor, federal-state regulatory interaction. Although the study was limited to power plant siting, its conclusions are applicable to most large industrial development projects that have significant environmental effects.

Establishing a realistic timeline for regulatory review, granting permits, and construction of a project is absolutely critical to a project developer. Most developers are private entities and thus have to fund capital construction costs out of accrued profits or debt financing. Before a developer will make a decision to commence a project, it must have some assurance that the project will be economically viable, that the benefits of the project will exceed the costs. To make that basic economic assessment, a developer needs to know a great deal of information. It has to know realistically how long is it going to take to permit and construct a project. To plot a reasonable timeline the developer's legal staff has to determine what statutes have to be complied with, what agencies have to review all or part of the project, what requirements each agency has for information in applications, what timing requirements agencies have for filing of applications, and what preliminary data must be collected by the developer before filing applications. In addition a careful project developer should have engaged in extensive preliminary planning before submitting any applications.[23]

This kind of careful planning in advance can help solve a number of recurring problems or issues that can seriously affect the permitting timeline for a large-scale project. These issues will be discussed next.

B. Review for Environmental Effects: NEPA and State Environmental Quality Legislation

Industrial development projects in the energy, metals, mining, chemicals and paper industries almost always have significant environmental effects.[24] Coal fired power plants emit significant quantities of various air pollutants, cause water pollution through thermal discharges into cooling water, and cause acid rain thereby changing the pH level of lakes and rivers in surrounding areas.[25] If scrubber technology is used to control emissions of air pollutants, a significant solid waste problem is created.[26] Oil pipelines and pipeline terminals create air pollution[27] and water pollution concerns at the point of loading oil from ship to pipeline terminal.[28] Pipelines also raise land use and coastal zone concerns that can be very significant in some cases.[29] Oil drilling, especially enhanced oil recovery, causes air pollution, water pollution, and solid waste problems.[30] Mining and mineral extraction projects can raise serious air quality, water quality, and land use control issues.[31] In arid areas of the country such as the west, allocation of water among competing uses can create significant problems for oil shale development and coal slurry pipelines.[32] Nuclear power plants use cooling water and produce thermal discharges into surrounding bodies of water.[33] Nuclear power plants also produce, in spent fuel, highly toxic hazardous wastes that must be dealt with.[34] Nuclear power plants present special concerns of safety as citizens in communities close to existing and planned plants worry about the likelihood of a nuclear accident and about the long term effects of low level radiation emissions.[35] Other heavy industries create air and water pollution problems.

It is primarily because of these significant environmental effects that industrial development projects must comply with permitting requirements and agencies must require extensive information from developers about their projects. Most of the major federal and state permitting laws that apply to industrial development projects are authorized by environmental statutes ranging from the National Environmental Policy Act of 1969 (NEPA),[36] to the Clean Air Act,[37] the federal Water Pollution Control Amendments of 1972[38] and even the Atomic Energy Act of 1954[39] which focuses the Nuclear Regulatory Commission's attention on "public safety and health" as the primary regulatory standard for licensing nuclear power plants.[40]

It is appropriate to begin this discussion with NEPA, a non-permitting statute that requires all federal governmental agencies to prepare an environmental impact statement for "major federal actions significantly effecting the quality of the human environment."[41] NEPA's environmental impact statement requirement is intended to be pre-decisional, to require agencies to consider impacts, alternatives, and mitigation measures before a decision is reached to commit resources to a project.[42] The scope of NEPA includes federal programs, direct federal construction projects, federal grants given to states for construction projects, private projects crossing federal lands, and review of private projects by permitting agencies mandated by substantive environmental quality or other statutes.[43] NEPA review by these agencies must precede permit decisions.

Because of NEPA's scope, many federal agencies have environmental impact statement preparation responsibilities for a single industrial development project. These agencies often include the Bureau of Land Management of the Department of the Interior,[44] the Army Corps of Engineers[45], the Environmental Protection Agency,[46] the Department of Energy,[47] and others. In addition, NEPA requires the responsible federal official preparing an EIS to obtain comments in the draft stage from "any federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved,"[48] and from "appropriate federal, state, and local agencies, which are authorized to develop and enforce environmental standards."[49] Thus numerous federal, state, and local agencies are required to be included at a very early stage in the governmental review of a large project.[50]

One problem that can arise in any major project review is how to divide the responsibility for preparing an Environmental Impact Statement. If all agencies that possessed substantive review responsibility over part of an industrial development project were required to and in fact did prepare EIS's, the resulting documents would be duplicative and overlapping in content, in resources expended in writing reports, and in impacts discussed. Alternatively each agency could be assigned responsibility only for impacts within its substantive jurisdiction. However, assigning impacts to various agencies would lead to fragmented reports, and an inability to focus on overall impacts of a project as well as mitigation measures and alternatives.[51] Thus another mechanism is necessary to ensure that efficient and thorough EIS's are prepared.

The Council on Environmental Quality (CEQ)[52] developed regulations to implement NEPA which adopted the lead agency/cooperating agency approach to solve this problem.[53] A lead agency is designated to supervise preparation of an environmental impact statement whenever more than one federal agency has NEPA responsibilities in an action.[54] In a major industrial development project, there will be many federal agencies involved in permit or impact review.[55] Under the CEQ regulations, these agencies are required to informally agree as to which agency is to be the lead agency.[56] When there is disagreement among agencies over who should be the lead, five criteria for a designation are specified,[57] and CEQ, on request of an agency, is authorized to resolve a dispute and designate a lead agency.[58]

Once a lead agency is designated other agencies are deemed cooperating agencies.[59] The lead and cooperating agencies must work together with the lead agencies having coordination responsibilities. Lead agencies are required to request that agencies with jurisdiction or environmental expertise participate in the preparation process and to designate those as cooperating agencies,[60] to include cooperating agencies in the EIS preparation process at the earliest possible moment,[61] to use the analysis and expertise of cooperating agencies in preparing the EIS,[62] and to meet with cooperating agencies on request.[63] Cooperating agencies must participate in the NEPA process generally[64] and in the scoping of issues process.[65] They must assume responsibility for preparing parts of a report on request,[66] and must make available agency staff and funds to assist in preparation of the EIS.[67]

The CEQ regulations allocate responsibility among lead agencies, cooperating agencies, and commenting agencies throughout all aspects of the EIS preparation process.[68] The regulations are designed to effectively define roles for all of the multiple agencies that must participate in the environmental review process. These roles will be discussed for important stages of the EIS process.

A critical stage for environmental review of major industrial development project is the early identification of environmental issues. This is called the "scoping process" in the CEQ regulations.[69] Scoping is the means for identifying all significant issues in a proposed action before the draft EIS or final EIS is prepared.[70] Scoping is required to ensure thorough identification and consideration of all environmental impacts of a project, to avoid redrafting an EIS or preparing of a supplemental EIS to cover an issue overlooked initially, and to avoid challenges in court to the adequacy of an EIS. Agency officials who are experienced in the preparation of EIS documents consider the scoping process to be essential to high quality preparation of EIS's, and necessary to avoid these problems.[71]

The lead agency plays an important role in the scoping process including having responsibility for obtaining participation of other agencies, identifying issues, assigning preparation responsibilities among agencies, identifying and intergrating other environmental reviews, integrating environmental review and permit decisionmaking, setting time limits, and holding scoping meetings.[72] The lead agency is also authorized to set time limits for completion of all phases of the EIS process, and must do so when requested by an applicant.[73] The lead agency may also designate an agency official as an expediter of the NEPA process.[74]

The EIS process must be started immediately after an application for review of a project is received by the relevant agency.[75] The EIS process includes preparation of a draft EIS based on the allocation of responsibility between the lead and cooperating agencies determined in the scoping process.[76] The draft statement must discuss environmental impacts arising from the project, alternatives to the project that are less detrimental environmentally, and mitigation measures.[77] The draft report (and the final report) must be circulated to a wide variety of groups for comments including federal agencies with jurisdiction or environmental expertise, state and local agencies, the applicant, members of the public, and others.[78] The lead agency must ensure that the final EIS reflects the comments of agencies and others who reviewed the draft EIS.[79] Agencies have 45 days to make comments on the draft statement.[80] The final EIS must be completed and issued before agencies with permit authority reach a decision to issue permits.[81]

The NEPA review process for major projects is complicated by state statutes such as the California Environmental Quality Act.[82] These Acts, often called "little NEPAs," require state and local agencies reviewing a major industrial development project to prepare state environmental impact reports[83] that can duplicate efforts undertaken by federal agencies under NEPA.[84] However, many potential problems can be resolved if state agencies are allowed, as are California agencies,[85] to prepare joint state-federal EIS's. The CEQ regulations explicitly authorize federal agencies to cooperate with state and local agencies in many ways including holding joint hearings, preparing joint environmental impact statements, and generally working to reduce duplication and overlapping review.[86]

Joint federal-state EIS preparation can work very well when the agencies are cooperative. For example, the Bureau of Land Management of the Department of Interior has worked out memorandums of understanding (MOU's) with the California Energy Commission and other state agencies to prepare joint statements on a number of projects. These MOU's designate officials from each agency to be responsible for EIS preparation for a project, they define each agency's role, and they designate a lead agency and lead official. MOU's encourage an efficient cooperative effort by multiple agencies to prepare required EIS's without duplication and overlap in their work. Working out such agreements is to be strongly encouraged.[87]

A major issue with the CEQ regulations as they apply to major industrial development projects is whether there needs to be an agency or body, separate from the lead agency, to implement the regulations.[88] Critics of the environmental review process state that the CEQ regulations are not self-implementing and their effectiveness depends on the attitudes and practices of agency officials.[89] A number of specific criticisms made by oil industry representatives support this proposition. For example, agencies do not always utilize the scoping process most effectively.[90] In addition, agencies should be encouraged to hold interagency and public meetings before the formal scoping meetings for large or controversial projects. Furthermore, these critics say that agencies do not and should establish and publicly commit to clearly defined time schedules for preparation of the EIS. Also some federal agencies do not adequately coordinate with other federal and state and local agencies and this reduces the effectiveness of the scoping process. Coordination by federal lead agencies could be bettered by assigning a single individual within a lead agency to coordinate and push the EIS process.[91]

Many of these same criticisms are contained in a recent Bureau of Land Management (BLM) study of its energy facility permitting process.[92] Even though BLM had fully applied the CEQ regulations to its permitting process and had established and used a coordinating body, the Office of Special Projects, the study found there was a continued need to develop interagency cooperation, particularly with the Federal Energy Regulatory Commission (FERC).[93] The study also noted a number of agency coordination problems including decisions as to which agency should be the lead for EIS preparation, difficulties with different environmental analysis requirements imposed by various agencies, lack of responsiveness by cooperating agencies with lead agency's needs, and lack of coordination by the lead agency with the cooperating agencies in some cases. It noted that lack of cooperation by FERC with BLM was a special problem. The study made several recommendations to respond to these problems. These included establishing a Department of Interior Wide Coordinating Committee to quickly resolve issues involving major projects. Also, project managers should be assigned to a project until it is completed and should be given commensurate responsibility and authority. Conflicts in project priorities should be resolved by BLM state office directors.[94]

The BLM study recommended a number of measures to improve interagency cooperation and coordination. These included initiating high level meetings at the associate directorate level between agencies to encourage cooperation, designating one lead agency and not using joint lead agencies, getting specific time commitments from cooperating and other agencies involved in the process by means of MOU's and preparation plans, and obtaining input and comments from cooperating agencies in a timely manner. The study also recommended measures to expand currently inadequate involvement by state governments in the BLM energy facility siting process.[95]

These criticisms suggest that much of the success of the CEQ regulations is dependent on the agency chosen as the lead agency. If that agency or a branch of the agency, such as BLM's Office of Special Projects,[96] places a high priority on implementing the CEQ process, then it will work quite well. If, on the other hand, the lead agency chooses to ignore the CEQ regulations, or wishes to pursue its own interests, or places a higher priority on its substantive mission, then the CEQ regulations will not work.[97]

Cooperating agencies must also fulfill their responsibilities under the regulations. To do so, these agencies must be notified of the start of the EIS process. If not consulted, a cooperative agency may be excluded from the process.[98] Cooperating agencies may not respond if they have conflicting or different missions or a different set of priorities than the lead agency. Finally if a cooperating agency is fighting a turf battle (jurisdictional conflict) with the lead agency or with other agencies then the CEQ process will not work.[99]

The CEQ regulations' effectiveness is dependent upon voluntary compliance by affected agencies and by the developer applicant. The regulations do not provide any formal enforcement mechanism or sanctions for noncompliance with various duties imposed on lead and cooperating agencies.[100] Even the time limit regulation, which is mandatory when requested by the applicant,[101] is not self-enforcing so that a lead agency could fail to set a time limit for completion of an EIS, or more likely, could set a deadline, but be unable to meet that deadline.[102]

An important question is what measures should be developed to encourage or require agencies with NEPA responsibilities to make implementing the CEQ regulations a priority. Various alternatives to be considered include amending NEPA to add statutory time limits enforceable in court, imposing significant responsibility on the developer applicant working with the lead agency to "manage" the whole process of EIS development, designating a coordinating body within a government agency with a special mission of carrying out NEPA review under the CEQ approach,[103] or utilizing a voluntary body such as the Colorado Joint Review Process, whose sole responsibility is to organize and coordinate review by multiple agencies but which agency has no substantive permitting responsibility.

One alternative is to amend NEPA to impose statutory time limits for the completion of EIS's. This alternative could be based on similar statutory time limits contained in the California Environmental Quality Act which require completion of EIS's within one year.[104] A one year time limit could be added to NEPA with an 18 month time limit for large-scale projects in which the CEQ regulations applied and a lead agency was designated.[105] There are several advantages to this approach. A statutory time limit makes efficiency a priority and puts pressure on agencies that otherwise might take an excessive length of time to complete EIS responsibilities.[106] Furthermore, the time limit would apply in all cases not just to those in which the lead agency choose to adopt a time limit or schedule for a particular project.[107] Finally, a time limit statute would be more readily enforceable in court than would an agency developed decision schedule.[108]

The CEQA time limits for EIR preparation have worked fairly well to produce timely EIR's in California . California agency officials generally felt that statutory time limits were something the legislature had a right to impose, that the agencies had to comply with them, and that the agencies generally complied with the statutory deadlines.[109] In contrast, developer representatives who were affected by the California time limit statutes were critical of agency utilization of time limits. They felt agencies would demand excessive or unreasonable amounts of information in an application and would reject applications as incomplete. This action suspends the starting of the time period which is defined as the date of acceptance of a complete application.[110] They also felt agencies would act to deny an application within the time period if there were insufficient time to thoroughly consider the issues. Finally, they felt applicant waivers of time limits or consents to extensions were essential to protect developers from such denials.[111]

Federal agency official were critical of and doubted the utility of time limit statutes. These officials felt that such statutes would not be effective in ensuring a prompt decision or would lead to prompt but poor or ill-conceived decisions. Also, agencies with narrow substantive missions would vigorously examine the impact of the project from their own statutory perspective but would not care whether that examination took a lengthy time or would not respond in a timely manner to a lead agency's direction. Furthermore, agencies often have many project applications under consideration at one time. They also have limited staff resources and are unable to push all projects at the same time. Agencies receive no guidance from the time limit statute itself as to how to set priorities among projects.[112]

A more serious problem for time limit statutes, in the eyes of all agency officials interviewed, state and federal, is based on the contention that government is not primarily responsible for delays in completing EIS's or permit reviews. Most government officials work very hard at their jobs and are not slothful. In the opinion of these officials developers are responsible for most of the delays. A variety of reasons were given for this. Some developers were unfamiliar with regulatory requirements that applied to their project. Other developers failed to provide adequate or complete information on their project applications or did not know what information was required. Some developers presented applications that were ill conceived or not well planned or were for projects of marginal economic value to the developer. Finally, developers would slow down review and development of projects when economic circumstances changed for the worse.[113] This point is illustrated by considering the eight project applications that are currently going through the Colorado Joint Review Process. Virtually all of these have been slowed down or put on hold because of external economic reasons or the developer's internal economic situation.[114]

If delay is caused by a developer's decision to slow down or stop a project's development, then a time limit statute mandating governmental action by a specified date is ineffective and unresponsive to the real problem. Short of imposing a statutory duty on developers to proceed with a project with all due speed, there is little that a governmental official can do to push an application to completion. Developers are likely to oppose such a due diligence requirement as an infringement on their managerial discretion. In addition some applications may not be worth pursuing to completion, particularly those that are not well planned or have marginal profitability. Forcing developers to diligently pursue these applications to decision would waste private and governmental resources. Thus statutory time limits may not be a very helpful solution.

Time limit statutes[115] have other problems. Judicial enforcement is often lacking because the statute fails to specify what consequence is to flow from failure to meet the time limit. Other statutes specify a consequence, the project is deemed approved, but that may be an unwise consequence if a project should not be approved for environmental reasons or without modifications.[116] Specifying those consequences will often force lead agencies with permitting responsibilities to act within the time period and deny the application. Judicial enforcement is also ineffective in that it takes more time to solve a timing problem. Finally, time limit statutes for preparing EIS's may be waived by applicants. This is a desirable alternative to many developers since the EIS that is prepared must be thorough and complete before a permit can be issued. If the EIS is not thorough and complete because the agency was hard-pressed to meet a time deadline, there is a real risk of judicial challenges to the adequacy of the EIS, which would further delay the project.[118] Thus time limit statutes should be considered only as a last resort for agency-caused delays.

The second alternative is to impose significant responsibility on the developer applicant working with the lead agency to "manage" the whole process of E.I.S. development. This approach was strongly advocated by several interviewees who were corporate officials or represented developers.[119] There are several advantages to developer management of a project. Responsibility is placed directly on the party having the most control over decisions to go ahead or slow down a project. Another advantage is that developers frequently have much larger staff and monetary resources to devote to a project than does the government agency reviewing the project. A developer can allocate 25 people to work on a project E.I.S. or can hire a third party contractor to do the EIS preparation. By contrast the agency may be able to assign one or two staff to that project on a full time basis with other staff helping out on a part-time basis. Furthermore the developer often has a greater incentive to manage the process to completion. They have one project to manage, their own, whereas the agencies often have several or many project applications under review at any one time. Finally, the developer can actively participate in the agency process, can educate new agency staff when necessary, can monitor the progress at all agencies in a multiple clearance system, and can consult agency managers or high level officials when problems arise at a lower permitting staff level.[120]

There are, however, several significant disadvantages to developer management of the environmental review process. Some developers are unable, unwilling, or inexperienced so that they would not effectively manage the coordination of an agency EIS process. These developers would not provide sufficient help to agencies or would put distracting and countervailing pressure on the agencies to complete the process in the fastest manner possible. Furthermore, the relationship between some developers and some agencies is a hostile, adversary one with the agencies contending that these developers are uncooperative, will not provide adequate data, and will only disclose the information they think the agency should know. These developers, in return, contend that these agencies want too much information, including irrelevant data, that they are anti-business, and that the agencies are looking for opportunities to turn down an application. A developer will find it difficult to manage an EIS process if it has that type of relationship with the responsible agency.[121]

An even more difficult obstacle for developer management is the deep distrust that environmental groups and some members of local communities have for developers of major industrial projects. These groups often believe that developers are untruthful, cannot be trusted, and they will hide or minimize serious environmental effects from their projects.[122] This problem of distrust is magnified greatly if siting of a large-scale project in a particular community is controversial because of location or due to the environmental effects of the project. If controversy surrounds a project, it is much more difficult to work through the process. Distrust of the developer is deeper, opposition to the project may develop and organize, and intervenor groups may want to participate in agency proceedings, or may threaten judicial challenges to agency decisionmaking. Local political leaders may join in the controversy and politically sensitive agencies will scrutinize a developer's application far more carefully and may try to put the brakes on the project. After developer initiated economic slowdowns, this factor, political controversy, is the second most important cause of delay in project reviews.[123]

Even in the best of circumstances the developer may not be the best choice for coordination manager. The developer has a stake in the process. It wants the project to be approved. That incentive can distort the developer's perspective, leading it to prefer pushing the process through to completion and deemphasizing careful consideration. After all one person's delay is another's thoughtful environmentally sensitive consideration of the issues.[124] This does not mean that the developer should neglect the "managing" process for EIS preparation. It only means that there needs to be some other mechanism for coordinating the governmental review and approval process particularly with controversial or potentially controversial projects. As Standard Oil of Ohio found out, controversy can kill a project and leave a developer wondering what happened to them.[125]

The third alternative is to designate a coordinating body within a lead agency that would be primarily responsible for implementing the CEO regulations. A good example of this type of body is the now dismantled Office of Special Projects (OSP) of the Bureau of Land Management of the Department of the Interior.[126] During its life OSP played a major role in coordinating EIS preparation[127] for three major energy projects, the ETSI Project, the Northern Tier Pipeline Project, and the Alaska Natural Gas Transportation System. Each one of these projects involved pipelines crossing several states and necessitated review by multiple federal, state, and local agencies. Furthermore, OSP played a role not only in EIS preparation but also in permitting pursuant to the BLM's right of way granting authority under the Mineral Leasing Act of 1920.[128]

The OSP group was an integrated team of experts that could not only facilitate EIS drafting when BLM was the lead agency but could also coordinate cooperating and commenting agencies roles in the process. It was particularly useful in large cases that were controversial and that raised sensitive environmental issues. OSP carried out the scoping responsibilities for BLM when it was the lead agency, it identified all local, state, and federal agencies involved in an EIS process, and established coordination and agreement requirements. A project leader from OSP managed the project including preparation of draft and final EIS's and the decision document. An OSP EIS team was located in the Denver office of BLM and it worked closely with the Washington office.[129] In short, OSP worked well within the confines of BLM authority and participation. Because BLM is a critical federal agency more frequently involved in major energy projects than any other agency except EPA, OSP was located in an ideal place for coordinating EIS preparation in many large cases.[130] BLM's role is less important for nonenergy industrial development projects since they are less likely to be built on or to cross over federal lands. However, as explained herein a state level OSP-type body could serve the same purpose.

OSP was disbanded with the change of administrations in Washington. The Reagan administration intended to deemphasize and cut back on the role of the federal government in energy facility siting.[131] OSP was a Washington headquartered office in a federal agency far removed from the local community in which projects were to be sited. Furthermore, OSP was likely to be perceived as another layer of bureaucracy, another procedural hoop through which which a developer would have to jump.[132] In addition, the "new federalism" philosophy of the Republican administration emphasized a primary role for the states in regulating energy development.

Aside from these political objections, one could see other disadvantages to the OSP approach. First of all, if some agency other than BLM is designated the lead agency for a major energy project, OSP would play no role at all and that agency would need to set up an OSP like branch or itself emphasize coordination and project preparation. Another objection is that OSP is within an agency that has a dual role to play, coordinator of agency review and decisionmaker as to the adequacy of the developer's application at the permit stage. Some persons would object that OSP could not easily separate the two roles and that the permit decisionmaking role would conflict with and take precedence over the coordinating role. Even if no actual conflict occurred, developers might perceive a conflict or might distrust OSP because it was part of an agency that had a mandatory oversight role over a developer's project. Thus the argument goes, OSP would not have the neutral posture necessary to effectively mediate or "broker" the various interests.[133]

A final alternative is to utilize a state level body that would implement the CEQ process and would coordinate reviews by multiple agencies over a major project. Utilizing a state level body satisfies those persons who strongly advocate as a political goal implementation of the "new federalism" and return of more power to individual states. State level coordination is also more sensitive to local needs and concerns. State level bodies are closer to local communities than are Washington headquartered federal agencies. This is fairly important with siting of major industrial facilities since the local community in which a project is to be built has a strong interest in the project. This interest is more easily reflected in local and state political bodies than it is in federal agencies. Some federal agencies, like BLM, have decentralized their operation and delegated power to state field offices that are sensitive to local concerns. Other agencies such as Department of Energy or FERC have maintained a more centralized structure and are susceptible to perceptions that they are much too removed from the local scene to be either sensitive to a community's concerns or responsive to local political leaders. A related problem is that developers who are secretive or uncooperative or fail to consider local communities concerns can also be perceived as insensitive. A lack of sensitivity can delay or kill a project if it generates controversy or mobilizes the opposition.[134] A responsive state or local agency can mitigate some of these concerns of local communities.

The role of a state body will be extensively discussed, with the California Energy Commission and the Colorado Joint Review Process as alternative models,[135] in the final section of this paper. This next section discusses the substantive environmental quality statutes whose permit requirements apply to major projects and which have a major impact on the complexity and timing of review.

C. Permitting Review Under Substantive Environmental Quality Statutes: Clean Air, Clean Water, and Others

Because of significant environmental effects,[136] major industrial development projects must satisfy the standards of substantive environmental quality statutes administered by a variety of federal and state agencies. Each agency must review a project proposal to make sure that it satisfies the statutory standards it enforces. The proposal often must be modified before it is approved. Once approval occurs a permit is issued clearing the project under that statute. When all permits are received, then the developer may begin construction, assuming no permits are challenged in court. Depending upon the project, as many as ten or more agencies could have permit review authority. This section will discuss the various regulatory statutes applicable to major industrial development projects and the state and federal agencies administering them. It will identify permitting problems and responses to those problems.

Under the Clean Air Act Amendments of 1977,[137] a major project must satisfy either the new source review (NSR) standards for nonattainment areas[138] or the Prevention of Significant Deterioration (PSD) requirements if the air quality in the chosen location of the project meets or exceeds federal standards.[139] All new fossil fuel plants must also meet new source performance standards.[140] If a state implementation plan has been approved by EPA, then NSR and/or PSD review authority may be delegated to a designated state agency.[141] If not delegated, EPA retains permitting authority.

Both the permit review and the substantive requirements of the Clean Air Act are complicated. The complexity of air quality review is illustrated by a typical developer in California whose project would need to comply with NSR standards to receive a permit from a regional air pollution control district[142] as well as with the California Air Resources Board which supervises the A.P.C.D. review,[143] if the project was to be sited in a nonattainment area within California.[144] If on the other hand, the project was to be sited in a PSD or clean air area, or it emitted a pollutant as to which a standard had been attained, even though within a nonattainment area, EPA's region IX office would have to conduct a PSD review and issue a permit if the increment requirements were met.[145] Furthermore, because of the stringent nature of nonattainment area requirements and difficulty in obtaining emission offsets, PSD areas are likely to be the exclusive sites for future major projects.[146]

Air pollution was rated by interviewees as the most troublesome area for major projects.[147] There are many problems with air pollution regulation. First, it is not uncommon for a developer to have to obtain both a state N.S.R. review and permit under the nonattainment area standards and a federal E.P.A. PSD review and permit.[148] EPA and the state agency in California have different information collection and modeling requirements, both of which must be satisfied by a developer, at the pre-application data collection stage, in filing out applications, and in meeting ongoing monitoring requirements. These dual standards require more work, increase the complexity, and add additional costs, before a project can receive air quality permits.[149]

Air pollution control is also an extremely complex technical subject with many uncertainties in measuring emissions and in designing effective control measures. Furthermore much of the data to be collected for air quality permits duplicates information required for pre-decisional EIS's. If the lead agency for EIS preparation is not an air quality agency, the same information may be collected or at least analyzed twice once by the EIS agency and once by the air quality agency. Finally California and some other states are allowed to have more stringent requirements for air pollution control than those mandated under the Clean Air Act. This increases the costs to developers of control technology and adds to uncertainty because a dual-review applicant has to satisfy two standards, state and federal.[150]

Additional air quality problems identified in the interviews included a rapid turnover in staff and lack of experience by permitting staff at air quality agencies, reduction of governmental resources to process permit applications, and a large learning curve for companies and agency staff new to air quality permit processes. Finally, the complexity of air pollution control from the intricacies of the Clean Air Act to the engineering principles of scrubber technology make air permit review a very difficult and frustrating process.[151] These problems contribute to a lengthy air quality permit review process taking up to three years in some cases.[152] Permitting reforms directed to some of these problems are discussed in the next section of this report.

Water pollution control was considered to be less of a problem for major projects than was air pollution control.[153] Nevertheless, most projects require an NPDES permit under the Federal Water Pollution Control Act Amendments of 1972.[154] NPDES permit authority is often delegated to a state agency such as the state and regional water pollution control boards established in California.[155] If a project is built on navigable waters, then the Army Corps of Engineers must review the project and issue a section 404 permit or other permits.[156]

Obtaining these permits requires review by additional agencies, more applications, and more data to be collected, but should not slow down the process unless any of the permits are on the critical path, which means that obtaining permit X is a prerequisite to applying for or receiving permit Y.[157] Section 404 permits issued by the Army Corps of Engineers often present these problems. Corps permits take on an average 23 months to obtain, a far longer time than air or water permits.[158] Furthermore, section 404 permits are among the last to be released in a multiple clearance system due to the lengthy agency reviews required before their issuance and because other permits must be issued before the section 404 permits.[159] Otherwise water pollution permits are not as difficult to obtain as air permits. The federal water statute is not as complicated as the Clean Air Act. There are less disputes between industry and agencies over appropriate solutions and over what information is necessary to satisfy an agency.[160]

Major projects in the arid western United States do raise serious questions as to allocation of water and competing uses for water. This is a significant, unresolved issue for oil shale development and coal slurry pipelines.[161] It is the subject of interagency policy conflict in California.[162] It is a source of controversy between energy developers, and farmers, ranchers, and other users of water in the west.[163] The problem is caused by the scarcity of water, the large amounts of water used in some projects, and the demands of others who want the same water supply for other uses. This controversy could generate considerable political opposition and cause as much trouble for developers in the form of agency and judicial challenges as have environmental or anti-nuclear groups caused for particular projects in recent years.

Other federal environmental quality statutes that can effect an industrial development project regulate toxic substances,[164] hazardous wastes,[165] solid wastes,[166] regulate types of fuel that can be used,[167] or protect endangered species,[168] or occupational safety and health.[169] Each one of these statutes can add another substantive standard to be satisfied and another agency to review a project. For example, hazardous waste disposal has become an increasingly important issue in the last three years.

If a project is built on or crosses federal land, the Bureau of Land Management must issue a right of way permit for the project.[170] It is not uncommon for developers of major projects to experience lengthy delays in the right of way permit and the preceding EIS preparation processes.[171] These delays are frustrating and expensive. The BLM study of energy facility permitting referred to in this report found that several factors contributed to this delay. These included delayed responses by industry to agency information requests, and major changes by an applicant to the project proposal in the middle of review or late in the process right before a permit was to be issued.[172] The BLM study also identified other factors contributing to delay, such as lack of coordination by multiple agencies, and recommended various changes to respond to those factors. It noted major improvements in streamlining the process resulted from full implementation of the CEQ regulations and establishing the Office of Special Projects to coordinate EIS preparation and permit reviews.[173]

The BLM study recommended standardization of bureau right of way procedures, development of guidelines for information required and for scoping, provision of information on all federal permits required for energy projects, use of joint review by federal, state, and local agencies, establishing preapplication procedures, and identification of project problems early in the process. Adoption of these recommendations would be likely to steamline the BLM permitting review process.[174]

One other federal agency has a significant role to play in any energy project that includes an interstate oil or gas pipeline or sales of interstate natural gas. That is the Federal Energy Regulatory Commission[175] (FERC) which was actively involved in reviewing the SOHIO Pactex Pipeline Terminal case[176] and is still considering seismic safety issues in the Point Conception LNG Terminal Siting case.[177] FERC is the successor to the Federal Power Commission.[178] The FERC review process was lengthened in SOHIO and Pt.

Conception in both cases due to active participation of intervenors who opposed granting of approval for pipeline abandonment (SOHIO) and construction of the LNG Terminal (Pt. Conception).[179]

In addition to federal permit reviews, most projects must obtain several state permits. Other than federally delegated state permit authority,[180] the principal state permits to be obtained are a siting permit from a state facility siting agency[181] and a certificate of convenience and necessity issued by a state public utility commission,[182] if the developer is regulated by that body. These permits often must be preceded by an environmental impact analysis under a state environmental quality act.[183] It is important to note that many state siting statutes are limited to power plant siting only. Furthermore state P.U.C. review is limited to public utilities. Nonenergy developers will not have to deal with these agencies but may be in worse shape as to siting if a multitude of special purpose agencies must review these projects. See the third section of this report for a discussion of alternative siting approaches.

The siting agency review encompasses a broad range of issues. In California, the Energy Commission uses a two step process. First, the NOTICE OF INTENT or NOI stage, and second, the Application for Consideration, or AFC stage.[184] In the NOI stage, the applicant is required to present three alternative sites and facilities. The Commission must evaluate those three and find at least two sites and facilities acceptable. It must make a comparative merit determination among the sites.[185] At this stage, the Commission also would determine if the sites and facilities proposed comply with environmental, health and safety, need for power, and land use planning requirements.[186] The Commission must make findings as to each of these elements as well as to the relative merit of sites.[187] In the second or AFC stage, the developer applicant must complete an application for certification for a specific site and related facility.[188] The Commission must make site and facility-specific findings as to each of the NOI categories and must also prepare an environmental assessment.[189] When the Commission issues the certificate, the developer can ordinarily commence construction if other permits are also approved. The Commission's review is limited to power plant siting.

If the developer applicant is a regulated public utility, the state public utility commission will have to review the project proposal for economic, financial, rate, and system reliability factors. The PUC would then issue a certificate of convenience and necessity allowing the utility to construct the project and add it to the utility's rate base.[190]

To effectively manage this process of multiple agency review, a developer has to identify at a very early stage all agencies that have review and permitting responsibilities over the project.[191] These will include local agencies with land use planning responsibilities when the project involves a nonenergy industry. The developer must contact each agency and find out what information gathering requirements it has, what applications must be filed and filing dates for those, and whether some applications must precede others[192] as the environmental review process must precede permitting. This process is complicated enough so that advising developers as to regulatory requirements is a principal function of California's Office of Planning and Research.[193]

The regulatory review and permitting process takes additional time and contributes to the complexity of managing major project proposals.[194] Critics of permitting processes have identified a number of factors that contribute to lengthening or delaying permit approvals. One study identified federal agencies as causing more delays than state agencies due to federal rules and regulations.[195] Other factors included duplication in environmental reviews between state and federal agencies. Even though state agencies had a less significant delay problem, causes of delay that were identified at that level included utilities changing proposals, revising load forecasts, and extending operation dates. Agencies were charged by utilities with expecting too much information or not certifying an application as complete which prevents the time limit statute from commencing.[196] Other studies indicated that lack of a commitment by agencies to timely processing of permits, interagency conflicts, regulatory uncertainty, and lack of good management by agencies and developers are causes of delay.[197]

One factor that can cause more problems for a project and increase the length of permit reviews is controversy over the desirability of a project, its location, or its environmental effects.[198] Project opponents can exploit the environmental review and permitting processes to halt a project.[199] They can intervene at the agency level, can apply political pressure to an agency, and can file lawsuits challenging the adequacy of permits. These challenges can tie up a project for several years while the validity of an EIS or the issuance of a permit is litigated.[200] The threat of a lawsuit by an intervening group can cause an agency to be far more careful and cautious in its deliberations with a resulting slowdown in the agency process.[201] In addition, developers can contribute to delay by being secretive with information, giving too little information in applications, and for having unrealistic expectations for the start of a project's construction and operation.

D. Proposals for Procedural Improvements in Permit Review Processes

A variety of solutions have been proposed to streamline permit review processes. These solutions fall into several categories and will be discussed separately. One grouping is intra-agency consolidated information application and permit procedures. Related to this is time limits for the decisionmaking of one agency, and use of procedures to broaden participation of interest groups. Another grouping focuses on generic determinations for need for power, site banking, and developing clear policies for application of regulatory standards.

Beyond these single agency approaches are interagency proposals for coordinating review, using Memos of Understanding (MOU), collapsing all reviews into a single stop agency, and using a voluntary coordinating approach such as the Joint Review Process. Two final issues here are the use of special legislation tailored to a specific project and integrating judicial review into the administrative decisionmaking process in an efficient manner that preserves the rights of parties to have high quality judicial review.

One type of permit streamlining proposals focuses on the application process within an agency. These proposals include developing standardized information guidelines, common application requirements, and holding pre-application and initial application meetings between agency officials and the applicant. These meetings are designed to insure that agency and developer have a common understanding of what information is needed for a complete application thereby ensuring a quicker review on the merits of the application for a permit. These approaches can reduce confusion, can resolve conflicting information requirements, and can help smooth the application process. They are designed to reduce conflict over whether an application is complete and ready to go or whether more information is needed. EIS preparation, including the crucial scoping process, and permit review processes can run more effectively if complete information is available at an early stage. Developing standards for permit procedures and for substantive requirements to guide applicants in knowing what prerequisites they must meet to receive permits would also help developers to plan projects with greater certainty as to requirements to be met.[202] All of these reforms should also help to reduce a serious problem of regulatory uncertainty as to required information and permit standards which lengthens the review process and increases the costs of development to project proponents.[203]

Another proposal is the consolidated permit program developed by EPA to coordinate permitting review under five separate statutes[204] administered by EPA. This program includes consolidated applications for permits under all of the five regulatory statutes, issuance of a draft joint permit, common public hearings, and issuance of a joint final permit under some or all of the five statutes. If parallel state permits are required, joint hearings can be held for these permits.[205] Because of the crucial role played by statutes EPA enforces in the permitting process for energy projects,[206] this program could contribute significantly to reducing the costs of preparing data, completing applications, attending hearings, and could reduce the overall time for permitting which increases markedly in multiple permit cases as opposed to single permit cases.[207] Unfortunately, much of the E.P.A. program has been abandoned because it became much too complex and unworkable.

Another idea is for an agency to prepare a decision schedule outlining all significant stages of an EIS preparation and permit review process. The schedule should contain target deadlines for each stage. This can ensure completion of each step in a timely fashion, can allow monitoring of compliance by agency management, and can be used as an early warning system when a deadline is not met for one stage. EPA has developed a variety of decision schedules with time lines that are charted from beginning to end.[208] These can serve as models for other agencies.

If each agency that has responsibility for reviewing and permitting a major industrial project were to adopt these streamlining procedures, improvements could occur in the efficiency of the process. However, some agencies do not place a very high priority on efficiency and that is a cause of more lengthy permit reviews.[209] Furthermore, one study[210] determined that agencies without legislatively mandated time limits to issue permits had the most serious delays.[211] This study recommended that congress establish mandatory time limits for permit reviews.[212]

Legislatively mandated time limits are controversial.[213] If the time limit is unreasonably short, the agency can not enforce its substantive mandate because it does not have adequate time and the quality of the resulting decision may be reduced markedly.[214] Furthermore, those decisions are likely to be challenged in court and possibly set aside. This would cause a net increase in the time required because the decision would have to be remanded to the agency for reconsideration.

Most of the federal agency officials interviewed for this study felt that time limit statutes were not very helpful or effective. At best such statutes might force the agency to place a higher priority on efficiency, but that is dependent on having adequate staff resources. Developers interviewed were skeptical of time limit statutes for another reason. They were concerned that, as a deadline was reached, the agency would feel compelled to make a decision even if it was not yet ready to do so. In that instance, the agency would deny the permit if it felt there was not adequate time to reach a careful decision. This would force the developer to reapply and go through the process all over again, with more time and money expended. Developers wanted the statutes to contain waiver of time limit clauses based on a showing of good cause and applicant consent. This would allow the agency to take more time to reach a more careful decision hopefully approving the desired permit.[215]

State officials in California who were interviewed and whose agencies were subject to time limit statutes had a different attitude. These officials felt that time limits were workable, and that the agencies could and did regularly reach high quality decisions within the required time limit. The success of these statutes is shown by legislative reduction of one time limit from 18 months to 12 months which was done with agency support. Legislative consultants interviewed noted that time limit statutes were working well enough that there was virtually no pressure put on the California legislature by industry in the recent legislative sessions to impose more stringent limits. This contrasts with the situation several years ago in which there was considerable lobbying by developers to impose the time limits now in force.[216]

The California time limit statutes apply to environmental review under CEQA,[217] to California Energy Commission permitting reviews for thermal power plants[218] and, recently, to all other permitting processes[219] carried out by California state agencies. The statutes generally require the agency to establish a time deadline for a specific type of decision, but a maximum time is specified in the statute.[220] So long as the maximums are within a reasonable range based on actual agency experience, so long as there are waiver provisions for good cause (i.e. unforeseen delays),[221] and so long as adequate budgetary and staff resources are supplied to the agency, these statutory time limits are a workable solution.

The California statutes also address two other problems with time limit provisions. The first problem is defining the starting date for the beginning of the time period. This is usually determined to be the date on which an application is accepted as complete. The second problem is requiring the agency to make a determination as to whether or not an application is complete. The statutes usually require such a decision to be made within 30 days of the receipt of the application.[222] These problems result from disagreements between agency officials and applicants over how much information is necessary for an application to be complete. Applicants are concerned that agencies will reject applications as incomplete thus delaying the starting of the time period. Agencies are concerned that applicants will be secretive, uncooperative, and will submit applications with only minimal or inadequate information.[223] Whatever time limit statute is adopted should address these issues specifically. Furthermore, the agency and applicant should be encouraged to meet early in the process to establish information guidelines, or these should be set by the agency generically.[224]

The recent ABA study on siting concluded that "The establishment of reasonable regulatory time limits and schedules, coupled with some measure of flexibility for the unforeseen, can be an important source of discipline in the process despite some inherent imperfections."[225] This study also noted that twenty-one states have time limits on energy facility decisionmaking, ranging from 120 days to 24 months. Waivers for good cause are included in seven of the statutes. The study confirmed that problems can arise as to whether applications are complete and or whether time limits are mandatory or discretionary. Finally, it stated that sixteen states have recently established new energy facility licensing agencies.[226] Twelve of these sixteen states also have time limit statutes, suggesting a linkage between time limit statutes and siting agencies.

It is also desirable to encourage the participation of interest groups, ranging from citizens in the local community where a project is to be sited, to environmental and other potential intervenor groups, in the environmental impact and permitting review process. This may seem to be an unusual approach because adding new participants to an agency review process can frequently complicate and slow down the decisionmaking process, particularly when trial type procedure is used by the agency. However, excluding these groups from the agency process or maintaining secrecy about developer plans frequently creates or mobilizes project opponents. Those opponents can slow down the agency permit review process for a far greater length of time than would be added by their participation in the process. Furthermore, determined intervenor groups can tie up a project for years through challenging agency decisions in court, through political warfare, and through efforts to participate in the agency process.[227]

When a project is controversial, interest group participation in the process is even more important. Political controversy can stall or kill a project, often at the hands of opposition groups or local and state political leaders who are responsive to local concerns.[228] While it is impossible to eliminate controversy, it is possible to reduce opposition, to consider local concerns, and to make a record showing consideration of opponents' objections which will withstand later scrutiny by the reviewing courts.[229]

Furthermore, absent pragmatic concerns, it is highly desirable to have local community input into a project, to respond to or reduce the "Not in my backyard" attitude of communities toward energy facility or industrial development projects. Also the community may be able to make useful suggestions which would improve the project or hasten the community's acceptance of the developer or its project. Environmental groups may be able to point out problems with the project or to suggest mitigating measures.[230] If this is done early in the process, the developer's plans can be changed much more easily than later on.

Some developers are open to communities' input and public participation in the agency review process. This is often because of the reasons stated above. Other developers are not open, preferring to keep plans secret or undisclosed to the public until an application is formalized or even after that date. These differences are often a matter of corporate style. Some developers fear that releasing information will aid their competitors or will rally opponents. While it is difficult to entirely overcome this concern, developers are better off in the long run working with the local community in an open manner. Developers who work with the public can avoid sinking a lot of money into a project which must later be abandoned due to controversy or due to litigation challenging issuance of permits.[231]

The ABA study supports interest group participation.[232] So do representatives of several major developers.[233] However, a balance needs to be maintained so that interested persons can share information, and can have reasonable access to agency information and decisionmaking processes, but so that obstructionists, project opponents who are using the agency process to block the project at all costs without regard to whether environmental impacts can be mitigated, can not abuse the process and cause real harm.[234] One of the risks here is that it may be difficult to discern who is an interested citizen and who is an obstructionist. That risk is probably worth taking and it is essential that project developers be aware of that risk as the price of openness.

The California Energy Commission has a public advisor, whose role is to assist interested members of the public to understand and participate in the Commission's hearing process.[235] Furthermore, the Commission holds many of its licensing hearings in the local community in which a proposed project is to be sited. These techniques make it easier for citizens to participate in the Energy Commission process. However, there are several barriers to citizen participation including the formality of commission hearings, and the technical complexities of many of the issues dealt with in those hearings.[236] Finally, interviews with intervenor groups indicate that raising money to defray the cost of participation is a problem as is the attitude of some agencies and many developers that interest groups should not even be a part of the agency process.[237]

Another proposal is to determine generically many issues that otherwise would have to be individually litigated in every licensing case for a specific type of facility at a particular site. Reducing the number of issues that have to be adjudicated individually should shorten the decisionmaking process and will certainly simplify it. Generic determinations also promote uniformity and consistency. Generic proceedings are policy making sessions in which issues are resolved generally, using rulemaking or a public forum, and without regard to a specific applicant. The issues most easily determinable on a generic basis are "need for power" and "choice of technology." However, the generic approach could be applied to many other recurring issues such as plant design, pollution control technology, etc. As to these issues the generic proceeding should address a number of specific questions outside the context of a specific licensing proceeding. Because of the importance of generic determinations, there should be substantial involvement in the proceedings by interest groups and members of the public. Furthermore, for generic policy decisions to be effective, they should be cast into a format, such as substantive rules, that are enforceable in later licensing or certification proceedings for individual facilities.[238]

Site banking is another approach, used extensively in Maryland and Florida, by which a state designates sites suitable for industrial or energy facility projects in advance of a specific facility application. The advantages of site banking include reducing the time required for licensing, minimizing uncertainty in the facility licensing process, and avoiding repetitive consideration of similar siting issues in each new facility certification proceeding. Related to site banking are multiple site proposals used in New York and California, in which a developer submits environmental impact analyses for three alternative sites, one or two of which may later be approved.[239] All of these approaches lessen the likelihood that a developer will pick an unsuitable site, pour a lot of money into facility planning at that site, only to have the project rejected because the site is unworkable. The Northern Tier Pipeline Project, with a pipeline proposed under Puget Sound, was rejected in substantial part due to such site related problems.

Another set of proposals respond to the problem of regulatory uncertainty. Uncertainty is very frustrating to developers because it frustrates planning and compliance efforts. These proposals include generically developed standards to govern the application of environmental statues, to resolve disagreements between agencies over the nature and acceptability of environmental impacts, and to establish the conditions for receiving a permit in advance of a developer's filing an application for a permit. Such standards may be difficult to develop with a new policy, such as the emission offset policy applied in the SOHIO case,[240] but once an agency gains experience with a type of problem, it can and should develop specific standards governing permit approvals and interpretations of key terms in environmental statues. Agencies should also work out a process with other agencies, using memorandums of understanding, whereby two (or more) agencies can reach agreement on environmental impacts and on appropriate permitting solutions in specific types of cases.[241] This would smooth the permit process when multiple agencies must review a project.

Discussion of procedural reforms in administrative law would not be complete without considering the role of reviewing courts that supervise agency decisionmaking. Agency environmental impact statements and permit decisions can be and are challenged in court. Litigation and the threat of filing lawsuits are potent weapons of project opponents. Court challenges can add two to four years time to the agency permitting process. Litigation makes agencies act more cautiously and can cause developers to abandon projects.[242] Nevertheless judicial review serves important functions of supervising agency decisionmaking, protecting the rights of private parties, and resolving a variety of legal issues. The goal here should be to balance the need for judicial review to serve these important purposes against the illegitimate use of court challenges as a device to block a project regardless of the merits of the challenge.

Reducing the number of agency decisions subject to court challenge is helpful. This is a real advantage of so-called "one stop siting agencies" in which only one permit is issued and only that permit can be challenged. Reducing the number of reviewing courts in a multiple tier judicial system is also helpful and can eliminate two years from the total time for judicial review.[243] This is an advantage of direct state supreme court review of siting agency decisions, the system used in California for review of PUC and Energy Commission decisions.[244] It is also desirable to specify a relatively short period of time, e.g. 30 days, after an agency decision is final, within which to file an action in court challenging the decision.[245] Preference provisions are commonly also included in expedited judicial review statutes,[246] but there are so many civil preference statutes, all of which cannot be equally entitled to priority, that preferences are not very helpful,[247] particularly in light of the fact that criminal litigation takes precedence over all civil cases in most jurisdictions.

The most potent weapon in the litigant's arsenal is the injunction, granted by the reviewing court to stay the agency decision approving the project pending judicial review. Developers fear granting of an injunction or approval of a stay even more than the filing of a judicial review action.[248] If the injunction is denied, it is often permissible for the developer to begin construction at its own risk pending the completion of judicial review and final approval of a project.[249] The best way to prevent a reviewing court from granting an injunction or a stay is for the agency's decision to be solidly supported with a good record showing the reasonableness of the agency's decision. The developer can assist in this process of developing a good agency record by freely providing information to the agency, by allowing opponents to participate so as to show that their arguments were known to and considered by the agency, and by cooperating with the agency.[250]

Short of these measures, it is probably improper and surely undesirable for the legislature to mandate time limits for judicial decisionmaking. There is only one statute currently in force that sets a specific deadline for a court to reach a decision on a challenge to agency decisionmaking. This statutory provision is limited to constitutional or statutory claims involving questions of law. Furthermore, the deadline provision in this statute can be extended if the reviewing court "determines that a longer period of time is necessary to satisfy the requirements of the U.S. Constitution."[251] This statute is probably constitutional because the court is free to take more time to decide constitutional issues thus minimizing the separation of powers argument. However, limiting the time for judicial decisionmaking is undesirable because it could reduce the quality of the court's decision. Furthermore, such a time limit on judicial review may be practically unenforceable.

Short of expediting judicial review, the best way to minimize or limit judicial challenges to agency decisions is to provide a fair and orderly procedure for agency review and approval of a project in which all interested parties can participate. The agency should strive to maintain its integrity and neutrality. Developers can contribute to an atmosphere of fairness by being open, cooperative and willing to make reasonable accommodations to other interested groups. These recommendations will not eliminate all challenges by diehard environmentalists ideologically opposed to any energy development. However, they should satisfy concerned community members and moderate environmentalists who are sincerely interested in mitigation of environmental impacts through having modifications made to proposals. Using these approaches should also decrease the likelihood that a judicial challenge will be successful and an agency decision set aside.[252]

The final topic to be discussed is the passage of special legislation by Congress or state legislatures to expedite administrative review of specific major projects. Since 1970 Congress has enacted special legislation on three different occasions governing respectively the Alaska Oil Pipeline from the north slope to Valdez,[253] the Alaska Natural Gas Pipeline,[254] and the Long Beach to Midland (SOHIO) and Northern Tier Oil Pipeline projects.[255] The California legislature has enacted special legislation governing respectively the SOHIO Pipeline[256] and Pt. Conception LNG Terminal projects.[257] Such special legislation is a product of developer lobbying and pressure coupled with legislative sentiment in favor of the project being approved.[258]

Most of these statutes impose deadlines, often very short, for reaching a decision on a project.[259] They sometimes include provisions waiving enforcement of specified environmental laws such as NEPA.[260] The federal statutes transfer ultimate decisionmaking authority from the agencies that normally review those projects to the President, who must recommend approval of the project, and to Congress, which must adopt a resolution approving the project.[261] The California legislation delegated one stop siting authority to the PUC (Pt. Conception)[262] and in the other case (SOHIO) legislated expedited judicial review.[263]

These statutes are enacted because of developer pressure and legislatures' concerns that projects will get hung up in agency review processes unless the legislature intervenes by passing special legislation. These statutes' primary purpose is usually to expedite agency and judicial review to insure prompt approval of a project so that the developer can commence construction as soon as possible.[264] Legislation is often enacted only when a project is well into the agency process[265] or, in one case, when a successful judicial challenge set aside an agency decision approving a pipeline right-of-way permit.[266]

These statutes are usually ineffective in that they do not achieve their intended purpose. Both the SOHIO Pactex Pipeline Project and the Northern Tier Pipeline Project were the subject of federal legislation enacted in late 1978. That statute, Title Five of the Public Utility Regulatory Policies Act of 1978,[267] was enacted too late in the process and did not prevent SOHIO from abandoning the project in 1979 because of problems with state agency permits not covered by the federal statute.[268] The Northern Tier Pipeline project did not fare any better. The chosen pipeline route was rejected by Washington Governor John Spellman in February, 1982 based on recommendations from the Washington State siting agency made more than three years after title five was enacted.[269]

The California state legislation expediting judicial review of the SOHIO Pactex Pipeline Project was also passed too late in the process and did not prevent project opponents from threatening to and actually litigating the validity of permits issued to SOHIO by state agencies.[270] Furthermore, the Pt. Conception LNG Terminal Siting Act,[271] which required the PUC to reach a decision on the project by July 1978 did not achieve its purpose. The PUC, exclusive siting agency for the project, reached a decision approving the project within the 1978 deadline. However approval was premised on two major conditions being satisfied, one of which concerned the seismic safety of the project. That issue alone required further agency deliberations for several years.[272] A final permit has not yet been issued although the PUC is about ready to finalize its approval of the seismic suitability of the chosen site. However, the developers of that project have put it on hold for several years for economic reasons, and some persons doubt whether the project will ever be built.[273] As of summer 1983, the developers of the LNG plant are seeking PUC approval to include the cost of developing the plant in the rate base as "plant held for future use."

The federal statutes expediting agency approval of the Alaska Oil and Natural Gas Pipelines were effective in that they resulted in quicker decisions approving the projects than might otherwise have occurred if the agencies had made the decision rather than Congress.[274] However, the Alaska Natural Gas Pipeline has never been built, due to financing problems. Thus only one of the five affected projects, the Alaska Oil Pipeline, was ever constructed and put into operation. Additionally, the costs associated with expediting those projects was substantial. These costs or negative consequences included a distortion of the normal agency process for reviewing projects,[275] a severe limiting on the time for decision which could have affected the quality of the decision,[276] the related use of crisis deadline time limits which either do not work or result in timely but shallow decisions,[277] and a legislatively forced determination not subject to judicial review that environmental impact statement requirements were met.[278] This last disadvantage comes close to proposals advocating waiver of the application of environmental laws to these projects, another poor and unnecessary idea.

Related to these statutes was the ill-conceived proposal for an Energy Mobilization Board which would have designated projects of high national priority and put them on a fast track review process in which expedition and efficiency would reign supreme. At one point the EMB proposal included provisions for waiver of federal environmental statutes, and federal preemption of state laws.[279] The EMB proposal has few defenders. Also, federal preemption in energy facility siting is undesirable unless there is some special reason for it, such as with nuclear power. In addition, the process for determining which projects are important enough to be put on the fast track creates another procedural layer or pitfall that can take more time or could be subject to challenge thereby defeating the purpose of the EMB. Finally, the EMB would have been used to force approval of controversial projects. If that happened, project opponents would have redoubled their efforts to halt such projects by challenging EMB decisions in court or by lobbying hard in Congress to sidetrack the EMB or a favorable decision by it on that project.[280] In the long run, the EMB could have generated so much political opposition that it probably would have not worked or the fast track would have been derailed.

Thus special legislation, whether project specific or fast track, is an undesirable alternative because it will not accomplish the goal of streamlining agency review or because it will speed up the process but will sacrifice rational environmental review. Nevertheless it is possible, utilizing some of the permitting reforms discussed herein, to accommodate both efficiency and substantive consistency, or both expedition and environmental quality without using such drastic approaches. The next section of this paper discusses two newer and less drastic approaches to accommodate both concerns. These approaches are different than previous proposals for streamlining agency procedures. However, both the California Energy Commission and the Colorado Joint Review Process use many of the procedural reforms previously discussed.

III. Alternative Models for Permitting Major Industrial Projects: One-Stop Siting Agencies and Coordinating Bodies

A. One-Stop Siting Agencies: The California Energy Commission As A Model

One solution to multiple agency review of industrial development projects is to consolidate most, if not all, environmental and permitting responsibilities into a so-called "one-stop siting agency." This approach has been quite popular in the last ten years. Sixteen states have recently established non-public-utility-commission siting agencies that are designed to provide comprehensive review of a project.[281] This approach is designed to allow a developer to obtain most, if not all, required reviews and permits by filing one application with one agency. These agencies are often based on the example of the Nuclear Regulatory Commission, a comprehensive reviewing agency for siting of nuclear power plants.[282] This alternative will be considered using the California Energy Commission as an example of such a siting agency.

The California Energy Commission was established by the Warren-Alquist Act of 1974.[283] It has exclusive siting jurisdiction over thermal electric generating facilities and related transmission lines.[284] In addition, the Commission has other responsibilities including preparing a biennial energy report with information provided by California utility companies. This report contains a prediction of the level of energy demand (i.e., load forecasts) in California in future years, it identifies fuel supply sources and facilities needed to meet that demand, it describes conservation and alternative technology efforts encouraged by the Commission, and it includes other matters.[285] While the Energy Commission's jurisdiction is limited to power plants, the one stop siting approach is broadly applicable to any major industrial project. The approach includes in its essential elements the collapsing of many permit reviews into one agency which will issue one permit and act as a common forum for all affected interests while having the final decisional authority over the project. The Energy Commission includes these elements. It also performs the role of energy policy maker for the State of California helping the state adapt to changes in oil supplies that occurred in the 1970's. Thus, an examination of the Energy Commission will be generally helpful in this study.

Under the Warren-Alquist Act, the Energy Commission is required not only to make facility and site certifications but also to encourage conservation, more efficient use of current resources, and development of alternative technologies such as cogeneration and geothermal generation of electricity.[286] The new geothermal technology is a preferred alternative that is subject to a simpler and shorter facility and site review process.[287] In addition, the Energy Commission has required California gas and electric utility companies to shift company policy from the past exclusive emphasis on assuming that growth in electricity demand would continue and meeting that demand through building large-scale conventional coal or oil fired power plants. Utilities in California are now expected to be energy managers who use load management, who encourage customers to insulate their homes, or to install cogeneration technology at a plant, thereby reducing the demand for gas and electricity and saving customers money. This is a real shift in role for the state's utilities from supply providers to demand managers. Due to Energy Commission encouragement the state's utilities and oil companies have made real progress in the commercial development of geothermal, wind energy, and cogeneration as alternative sources of supply.[288]

This dual role, siting agency, and energy policymaker may explain some conflicts between the commission and California's utilities. Utility representatives have criticized the Energy Commission on several grounds. One criticism is that the Commission requires excessive information in applications for facility and site certification at both the NOI and the AFC stages.[289] Agency officials respond to that criticism by saying that utilities deliberately submit incomplete applications to force the agency to specify what is needed in its application process.[290] Another criticism is that the Commissions's two stage site and facility certification process, called the NOI and AFC stages, is cumbersome, costly, requires duplicative review of the same issues in both stages, and takes an excessive length of time.[291]

Energy Commission officials interviewed by the author maintained that the statutory time limits for completing review of all facility applications were met at the first or NOI stage.[292] This point is confirmed by data supplied by the Commission to the ABA for its study of power plant siting.[293] The NOI stage review must be completed within 18 months under those requirements. The second or AFC stage must also be completed within 18 months, for a total time for review of 36 months, which is within the normal permitting time estimated for large plants in a recent study.[294] Thus the excessive length of time criticism does not appear to be supported by the data. The Commission approved NOI's for several large power plants, the Sun Desert Nuclear Power Plant (sponsored by San Diego Gas and Electric), and the Fossil 1 and 2 coal-fired plants (sponsored by Pacific Gas and Electric Company). This experience suggests that time limits may be a viable option for expediting power plant siting review.

An additional factor to consider is developer timetables for moving a project proposal forward. Commission officials noted that several sites have been approved using the NOI process but the utility applicants have not taken the next step to apply for certification of a specific facility at a specific site, in the second or AFC stage. Thus, these officials say, it is not the Commission's responsibility that some power plant proposals have been put on hold. The utilities' are responsible because they have not gone forward with proposals in the AFC stage usually for economic reasons (large power plants are very expensive to finance) or because of reduction in forecasted energy demand.[295]

Utility representatives might not agree with this assessment but would argue that the three alternative site information requirements mandated for the NOI stage,[296] and the two stage process, NOI and AFC,[297] substantially increase the information required and the costs of regulatory review by the Commission.[298] It is expensive to submit data for three alternative sites in the NOI stage and this criticism thus has merit. However, once a site is approved, it becomes available for a utility to file an application for a specific facility on that site in the subsequent AFC stage.[299] The Commission must then determine whether the application complies with all the requirements of local, state, and federal law governing safety, need for power, environmental impacts, and land-use planning.[300] In addition, the site basically remains available until such an application is filed.[301] The NOI stage can be viewed as a form of site banking, known as the multiple site proposal approach.[302] Thus, site suitable information need not be resubmitted or reconsidered in the second stage review. However, the Commission should strive to minimize duplicating review as to common siting issues in both the NOI and AFC stages. For example, the Commission must make specific findings as to need for power, safety, and compliance with local, state, and federal standards in its written decisions approving both the NOI and the AFC filed by a utility.[303] The Commission should not redecide an issue at the AFC stage that has already been considered at the NOI stage. Also, it should allow a utility to present the same information on overlapping issues in both stages of the process.[304]

The problem of how much information should be required for an application to be complete should lessen as utilities and the Commission gain more experience. Most problems occur the first time a developer files an application with the Commission or the first time the Commission considers a new issue.[305] Furthermore, the Commission specifies in general terms by regulations what information is required for each of the four types of applications.[306] Finally, the regulations require the Commission to determine, based on the executive director's recommendation, made within 30 days of receipt of the notice or application (20 days for geothermal notices or applications), whether the notice or application is substantially complete in that its documentation satisfies the information requirements of the Commission.[307] If it is complete, it is filed and the filing date relates back to the date of submission for purposes of triggering the running of the time period for reaching a decision. If the notice or application is determined not to be substantially complete, the Commission is required to specify the defects in the application and either return the application or conditionally file it if the developer promises in writing to supply the missing information.[308] These regulations should help a developer to learn what information is needed. In addition, the responsibility is placed on the agency to specify what is needed, so that a developer is not left guessing as to what is wrong with its submission.[309]

A more serious problem for the Energy Commission, other state siting agencys, and those considering this approach is the relationship of the Commission with pre-existing established agencies. When the Commission was created in 1975, it was folded into an existing structure of California agencies that had previously regulated power plant projects on a piecemeal or fragmented basis. Many of these agencies enforce provisions of federal environmental or land use legislation that mandate state enforcement of federal standards.[310] These agencies include the Air Resources Board and local air pollution control districts (Clean Air Act),[311] the regional water pollution control districts and state water resources control board (Federal

Water Pollution Control Act amendments of 1972),[312] and the California Coastal Commission[313] (Coastal land development under state law and consistency with the federal Coastal Zone Management Act of 1972).[314] In addition, state agencies, such as the Public Utility Commission, exercise jurisdiction over public utilities under state law and must issue a certificate of convenience and necessity before a utility can put into its rate base money spent on developing a power plant as well as the value of the plant.[315] In addition, regional bodies, such as the Bay Area Conservation and Development Commission,[316] and local bodies such as counties carry out state and local land use planning laws.[317] These agencies must be considered by the Energy Commission. The Warren-Alquist Act recognized potential conflicts with these agencies and required the Energy Commission to consult and work with most of them in making power-plant siting decisions.[318] These existing agencies would possess more direct review authority over nonenergy industrial projects that are not regulated by the Commission.

A fundamental question to be answered by siting agencies such as the Commission is whether they can be and whether they should be the sole and exclusive decisionmaker for power plant siting decisions in their state. The one-stop siting idea was originally promoted as an approach which allowed the developer to obtain all permits with one application and consideration by only one agency of its project proposal.[319] However, this ideal is illusory. It is not possible for utilities in California to have one-stop siting because both the PUC and the CEC must approve a power plant project. Furthermore, it is extremely doubtful that any of the federal environmental quality or land use planning statutes would directly permit the Energy Commission process to preempt or override federal standards and the authority of the designated state agency that enforces those standards. The only way to integrate directly enforcement of those standards would be for the state of California to formally request that the enforcing state agency be changed to the Energy Commission and California's enforcement plans be amended accordingly.[320] Furthermore, the California legislature would have to amend many state law provisions and make the Energy Commission a new super agency to truly consolidate all permitting and review functions under one roof.[321]

Assuming that the California legislature had the time to go through that cumbersome process, and that it was politically feasible to do so, both of which are doubtful propositions,[322] the resulting agency would be much too large and unwieldly to function effectively. Also, the kind of conflicts that now occur between agencies over appropriate resolutions of problems would be transferred into the new agency and would become conflicts within the agency. Thus the super agency approach, which would be necessary for the Commission to fulfill the ideal of one-stop siting, is impractical. Also, the super agency would only consolidate state and local agencies and not federal agencies who must also review and approve large scale projects. The only value of such an approach is that the necessary staff expertise in scientific disciplines would be concentrated in the super-agency.[323]

If the California Energy Commission is not a one-stop siting agency, what is it. Commission officials consider it to be a "common forum" or a broker of the various regulatory and other interests affected by power plant siting proposals.[324] It is also a developer of California energy policy and a statewide demand and supply forecasting body.[325] The Warren-Alquist Act emphasizes the "common forum" approach by requiring the Energy commission to consult designated affected agencies and obtain their input as to compliance of a proposal with those agencies' substantive laws.[326] This consultation is necessary in part because the Commission does not possess the technical expertise and staff and budgetary resources to evaluate compliance with all applicable laws. It is also necessary because of the provisions of federal law which require enforcement of federal standards, and it is politically wise because it avoids fights with other agencies, or turf battles, which can lead to delays and litigation over projects.[327] Probably because of these factors the Commission has exercised its override authority only once, in the Geysers 16 Geothermal Project. In that case it overrode an objection by the County of Sonoma to the placement of transmission lines running from the project. The county filed a lawsuit against the commission over the override which is still pending.[328]

The Energy Commission has recognized the potential for conflict between its permitting review authority and the authority of other California state agencies enforcing federal or state statutes. It has resolved some of these conflicts by adopting a joint policy statement between it and the California Air Resources Board governing compliance of power plant projects with air quality laws.[329] It also has adopted a statement of common policy between it, the California Coastal Commission, and the San Francisco Bay Area Conservation and Development Commission governing siting of power plants in the California coastal zone.[330] In the latter statement the three agencies agreed on a set of priorities for areas of the state in which new thermal power plants should be sited. In the air quality policy statement, the two agencies worked out procedures to smooth the air quality compliance determination process so as to avoid "any irreconcilable conflict between the needs for clean air and adequate electric power."[331] Because these policy agreements help to avoid or limit inter-agency conflict over policy and reduce turf battles and the resulting delay in agency review that those battles can cause, they are to be strongly encouraged.[332]

Critics of the one-stop siting approach have argued that creating such agencies is not helpful and merely erects another procedural barrier to approval of a project. This is particularly true when the siting agency does not in fact exercise exclusive authority, or when the agency allows all other relevant agencies to impose their own standards of compliance on the developer's project in addition to the siting agency's standards. Developers feel this is the worst of all situations because those other agency requirements would have applied to the project without the new agency's participation in the process, so that setting up the one-stop agency is not only a fruitless gesture, but creates additional red tape for a project developer.[333]

It is not possible to completely resolve the question of the value of special siting agencies. The Energy Commission performs valuable functions in developing energy policy for the state, in forecasting energy demand on a statewide basis,[334] and in siting projects which otherwise would be the responsibility of local agencies at least as to the location of the facility. It is only in the area of permitting and determining compliance with environmental laws that the criticism of adding an additional layer of review is valid, but it is a significant criticism.[335] Furthermore, the Commission is not a neutral body either in setting energy policy or in making siting decisions, and the Commission's decisions are sometimes controversial or opposed by developers and others.[336] For example, the Commission's emphasis on alternative energy sources and conservation is opposed by some developers but it is required by the Warren-Alquist Act.[337] Policy advocacy may affect the ability of the Commission to be a "common forum". Some interviewees felt that the "common forum" or broker approach required the forum agency to be a neutral mediator or to operate by consensus to effectively manage or handle a multiple agency review process.[338] To be neutral, the forum agency should probably not have policy making or permit review responsibility but should focus on getting the parties together and coordinating their efforts.[339] Other state siting agencies do not play as extensive a role in energy policy. Unfortunately, the recession in the last 2½ years has slowed to a halt virtually all major projects and thus made a current evaluation of one stop siting agencies very difficult even in states such as Wyoming or Florida which have had active agencies.

On balance the Energy Commission probably provides a net benefit to the state of California. However it is questionable whether the Commission permitting process is superior to the other major alternative for large-scale review, coordination by a non-permitting body, such as the California Office of Planning and Research, which helps developers of refineries, pipelines, offshore and onshore oil drilling, and nonenergy industrial development projects[340] work their way through the maze of multiple agencys that must review their projects.[341] OPR possess no permitting or policy making authority. It provides information as to what permits are required. What agencies must pass on the project, what information may be required, and helps a developer to work through the multiple agency review process. The OPR model is very similar to the Colorado Joint Review Process which will be examined next as an alternative approach to permitting major facility projects.

B. The Colorado Joint Review Process

The Colorado Joint Review Process (JRP) is an innovative new approach for coordinating the permitting reviews by many agencies of major industrial projects.[342] In 1978, JRP was set up as a result of the combined efforts of the Colorado Department of Natural Resources and the AMAX Company, a Colorado mining corporation that wanted to develop a molybdenum mine in the vicinity of Mt. Emmons in Colorado. Since that time, the AMAX project has worked its way through JRP and a total of seven other projects have started under JRP. These projects range from mining to oil shale production facilities. Unfortunately due to the recession none of these projects have completed the JRP and all have been placed on hold or abandoned. JRP is an entirely voluntary process, that exists without statutory authority. JRP has no permitting or review responsibilities over energy projects. Its sole purpose is to act as a coordinating body to bring together the developer of a project, all relevant local, state, and federal agencies, members of the community in which a project is to be sited, and environmental groups.[343]

The Joint Review Process has three stages. The Process begins when a developer applies to have a project reviewed under JRP. Stage I of the Process consists of an evaluation of the project to determine whether it should be accepted under JRP. This determination is made by Colorado state agencies. The executive directors of these agencies consult other affected agencies at the local, state, and federal level as well as individuals and then reach a decision as to whether a project will be accepted. To qualify, the project must be a "major energy and mineral resource development project". It must also be offered for JRP review in an early stage of development, and state agencies who will be implementing Joint Review must be able to commit staff to the proposed project. The Stage I process takes from 24 to 31 days.[344] While JRP is now limited to mining and energy projects, the concept is applicable to all big industrial projects.

Once a project is accepted for Joint Review, Stage II, the organizational phase, starts and it takes about eight months. In this stage, the Governor of

Colorado assigns a state lead agency for the project. Other levels of government are also contacted, lead agencies are designated at those levels, and commitments to participate in Joint Review are obtained from those governments. This organizational effort leads to signing a joint agreement by federal, state, and local governments to participate in Joint Review. Then the JRP team, consisting of one representative from each level of government, is put together, and team meetings are scheduled (usually six meetings are necessary) to organize and set up the Stage III process. Later Stage II tasks include holding several public participation meetings, negotiating and finalizing a "Statement of Responsibilities" setting forth specifically the obligations of the project developer and all agencies, and developing the important JRP Project Decision Schedule for that proposal.[345]

The Project Decision Schedule (PDS) is the heart of the Stage III process for implementing coordinated review under the JRP model. The PDS provides "detailed guidelines for coordinating regulatory processes, public participation events, and JRP administrative processes into one logical, interrelated sequence of events."[346] There are four different model PDS's for different types of projects.[347] The actual decision schedule that is prepared is project specific and is based on company and agency scheduling criteria. The decision schedule is plotted out on a time line that coordinates and sequences environmental and permitting reviews by major agency category. This is integrated with the company's planned schedule for completion of various phases of the project from the basic idea stage, through exploration, feasibility, design, application, government approval, construction, and operation. Public participation opportunities are scheduled within the PDS. JRP continues to hold regular meetings during stage three to continue the coordinating role, to stabilize management of the PDS process, and to minimize delays in governmental decisionmaking.[348] JRP is a flexible process, that can be altered to meet project specific needs and can be used with other types of energy or industrial development project "such as coal gasification, coal liquifaction, coal fired power plants, petroleum upgrading facilities, refineries, pipelines, transmission lines."[349]

There are many advantages to this JRP approach. The Joint Review Process can be effectively used to coordinate multiple agency review of major projects because that objective is its major purpose. It can remain neutral and mediate various interests, thereby operating by consensus, because it has no policy making role, it is insulated from politics, and it has no substantive permitting or siting authority. It has the backing of the Governor of Colorado and high level state officials.[350] It is supported by mining companies who have been willing to participate in this process. Because it expressly includes opportunities for public participation, it allows community input which can prevent controversy or reduce the likelihood that intervenor groups will feel excluded or feel that a project is being railroaded through the process. Because they can participate these groups are less likely to try and block a project through marshalling political opposition, or threatening to and actually filing lawsuits challenging the project.[351]

The JRP process relies on frequent meetings throughout the entire process in which all the parties sit down together in one room to meet and talk with each other, establish lines of communication, and raise and deal with many issues. This process is quite effective for implementing the scoping of issues method for preparing environmental impact statements under the CEQ regulations.[352] It is also an open process, in a nonadversary setting, in which public members can more meaningfully participate and make their concerns known. Due to the early involvement of the JRP in a proposal's development, these concerns can often be addressed before the developer has made a firm financial commitment to a specific design for its project. Furthermore, changes can more easily be made to the project in that early stage to reflect community conerns than is the case later on in the project.[353]

JRP is not the ideal solution that will solve all problems in energy facility siting. In fact, there is no such solution. Joint Review will not prevent diehard ideological opponents of energy development from opposing a project and filing lawsuits. However, Joint Review may help agencies win those suits through being able to make a good record. It will not ensure the most efficient development of energy projects, because developers are still in control of how fast those projects unfold. In fact, most of the seven or eight projects now in JRP have been put on hold for economic reasons unrelated to JRP. Joint Review will not eliminate all policy conflicts that may arise in the course of PDS implementation. It is not a perfect approach.[354]

However, the Joint Review Process is a significant breakthrough in development of a rational management process for coordinating multiple agency review of major energy projects, particularly those that are controversial or in which substantial public input is desired. The JRP approach is being tried in several additional states such as Utah and Illinois.

Other states should be encouraged to experiment by setting up Joint Review Processes similar to Colorado's. JRP preserves the enforcement authority of each reviewing agency, it does not require rewriting of state law, or changing state enforcement plans under federal environmental quality statutes, and it explicitly recognizes that no one agency can possess expertise in all areas or be all things to all people. Finally, the JRP is structured to fulfill more precisely the "common forum" or mediation model for coordination coupled with a deemphasis on adversary procedure. It does so without adding another procedural layer to the process. It is merely a more effective way to coordinate the current established agency procedures. However, in order for JRP to work the governor and other high level officials must be committed to the idea and must support implementation of it. Furthermore, other approaches can work depending on the role played by these same officials.

Conclusion

This report has examined the regulatory structure governing permitting and siting of major industrial projects in the United States. It has pinpointed problems with that structure based on interviews with approximately 110 persons experienced in regulation of siting at all levels of government, local, state, and federal, among public interest groups, and among energy project developers. It has also utilized studies prepared by others directed toward these same problems. It has pinpointed key stages of the process of regulation and problems with each stage. It has discussed proposed solutions to problems identified herein. It has examined two alternative models at the state level for regulating siting, the siting agency, exemplified by the California Energy Commission, and the non-permitting coordinating body, exemplified by the Colorado Joint Review Process. It has concluded that on balance, the coordinating body approach is better suited as an optimum approach for efficiently conducting the permitting and siting of major industrial projects. A summary of proposed recommendations are contained at the beginning of this report and are based on its contents.

Appendix A: Survey Questionnaire and Explanation of Survey Procedures

Survey Procedures

The questionnaire was sent out by mail to approximately 110 individuals at all levels of Government, developers, and public interest groups. These individuals' names were identified through extensive checking by letter and telephone performed by two research assistants who worked for the author. They also scheduled all interviews, personal and over the telephone, and made sure that I had accurate phone numbers and mailing addresses for each interviewee. Each interviewee was instructed to look over the questionnaire prior to the interview. At the interview itself, I went through the questionnaire with each interviewee for an average one hour time period per interview. Most persons identified problems and commented on those problems. Interviewees also presented their own ideas and provided to me written studies, manuals, and papers relevant to the overall topic. Virtually all interviewees requested an opportunity to read and comment on the report. The survey produced a wealth of valuable information, in fact, more than could be utilized for the draft report. It also gave the author new insight into the real world of agency decisionmaking. Most of the interviews (90) were conducted in summer, 1982. A smaller group were conducted in summer, 1983 (20). Out of this group, 92 usable questionnaire responses were received and compiled in a survey (see Appendix B).

QUESTIONNAIRE

Prepared
by

Gregory L. Ogden
Professor of Law
Pepperdine University
School of Law

For Use With

"Public regulation of siting of
industrial development projects,"
a study for the Administrative Conference
of the United States.

I. INTERVIEW SOURCE INFORMATION

1. Name of Interviewee: ______________________

2. Position: ______________________

3. Company or Entity: ______________________

4. Address: ______________________
(Street Address)

____
(City) (State) (Zip Code)

5. Phone Number: ________ ______________________
(Area Code) [Phone Number(s)]

6. Date of Interview: ______________________

II. INTERVIEWEE EXPERIENCE

Questions

1. Please state what current or past responsibilities you have had in regard to public regulation of siting of industrial development projects.

2. Please name particular projects for which you have had responsibilities.

3. Please state the capacity in which you were involved in those projects, e.g., as counsel for a reviewing agency, or as counsel for a project developer.

4. Please state the number of years for which you have had such responsibilities.

III. INTERVIEWEE COMMENTS

1. What problems, if any, exist in regard to public regulation of siting of industrial development projects?

2. Of the following possible types of problems, please indicate the ones that you feel are real problems and explain the nature of the problem.

Problem

a. E.I.R./E.I.S. - (Environmental Impact Statement/Report) process:

Comments:

b. Particular pollution control or other environmental requirements such as:

air pollution:
water pollution:
land use controls:
coastal zone restrictions:
hazardous waste
other (specify):

Comments:

c. Federal-State relations (Federalism) such as a conflict between a national interest and the interest of a particular state or region:

Comments:

d. The political environment such as substantial opposition to particular projects or to an industry by governmental officials or members of the public:

Comments:

e. Delay by specific agencies in reviewing applications, holding hearings, and making permit approval decisions:

Comments: (Specify agency & nature of decision).

f. Delay caused by multiple agencies who must review and approve permits for a particular project:

Comments:

g. Delay caused by judicial challenges to permit approval decisions:

Comments:

h. Delay caused by agencies exercising too much discretion in decision making/policy making, or too little discretions:

Comments:

i. Duplication or overlapping review by several agencies of similar issues in a particular project:

Comments:

j. Inability or unwillingness of a single interest agency (e.g., the Air Resources Board) to consider broader issues relevant to a particular project but outside the agency's scope of delegated authority:

Comments:

k. Lack of coordination or authority to coordinate by multiple agencies reviewing different aspects of a particular project:

Comments:

l. Conflict among local, state, and federal agencies having authority to regulate a particular subject (e.g., air pollution control) over what is an acceptable resolution of a problem with a particular project ("The Whipsaw Effect"):

Comments:

m. Uncertainty by regulatory agencies as to what standards or policies to apply to a particular issue in a new project:

Comments:

n. Substantive complexity of a particular project, either technical, or safety, or raises a variety of issues:

Comments:

o. Developer related problems such as inadequate information given in applications or a project that is not well designed or well planned.

Comments:

p. Problems with the location/site of the project:

Comment:

q. Other problems (specify nature):

Comments/Nature:

3. SOLUTIONS TO PROBLEMS: Please state your ideas as to what solutions there are to any problems that you have previously identified:

4. Please evaluate the effectiveness of the following possible solutions:

   a. Time limit statutes which require agencies to decide cases within specified periods of time.

	1	2	3	4	5	
Not Effective						Very Effective

      Comments:

   b. One stop siting agencies in which all permit approval processes are conducted in one agency.

	1	2	3	4	5	
Not effective						Very effective

      Comments:

c. The once proposed Federal Energy Mobilization Board:

	1	2	3	4	5	
Not effective						Very effective

Comments:

d. Federal preemption and control as illustrated by the Nuclear Regulatory Commission and nuclear power plants.

	1	2	3	4	5	
Not effective						Very effective

Comments:

e. The Colorado Joint Review Process or similar processes:

	1	2	3	4	5	
Not effective						Very effective

Comments:

f. Other possible solutions (state the nature of any solution):

	1	2	3	4	5	
Not effective						Very effective

Comments:

Appendix B: Compilation of Survey Questionnaire Results

Appendix B

Questionnaire Survey Results

There were 92 total questionnaires usable for the survey out of 110 persons interviewed (approx.).

Table 1 contains positive responses to survey questions. Positive responses indicate some problem was identified in the subject probed by the question.

Table 1

Responses by question in rank order	Number
Political environment	60
Federal-state relations	59
Substantive complexity	49
Multiple agency review	46
Air Pollution	43
Judicial challenges	42
Local, state, federal agency conflicts	40
Regulatory uncertainty	38
Environment Impact Statement	37
Lack of coordination among agencies	36
Duplication and overlapping review by several agencies	35
Inability of single interest agency to consider broader issues	29
Delay by specific agencies	28
Agency discretion	27
Coastal zone regulation	21
Water pollution	16
Hazardous waste control	12
Location of site	10
Land use controls	8

Developer-related problems	7

Interviewee additions

Not enough public involvement	4
Statutes not clear enough	3
Federal agency's too removed from site	2
Agencies requested too much data	2
Perception that government is only cause of delay	2
Industry seeks approval before it is prepared to go forward.	1
Lack of early planning	1

Table 2 contains responses to several proposed solutions and interviewee suggestions for solutions.

Table 2

1. Time limit statutes	39 favor	vs.	21 disfavor
2. One stop siting	42 favor	vs.	25 disfavor
3. Federal energy mobilization board	4 favor	vs.	34 disfavor
4. Federal preemption	22 favor	vs.	34 disfavor

Other suggested solutions:

- Colorado type Joint Review.	10 favored
- Enhance interdepartmental communication.	7 favored
- Clarify and simplify rules and procedures	2 favored
- Drop adversary stance (hire more engineers & less lawyers in government regulatory commissions).	1 favored

Appendix C: Advice From the Office of Planning and Research to Developers in California

916/322-8515

May 1982

TEN PRACTICAL TIPS TO FOLLOW FOR GETTING A DEVELOPMENT PROJECT APPROVED IN CALIFORNIA

by Ron Bass

Companies planning to expand their facilities or build new ones in California generally must obtain approval from various government agencies concerned with the environmental impacts of their project. These may include a City Council or County Board of Supervisors, as well as state and federal regulatory agencies. To help businesses learn which agencies are involved with a particular project, the Office of Planning and Research published the California Permit Handbook and Permit Handbook Summary. The Handbook lists most of the state's environmental agencies and explains their permit requirements.

After using the Permit Handbook to identify permits, many businesses have asked the Office of Planning and Research for practical advice on how to successfully get through the permit process. Consequently, we have put together the following ten tips based on our experience with hundreds of projects:

I.	CONSULT EARLY	Consultation with environmental agencies should begin as early as possible in planning your project. Do not approach agencies with a project already designed.
II.	LEARN THE RULES	Take time to study the plans and regulations of those agencies that must approve your project. Read your city or county general plans and zoning ordinance. Study state and federal agency permitting requirements that effect your project.
III.	KNOW THE PLAYERS	Become familiar with the regulators and how they function. Attend meetings. Read staff reports and environmental studies for projects similar to yours.
IV.	CAREFULLY SELECT YOUR SITE	Do not purchase a site without carefully studying the environmental constraints and surrounding land uses. Evaluate several alternative sites before making your choice. Use options that allow you to obtain permits before you close your deal.
V.	REDUCE ENVIRONMENTAL IMPACTS	Design your project to eliminate or reduce as many potential environmental impacts as possible. Consider environmentally superior alternatives. Incorporate the suggestions you learned during early consultation into the project design.

VI.	INVOLVE THE PUBLIC	Plan a public participation program. Learn who your potential opponents are (neighborhood groups, environmental organizations, community leaders). Meet with them, get their ideas and views. Use press releases and announcements to keep the public informed about progress of your project. Avoid surprises.
VII.	DO NOT APPROACH THE PROCESS WITH AN ADVERSARY ATTITUDE	It is generally counterproductive to resist the permit process as you are going through it. An adversary attitude often results in hostility and delay, and may even result in project denial.
VIII.	PAY ATTENTION TO DETAILS	Follow all the rules. Respond promptly to requests for information. Be on time for meetings with regulators. Do not cut corners.
IX.	BE WILLING TO NEGOTIATE	Recognize that government regulators have a great deal of authority to require changes in your project. But, they are willing to negotiate and you should be too. Remember, it may be better to get part of what you want rather than nothing.
X.	USE THE OFFICE OF PERMIT ASSISTANCE	This state level office was set up in the Governor's Office of Planning and Research to help businesses and government officials deal more effectively with the environmental laws. The staff of the Office will help identify the regulatory agencies and set up meetings with them.

For further information, you should contact the Office of Permit Assistance at 916/322-8515.

Appendix D: EPA Model Decision Schedule

Model Project Decision Schedule:
NEPA Environmental Review (NPDES Permit)

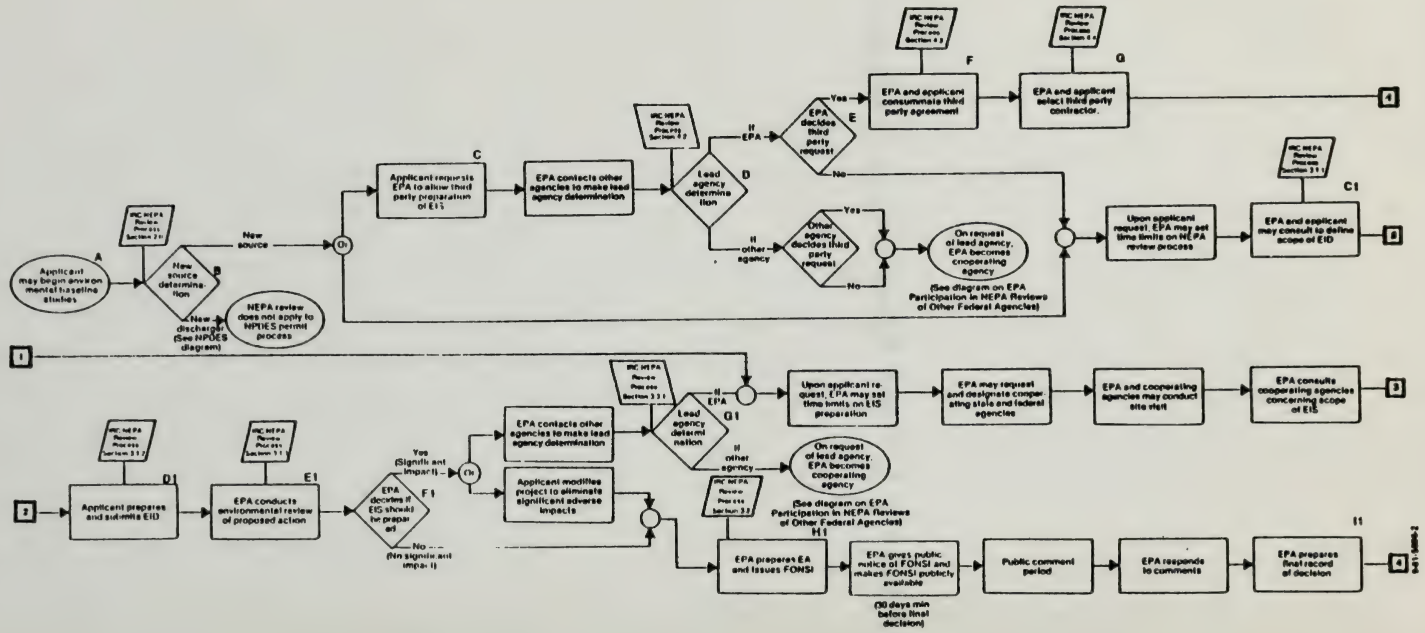
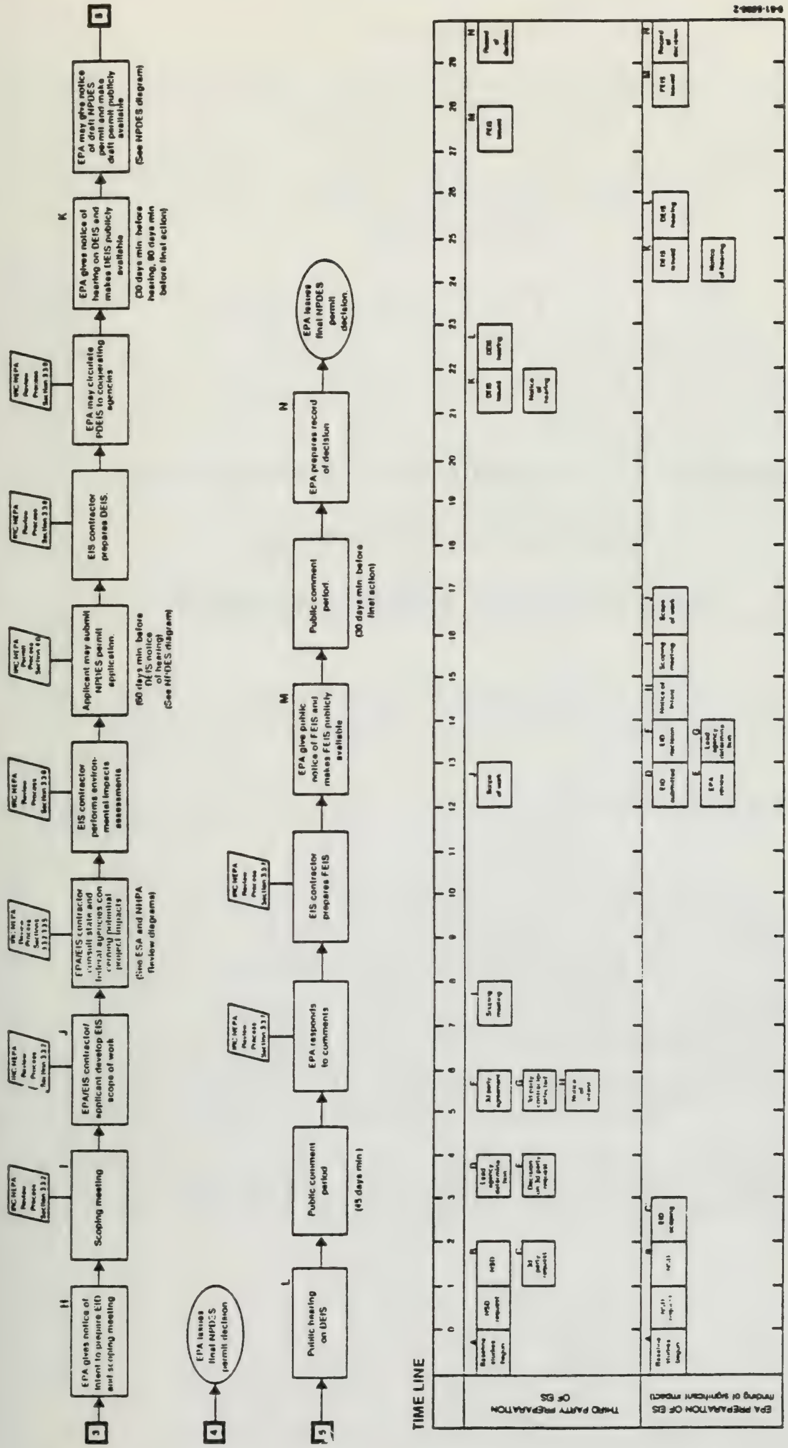

A
Applicant may begin environmental baseline studies
IRC NEPA Review Process Section 2.1
B
New source determination
New source
New discharger (See NPDES diagram)
NEPA review does not apply to NPDES permit process
Or
C
Applicant requests EPA to allow third party preparation of EIS
EPA contacts other agencies to make lead agency determination
IRC NEPA Review Process Section 4.2
D
Lead agency determination
If EPA
If other agency
E
EPA decides third party request
Yes
No
IRC NEPA Review Process Section 4.3
F
EPA and applicant consummate third party agreement
IRC NEPA Review Process Section 4.4
G
EPA and applicant select third party contractor.
4
Other agency decides third party request
Yes
No
On request of lead agency, EPA becomes cooperating agency
(See diagram on EPA Participation in NEPA Reviews of Other Federal Agencies)
Upon applicant request, EPA may set time limits on NEPA review process
IRC NEPA Review Process Section 3.1.1
C1
EPA and applicant may consult to define scope of EID
5
1
IRC NEPA Review Process Section 3.3.1
If EPA
G1
Lead agency determination
If other agency
Upon applicant request, EPA may set time limits on EIS preparation
EPA may request and designate cooperating state and federal agencies
EPA and cooperating agencies may conduct site visit
EPA consults cooperating agencies concerning scope of EIS
3
2
IRC NEPA Review Process Section 3.1.2
D1
Applicant prepares and submits EID
IRC NEPA Review Process Section 3.1.1
E1
EPA conducts environmental review of proposed action
F1
EPA decides if EIS should be prepared
Yes (Significant impact)
No (No significant impact)
Or
EPA contacts other agencies to make lead agency determination
Applicant modifies project to eliminate significant adverse impacts
On request of lead agency, EPA becomes cooperating agency
(See diagram on EPA Participation in NEPA Reviews of Other Federal Agencies)
IRC NEPA Review Process Section 3.2
H1
EPA prepares EA and issues FONSI
EPA gives public notice of FONSI and makes FONSI publicly available
(30 days min before final decision)
Public comment period
EPA responds to comments
I1
EPA prepares final record of decision
4

Figure 1-1. Model Project Decision Schedule: NEPA Environmental Review (NPDES Permit)


3
H
EPA gives notice of intent to prepare EIS and scoping meeting
I
Scoping meeting
J
EPA/EIS contractor/applicant develop EIS scope of work
EPA/EIS contractor consult state and federal agencies concerning potential project impacts
(See ESA and NHPA Review diagrams)
EIS contractor performs environmental impacts assessments
Applicant may submit NPDES permit application.
(60 days min before DEIS notice of hearing) (See NPDES diagram)
EIS contractor prepares DEIS.
EPA may circulate PDEIS to cooperating agencies
K
EPA gives notice of hearing on DEIS and makes DEIS publicly available
(30 days min before hearing, 90 days min before final action)
EPA may give notice of draft NPDES permit and make draft permit publicly available
(See NPDES diagram)
5
4
EPA issues final NPDES permit decision
5
L
Public hearing on DEIS
Public comment period
(45 days min)
EPA responds to comments
EIS contractor prepares FEIS
M
EPA give public notice of FEIS and makes FEIS publicly available
Public comment period
(30 days min before final action)
N
EPA prepares record of decision
EPA issues final NPDES permit decision
TIME LINE
THIRD PARTY PREPARATION OF EIS
EPA PREPARATION OF EIS (finding of significant impact)
0
1
2
3
4
5
6
7
8
9
10
11
12
13
14
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1-4

Figure 1-1. (Continued)

Appendix E: Colorado Joint Review Project

Model Decision Schedules

(See First Draft Report Appendix G)

FOOTNOTES

1. For example, the Geysers Geothermal Energy Project in northern California required review by the Bureau of Land Management (BLM), of the U.S. Department of the Interior, by the California Energy Commission, a state agency, and by the county of Sonoma, a local body. The county is currently litigating the validity of the Energy Commission's exercise of override authority on transmission line siting for the project. Interviews with Energy Commission officials were conducted by the author in July, 1982 and they discussed these matters.

2. The adjudicatory procedures required by sections 554, 556, and 557 of the federal Administrative Procedure Act (APA), 5 U.S.C. §§ 551-706, presuppose that a single agency is acting in a single adjudicatory proceeding. While the drafters of the APA no doubt contemplated that agencies would have many pending actions, and thus would need to use administrative law judges to hear testimony (see § 556(b)(3) the APA does not explicitly provide procedures to govern industrial development projects in which a developer applicant must file applications, and participate in permit hearings before multiple agencies within a level of government or in several levels of government, federal, state, and local. This is not intended as a criticism of the APA but only as an observation that the Act does not provide formal procedures to govern multiple agency reviews. While rulemaking under § 553 of the APA does encompass matters of "general applicability" affecting an entire industry, the focus of § 553 is on a single agency engaging in rulemaking. Furthermore, permit reviews for large-scale projects are adjudicatory in nature and are not within the scope of § 553.

3. The California Energy Commission was established in 1974 by the Warren-Alquist Act; Stat. 1974, C. 276, p. 501, § 2, operative Jan. 7, 1975, and is codified in Cal. Pub. Res. Code §§ 25000-968 (1977, as amended 1982 Supp.).

4. See Legal Times, Monday, June 31, 1982, " Joint Review Process Expedites Project Completion", by Don G. Scroggin, Esq.

5. Cal. Pub. Res. Code § 25500 (1977) provides that

> In accordance with the provisions of this division, the commission shall have the exclusive power to certify all sites and related facilities in the state, whether a new site and related facility or a change or addition to an existing facility. The issuance of a certificate by the commission shall be in lieu of any permit, certificate, or similar document required by any state, local or regional agency, or federal agency to the extent permitted by federal law, for such use of the site and related facilities, and shall supersede any applicable statute, ordinance, or regulation of any state, local, or regional agency, or federal agency to the extent permitted by federal law. (emphasis added).

This statute clearly confers override authority over state, local, or regional agencies, and federal agencies, when allowed by federal law. The wording of the statute illustrates the regulatory complexity of siting energy facilities with agencies at multiple levels of government having responsibility for part of a project.

6. Interview with Adam Poe, Director, Colorado Joint Review Process, August, 1982.

7. Ogden "Problems in the Regulation of Energy Facilities: Lessons from the SOHIO Pipeline Terminal Case," Part I of a J.S.D. dissertation in the faculty of law, Columbia University (hereinafter referred to as "SOHIO paper").

8. See Appendix A, infra, for the survey questionnaire and an explanation of how the survey was conducted.

9. This assumption is subject to criticism. Some of the officials interviewed by the author in the summer of 1982 noted that environmental impacts of energy projects varied widely depending on the site, the technology chosen, and the output of the facility. Many interviewees made the observation that few general comments could be made because each large-scale project is unique. Nevertheless, as will be demonstrated herein, there are common elements in regulatory structure and permits required for all industrial development projects. This is principally due to the pervasive nature of federal environmental statutes such as the Clean Air Act, Pub.L. 91-604, 84 Stat. 1676 (1970) as amended Aug. 7, 1977, Pub.L. 95-95, 91 Stat, 691, codified in 42 U.S.C. §§ 7401-7642 (1979), that mandates nationwide pollution control efforts that all states must implement.

10. This assumption is very important. Some proposals, such as the ill-conceived Energy Mobilization Board, included provisions for the waiver of federal and state environmental laws. It is the author's position that environmental protection laws can and should be enforced when large-scale projects are reviewed and permitted. Furthermore, environmental protection laws do not directly prohibit the approval of most industrial development projects but are designed to require pollution control technology to be installed often at great cost. Also, review for compliance with environmental statutes increases the time needed to permit projects. Furthermore, the optimum model for quality review of these projects should include strict environmental review since most large-scale projects do have significant environmental effects. See discussion, infra, text at notes 12-25.

11. Interviews were conducted with officials at the Nuclear Regulatory Commission, utility developers of nuclear power plants, and public interest group intervenors. As could be expected, these individuals were quite knowledgeable about siting of nuclear power plants and problems with nuclear power but their knowledge was limited to that type of technology. The author is hesitant to join together analysis of problems of nuclear power plant siting with problems of non- nuclear siting because of the unique issues posed by the former. Furthermore, neither of the approaches examined, the California Energy Commission, or the Colorado Joint Review Process, have direct siting responsibility for nuclear power plants. That is the function of the Nuclear Regulatory Commission. However, the regulatory structure for nuclear and

non-nuclear power plants bears some similarity and nuclear power plants are subject to multiple agency permit processes as are non-nuclear plants. Thus the plant discussion will focus on nuclear power, to the extent of common problems of multiple agency review, coordination, and management of permit reviews.

12. Flores and Appleman, Analysis of Coal Electric Facility Permitting and Construction Timelines, Lewin and Associates, Inc. (1979) at 5,14-15 (hereinafter referred to as Flores and Appleman).

13. Id. at 14-15.

14. Id. at 18.

15. Pub.L. 91-604, 84 Stat. 1676 (1970), as amended Aug. 7, 1977, Pub.L. 95-95, 91 Stat. 691, codified in 42 U.S.C §§ 7401-7642 (1979). The PSD statutes are set forth in 42 U.S.C. §§ 7470-7491. PSD requirements are designed to maintain good air quality in regions of the nation in which ambient air quality standards for particular pollutants have been attained. These include areas, such as national parks, that have pristine air quality and no significant air pollution problems. In addition they include regions that have reduced emissions of particular pollutants so as to achieve attainment.

16. Pub.L. 92-500, 86 Stat. 816, as amended December 27, 1977, Pub.L. 95-217, 91 Stat. 1581, codified in 33 U.S.C. §§ 1251-1376. 33 U.S.C § 1342 is the statutory section that authorizes NPDES permits.

17. 33 U.S.C. § 1344 of the federal Water Pollution Control Act Amendments of 1972, supra, note 16, codifies the Army Corps of Engineers § 404 authority to issue permits for the discharge of dredged or fill material in navigable waters.

18. Flores and Appleman, supra note 12, at 8-14.

19. This study is limited to the type of technology used, coal fired electric power plants, and thus would not apply to nuclear power plants, oil pipelines and ocean terminals, and extraction of natural resources. However, its conclusions are still helpful in making two points, that energy facility siting is impacted by the permitting process, and that siting takes a lengthy time.

20. Illustrative "worst case" projects discussed in the literature include the "Storm King" Project, a pumped storage power plant planned for the Hudson River near Storm King mountain. This project was litigated in Scenic Hudson Preservation Conference v. Federal Power Commission, 354 F.2d 608 (2d Cir., 1965) and in Scenic Hudson Preservation Conf. v. F.P.C., 453 F.2d 463 (2d Cir., 1971). Administrative review and litigation over this project, which was eventually abandoned by Consolidated Edison of New York, spanned a six year time period. Two nuclear power plant projects which had lengthy reviews were: 1) the Diablo Canyon Nuclear Power Plant owned by Pacific Gas and Electric Co. in California. The initial construction license in that case was applied

for in 1967, and a low power operating license was granted in 1982 a 15 year time period. 2) The Vermont Yankee Nuclear Power Plant for which a construction license was granted in December 1967. A final U.S. Supreme Court decision deciding a challenge to the granting of an operating license was rendered in 1978 in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978) an eleven year time period. Other examples include the SOHIO Pactex Pipeline Terminal Project, started in 1975 and abandoned in 1979, and the Pt. Conception LNG Terminal started in 1975, with administrative review still pending in 1982 before the Federal Energy Regulatory commission. One factor that is common to all of these projects is controversy. Each project generated organized opposition, and this lengthened the review process considerably. Another factor common to all of the projects is significant environmental effects which caused much of the opposition. In addition, two of the projects, Diablo Canyon, and Point Conception, posed significant safety issues.

21. Flores and Appleman, supra note 12, at 13.

22. Id. at 15.

23. Interviews with a number of company representatives and agency officials in July, 1982 provided most of this material.

24. The SOHIO Pactex Pipeline Terminal Project would have increased emissions of hydrocarbons, an air pollutant whose concentration already exceeded the maximum safe level in the Los Angeles Air Basin. How to minimize the impact of those increased emissions was the major environmental issue in the SOHIO case. See SOHIO paper, supra note 7, text notes at 400-423.

25. Energy Technologies and the Environment, Environmental Information Handbook, U.S. Department of Energy, June 1981, at 38-43. (hereinafter referred to as Energy Technologies). Air pollutants emitted from coal combustion include sulfur dioxide, which, when converted to sulfuric acid in the atmosphere, causes the problem of acid rain, nitrogen oxide, carbon dioxide, and particulates, microscopic solid particles. Major solid waste disposal problems are caused by deposits of fly ash, bottom ash, and scrubber sludge which are produced in large quantities from coal combustion. Water pollution problems are less significant with coal-fired plants but there can be problems with discharges of heated cooling water which raise the average temperature in the body of water to which the water is returned. Other water pollution problems are the result of cooling water blowdown and drift, and ash-handling waste waters. Id. The air pollution problems from coal use are significant enough that the California Energy Commission has expressed opposition to construction of coal-fired power plants. It stated: "The Commission does not view coal-fired power plants, located in California or elsewhere, as a preferred alternative because of the environmental problems, high capital costs, and long lead times that accompany the construction and operation of these facilities." Electricity Tomorrow, 1981 Final Report, California Energy Commission, January 1981, at 211.

26. Energy Technologies, supra note 25, at 40-41.

27. SOHIO paper, _supra_ note 7, at notes 400-423.

28. The problem of oil spills is more acute from offshore drilling rigs, e.g. the Santa Barbara Channel oil spill, but there have been several cases of oil carrying tankers encountering difficulties which led to large oil spills and despoiling of water and beaches near the spill.

29. One major conflict in the SOHIO case was over the location of the oil storage tanks. The air pollution agencies, the California Air Resources Board, and the Southern California Air Quality Management District, wanted the storage tanks to be located on the coast to minimize air pollution effects due to emission of hydrocarbons from the storage tanks. The California Coastal Commission wanted the storage tanks to be located inland to minimize harm to coastal aesthetics. This issue was eventually resolved in favor of a coastal placement, but the conflict illustrates coastal zone land use concerns.

    Another example of these concerns is illustrated in the rejection by the Governor of Washington, John Spellman, of the Northern Tier Pipeline Company's application to construct and operate an oil pipeline starting at Port Angeles, Washington, crossing Puget Sound underwater, traversing the state of Washington, and leading to midwestern refineries. _Los Angeles Times_, February, 1982. The Governor followed the recommendations of the Washington State Energy Facility Site Evaluation Council which gave two reasons for recommending rejection. The Council stated: "It's concerned about the safety of 22 miles of pipeline that would pass under Puget Sound, and doesn't think the company has studied bottom conditions in sufficient detail. And it thinks Port Angeles is the wrong place for an oil port, because that city is the only potential site on the Olympic Peninsula where a tanker fire or explosion could threaten an urban population." _The Seattle Times_, Sunday, January 24, 1982 at A14.

30. Energy Technologies, _supra_ note 25, at 187-90.

31. Energy Technologies, _supra_ note 25, at 18-14.

32. _Id_. at 22, 149-174.

33. _Id_. at 231.

34. _Id_. at 231-35, 245-56.

35. _Id_. at 234-35.

36. Pub. L. 91-90, 83 Stat. 852, January 1, 1970, codified at 42 U.S.C. §§ 4321 et. seq.

37. Pub. L. 91-604, 84 Stat. 1676, (1970) as amended, August 7, 1977, Pub. L. 95-95, 91 Stat. 691, codified in 42 U.S.C. §§ 7401-7491 (1979).

38. Pub. L. 92-500, 86 Stat. 815, as amended December 27, 1977, Pub. L. 95-217, 91 Stat. 1581, codified in 42 U.S.C. §§ 1251-1376 (1979).

39. Enacted August 30, 1954, c. 1073, 68 Stat. 921, codified in 42 U.S.C. §§ 2011-2294 (1978).

40. 42 U.S.C. §§ 2012(d), 2131(b), 2232(a), (1978). § 2232(a) provides in part that license applications contain information allowing the Commission to find that "the utilization or production of special nuclear material will be in accord with the common defense and security *and will provide adequate protection to the health and safety of the public*." (emphasis added).

41. 42 U.S.C. §§ 4322(2) states "all agencies of the Federal Government shall . . . (c) include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on

    (i) the environmental impact of the proposed action,
    (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
    (iii) alternatives to the proposed action,
    (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
    (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."

42. *Kleppe v. Sierra Club*, 427 U.S. 390 (1976). NEPA requires agencies to "consider" environmental impacts before reaching a decision but it is not a substantive statute mandating enforcement of environmental standards *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223 (1980).

43. *Scientist's Institute for Public Information, Inc*. v. *Atomic Energy Commission*, 481 F.2d 1079 (D.C. Cir. 1973).

44. The Bureau's authority is based on its responsibility to approve rights of way on all federally owned lands for many purposes including oil and gas pipelines. BLM's statutory authority is based primarily on the Mineral Leasing Act of 1920, 30 U.S.C. § 185 (1980). Each year, the Bureau processes hundreds of right of way applications including, on an average, 20 major applications for energy facilities such as for oil shale production, coal gasification, oil or natural gas pipelines, electric transmission lines, coal-fired electric generating stations, coal slurry pipelines, and wind power generating plants. U.S. Department of the Interior, Bureau of Land Management, "A Review of the Bureau of Land Management's Energy Facility Permitting Process," April, 1981 at II. (hereinafter referred to as BLM permitting study).

45. The Army Corps of Engineers has responsibility for dredge and fill permits when material is discharged in navigable waters under 42 U.S.C. § 1344 (1979). It also possesses flood control and dam building authority on navigable waters under § 33 U.S.C. §§ 701-709 (1978).

46. The Environmental Protection Agency has primary responsibility for enforcing the provisions of the Clean Water Act, See 33 U.S.C § 1341,

1342, and the provisions of the Clean Air Act, 42 U.S.C. § 7401-7642 (1979).

47. The Department of Energy (DOE) was established by the Department of Energy Organization Act of 1977, Pub. L. 95-91, August 5, 1977, 91 Stat. 565, codified in 42 U.S.C. §§ 7101-7375 (1981). Within D.O.E., but independent of it, is the Federal Energy Regulatory Commission (FERC), which has authority to regulate interstate oil and gas pipelines and interstate sales of natural gas. FERC was established under 42 U.S.C. §§ 7171-77 (1981).

48. 42 U.S.C. § 4332(c) (1982).

49. 42 U.S.C. § 4332(c) (1982).

50. The Environmental Protection Agency developed a list of federal agencies, other than EPA, that might be involved in a major energy project. The list, dated November 27, 1979, named agencies and the various statutes or regulations that authorized their involvement. Twenty-six federal agencies, or departments within agencies, were listed. These included, in the Department of Agriculture, the U.S. Forest Service, Rural Electrification Administration, and Soil Conservation Service; in the Department of Commerce, the National Oceanic and Atmospheric Administration (NOAA), the Maritime Administration, and the Economic Development Administration; in the Department of Defense, The Army Corps of Engineers; the Department of Energy; the Federal Energy Regulatory Commission; in the Department of the Interior, the Bureau of Indian Affairs, the Bureau of Land Management, the Bureau of Mines, the Bureau of Reclamation, the U.S. Geological Survey, the U.S. Fish and Wildlife Service, the National Park Service, the Office of Surface Mining Reclamation and Enforcement; the Department of State; in the Department of Transportation, the Coast Guard, the Federal Highway Administration, the Office of Pipeline Safety, Special Programs Administration, Federal Railroad Administration; the Interstate Commerce Commission; the Nuclear Regulatory Commission; the Tennessee Valley Authority; and various River Basin Commissions such as the Delaware River Basin Authority. Not all of the agencies would be involved in every case. However, EPA and BLM would probably be most frequently involved. In addition a number of state and local agencies would also have input into a major energy project. In California, these would the California Energy Commission, the Air Resources Board, the Regional Air Pollution Control district, the State and Regional Water Quality Control Board, the Public Utilities Commission, and some local agencies.

51. NEPA requires consideration of alternatives to a project. 42 U.S.C. § 4332(c)(13) requires responsible officials to include in an E.I.S. "alternatives to the proposed action." It would be difficult to adequately consider alternatives without one overall report that discussed all impacts of a project.

52. The Council on Environmental Quality (CEQ) was established under NEPA, in 42 U.S.C. §§ 4341-466. CEQ is a three person body within the executive office of the President (§ 4342) that has a variety of responsibilities including helping to prepare annual environmental quality reports

(§ 4332), working with all federal agencies to develop methods and procedures to incorporate environmental values into governmental decisionmaking (§ 4332) and engaging in a variety of tasks to carry out its role as advisor on environmental policy for all federal agencies and programs (§ 4344). CEQ accomplishes its statutory responsibility through four methods: 1) advising the President and the Congress on major environmental issues and concerns; 2) coordinating the environmental efforts of federal agencies' programs; 3) acting as a clearing house for environmental information; and 4) formulating and issuing regulations for federal agencies to follow in reporting the environmental impacts of programs. "The Council on Environmental Quality: A Tool in Shaping National Policy" Report by the Comptroller General of the United States, U.S. General Accounting Office, March 19, 1981, CED 81, 66 at 10-14. CEQ fills an important role, is quite effective at what it does, and could not easily be replaced by another agency. Much of its strength lies in its advisory role; it has no substantive regulatory authority although it has promulgated NEPA compliance regulations. Id. at 17-18.

53. The CEQ regulations implementing N.E.P.A. were first promulgated in 43 Fed. Reg. 55990, Nov. 28, 1978, and are codified in 40 C.F.R. §§ 1500-1508 (1981). The CEQ regulations are discussed more extensively in Goplerud, NEPA at Nine: Alive and Well or Wounded in Action, 55 N. Dak. L. Rev. 497 (1979).

54. 40 C.F.R. § 1501.5(a)(1) (1981). The "lead agency" concept originally appeared in the California Environmental Quality Act, Cal. Pub. Res. Code § 21000-21176 (1977). Cal. Pub. Res. Code § 21067 states "'lead agency' means the public agency which has the principal responsibility for carrying out or approving a project which may have a significant effect upon the human environment." Under Cal. Pub. Res. Code § 21069, "responsible agencies" are "a public agency, other than the lead agency, which has responsibility for carrying out or approving a project." Lead agencies are designated to prepare environmental impact reports whenever two or more public agencies in California have responsibility for approving a project. In case of dispute over designating the lead agency, the Office of Planning and Research, a state body, will, on request, designate a lead agency. Cal. Pub. Res. Code § 21165 (1977).

55. See list of federal agencies, supra note 50, 26 were identified other than E.P.A. In addition, the U.S. Geological Survey ascertained that 102 permits, environmental and other types, would be required to develop oil shale in Colorado. Many but not all of these were federal permits. Report by the Comptroller General of the United States, U.S. General Accounting Office, "Possible Ways to Streamline Existing Federal Energy Mineral Leasing Rules" EMD-81-44, January 21, 1981, at 4.

56. 40 C.F.R. § 1501.5(c). It states in part: "If an action falls within the provisions of paragraph (a) of this section the potential lead agencies shall determine by letter or memorandum which agency shall be the lead agency and which shall be cooperating agencies. The agencies shall resolve the lead agency question so as not to cause delay."

57. 40 C.F.R. § 1501.5(c). It states in part:
" If there is disagreement among the agencies, the following

factors (which are listed in order of descending importance) shall determine lead agency designation:
(1) Magnitude of agency's involvement.
(2) Project approval/disapproval authority.
(3) Expertise concerning the action's environmental effects.
(4) Duration of agency's involvement.
(5) Sequence of agency's involvement."

58. 40 C.F.R. § 1501.5(e),(f).

59. 40 C.F.R. § 1501.6.

60. 40 C.F.R. § 1501.6.

61. 40 C.F.R. § 1501.6(a)(1).

62. 40 C.F.R. § 1501.6(a)(2).

63. 40 C.F.R. § 1501.6(a)(3).

64. 40 C.F.R. § 1501.6(b)(1).

65. 40 C.F.R. § 1501.6(b)(2).

66. 40 C.F.R. § 1501.6(b)(3).

67. 40 C.F.R. § 1501.6(b)(4),(5).

68. 40 C.F.R. § 1502, 1503.

69. 40 C.F.R. § 1501.7. Many governmental officials interviewed by the author emphasized the critical importance of the scoping process to identify key environmental issues early in the process. This was deemed to be an essential prerequisite to the later preparation of an adequate E.I.S. that would not be successfully challenged in court.

70. 40 C.F.R. § 1501.7.

71. Bureau of Land Management and other agency officials interviewed had extensive experience in preparing EIS's for major energy projects. These interviewees identified the problems listed in the text as ones to be avoided by a thorough early "scoping" of significant environmental issues. Interviews conducted by the author in July, 1982. Interview notes on file in author's office.

72. 40 C.F.R. 1501.7(a)(1)-(7).

73. 40 C.F.R. § 1501.8(a).

74. 40 C.F.R. § 1501.8(b)(3).

75. 40 C.F.R. § 1502.5(6).

76. 40 C.F.R. § 1502.9.

77. 40 C.F.R. § 1502.1.

78. 40 C.F.R. § 1502.19, 1503.1.

79. 40 C.F.R. § 1503.4.

80. 40 C.F.R. § 1503.2, § 1506.10.

81. 40 C.F.R. § 1506.1.

82. Cal. Pub. Res. Code §§ 21100-21176 (1977).

83. Cal. Pub. Res. Code § 21061 (1977). It sets forth the purposes of preparing environmental impact reports (EIR's) and states:

> "An environmental impact report is an informational document which, when its preparation is required by this division, shall be considered by every public agency prior to its approval or disapproval of a project. The purpose of an environmental impact report is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project."

84. For example, consider the BLM prepared EIS and the CEQA required EIR prepared by the Port of Long Beach and the California Public Utility Commission in the SOHIO Pactex Pipeline Terminal case. Both reports had to discuss the major environmental impact of that project, air pollution due to hydrocarbon emissions. Both NEPA and CEQA are interpreted to require the agency preparing the EIS/EIR to consider impacts outside its substantive jurisdiction and to consider the project as a whole. Because of that, the federal EIS and state EIR in SOHIO overlapped and duplicated each other on that major environmental issue. See discussion of Environmental Review Process, SOHIO paper, supra note 7, at notes 64-93.

85. Cal. Pub. Res. Code § 21083.5 requires use of NEPA prepared EIS's as a substitute for a CEQA prepared EIR if the EIS meets CEQA guidelines. § 21083.6 allows the waiver of CEQA mandated one year time limits when a joint EIS/EIR must be prepared for a project. Finally § 21083.7 requires substituting the EIS for the EIR, whenever a joint EIS/EIR must be prepared. Lead agencies are directed to consult with the federal agency preparing the E.I.S. All of these statutory requirements are designed to mandate cooperation by state agencies with federal agencies and to reduce duplication and overlapping review in environmental document preparation.

86. 40 C.F.R. § 1506.2.

87. "Memorandums of Understanding" (MOU's) are agreements entered into between agencies to allow cooperation and coordination in preparing environmental impact statement under NEPA or under state legislation such as CEQA, the California Environmental Quality Act.
The California Energy commission (CEC) provided MOU's for four projects: 1) Northern California Power Agency's Geothermal unit 3 at the Geysers, Sonoma County, California; the agreement there was worked out between

CEC, BLM, and the U.S. Geological Survey (U.S.G.S.) to prepare the environment review required by NEPA and CEQA. This review, called an environmental assessment, is conducted as part of the CEC permitting process, deemed the "functional equivalent" of preparing an EIR under CEQA; Cal. Pub. Res. Code § 21080.5 (1981); 2) Geothermal Unit #2, a separate unit of the same project with the same agencies and the Department of Energy. Furthermore, the Geothermal #2 agreement provided that the agencies would prepare a joint environmental study sufficient to satisfy NEPA and CEQA; 3) An MOU between the California Public Utilities Commission (PUC) and CEC to prepare a joint EIR, required under CEQA, for the Geysers 16 geothermal unit, specifically for the power plant transmission lines to transmit electricity from the unit to consumers; and (4) an MOU between BLM and the state of California to prepare a NEPA required EIS for the CalCoal (IVANPAH) Project, a proposed 1500 megawatt (with three 500 megawatt coal-fired units) electric generating plant to be built by Southern California Edison in the California desert. BLM and the state of California agreed that BLM would be the lead agency and the state the cooperating agency.

Other joint projects include: 1) BLM, Arizona, and the Cal. P.U.C. jointly preparing an EIS for a 500 killowatt transmission line proposed to be built by San Diego Gas and Electric Company and Arizona Public Service between the Palo Verde Nuclear Generating Station in Arizona, and a substation site in Imperial County, California; and 2) a joint EIS/EIR preparation agreement between BLM, CEC, and the Riverside County Planning Department for wind generating projects in the California desert. Energy Report, U.S. Department of the Interior, Bureau of Land Management, California Desert District, Riverside, California, Quarterly Report for the first quarter, 1982.

88. Several interviewees thought the CEQ regulations were excellent but needed some entity to implement them. One person felt that the Colorado Joint Review process was the best way to implement the CEQ regulations.

89. Letter from Bruce Beyaert, Manager, Environmental Planning, Environmental Affairs, Chevron, U.S.A., Inc., dated January 14, 1982, to Mr. Alan Hill, Council on Environmental Quality (hereinafter referred to as Chevron letter).

90. Chevron letter, supra, note 89.

91. Chevron letter, supra, note 89.

92. BLM permitting study, supra, note 44.

93. Id. at i, II 1-4.

94. Id. at III 1, 5-10.

95. Id.

96. See discussion, infra, text at notes 126-33.

97. Many officials interviewed made the point that special purpose agencies, such as air pollution control boards, get their political support and their statutory authority from being vigorous enforcers of the Clean Air Act and similar state laws. They get no support and have no mandate to lead the effort to expeditiously and cooperatively complete a complex EIS review process. Thus there is little incentive for those agencies to carry the ball as a lead agency or even to cooperate as a cooperative agency.

98. BLM permitting study, supra note 44, at III-10. The study noted: "Conversely, there have been cases east of the 100th meridian where BLM should have issued a right-of-way permit, but neither the applicant nor the federal agencies involved had informed the Bureau of the existence of the project." Id. (emphasis added).

99. Id. at III-10. The study noted that there are conflicts over who should be the lead agency. Another example of a battle occurred between the California Air Resources Board (CARB) and the southern California Air Quality Management District (AQMD) over which agency would decide air quality issues in the SOHIO Pactex Pipeline Terminal case. See SOHIO paper, supra note 7, at notes 305-323. When agencies are fighting with each other over who has responsibility for a project, then substantive review of the application is stopped until the agency conflict is resolved.

100. 40 CFR § 1507.1 (1981). This regulation makes compliance by all federal agencies mandatory ("shall comply") with a caveat that "it is the intent of these regulations to allow each agency flexibility in adapting its implementing procedures. . . . to the requirements of other applicable laws." 40 CFR § 1507.2 specifies NEPA duties agencies must carry out, and § 1507.3 requires agencies to adopt procedures to implement the CEQ regulations. None of these regulations specify that they are judicially enforceable by an applicant developer or by the agency itself or members of the public. Furthermore, there are no sanctions for noncompliance other than those imposed when an EIS is deemed inadequate. Without enforcement and sanctions, the mandatory duties imposed in § 1507.1-3 are not obligatory. An agency can choose to ignore the process without a penalty being imposed.

101. 40 CFR § 1501.8 (1981).

102. There are no sanctions for failure to set or meet time limits in any of the CEQ regulations. Unless the lead agency includes sanctions in its applicant requested time limit, there will be none applicable. Thus the applicant is limited to judicial enforcement of unreasonable delay prohibitions in the APA (5 U.S.C. § 706(1); see Ogden, Judicial Control of Administrative Delay, 3 U. Day. L. Rev. 345 (1978) or is left without a remedy. It is unfortunately very difficult to develop an effective workable statute or rule providing for judicial enforcement of and sanctions for noncompliance with time limit statutes. See discussion in SOHIO paper, supra note 7, at notes 152-182.

103. See discussion, infra at notes 342-354.

104. Cal. Pub. Res. code § 21100.2 (1982) provides: "Each state agency shall establish, by resolution or order, time limits, not to exceed one year, for completing and certifying environmental impact reports." The time limit can be extended if the applicant consents and there are justifying circumstances.

105. The longer deadline is justified by the complexity of the EIS process and the number of participating agencies in a large-scale project.

106. Many of the agency officials interviewed, including both those who favored and those who opposed time limit statutes, felt that such statutes made efficiency a higher priority than it otherwise would be, and put pressure on agencies to complete review processes on time. Often without such pressure there was little incentive for an agency to be timely and much incentive to be thorough, complete, and careful in considering a developer's application. In the latter posture, the agency is an aggressive guardian of its statutory mandate.

107. 40 C.F.R. § 1501.8 does not require time limits to be set except when applicants so request. Otherwise, the lead agency has discretion to set or not set time deadlines.

108. This assumes that the time limit statute contains an enforcement mechanism and sanctions. See discussion, supra, note 102.

109. Interviews with California state agency officials, July 1982. These officials spoke positively of the value of time limit statutes and rated them as more effective than did federal officials. This may be because the state officials had greater experience under such statutes, and had learned to work with them. Most federal officials had not had such experience since most federal agencies, unlike their California state counterparts, are not bound by statutory deadlines for completing project reviews.

110. Cal. Pub. Res. code § 21100.2 governing state agencies provides that "all such limits shall be measured from the date on which an application requesting approval of such a project is received and accepted as complete by the state agency." This statute also allows "a reasonable extension of such time period in the event that compelling circumstances justify additional time and the project applicant consents thereto."

111. Interviews with developer representatives, July, 1982.

112. Interviews with agency officials, July, 1982.

113. Id.

114. Interview with Adam Poe, Director, Colorado Joint Review Process, August, 1982.

115. The various types of time limit statutes commonly used are discussed in Ogden, Reducing Administrative Delay: Timeliness Standards, Judicial

Review of Agency Procedure, Procedural Reform, and Legislative Oversight, 4 U. Day, L. Rev. 71 (1979).

116. See discussion of such a statute in SOHIO paper, supra note 7, at notes 152-172.

117. Both developers and agency officials interviewed indicated that this would occur. The developers feared this consequence. The agency officials felt it was the only response they could make if the legislature imposed upon them too short a time period for decisionmaking.

118. This concern was expressed by a number of federal officials who prepared EIS's. It was a reason that they gave for being opposed to mandatory time limits. Interviews, July 1982.

119. These persons felt that it was the developer's responsibility to coordinate the review process. They also felt that any company with good management and good counsel could do a better job than government in monitoring and coordinating project reviews. They noted that agencies have many applications to consider at one time, and company X's application is just one of many. Company X, of course, is only interested in its own application and it therefore has an incentive to closely monitor the project through the agency review process, and to deal with any problems that may arise.

120. Based on interviews with corporate representatives and agency officials, July, 1982.

121. This type of adverse relationship is not widespread but the criticisms stated in the text on both sides were frequently made by developer and agency officials interviewed.

122. Interviews with agency officials, developers, and public interest group officials, and the SOHIO paper, supra note 7, at notes 374-75, support these points. One developer representative said that it was personally painful to him to have some project opponent disbelieve everything he said because of his official position with the company. Agency officials also described the warfare between project opponents and developers that reflected intense opposition and deep suspicion between the two groups in some cases.

123. This point was made many times by interviewees in all three sectors, government, industry, and public interest groups. The political environment factor in the author's survey (see appendix A, infra) was rated as having a very high impact with controversial projects. Some interviewees felt that political opposition was the deciding factor in the SOHIO Pactex Pipeline Terminal case and that the procedural traps SOHIO fell into were a smokescreen for political objections.

124. Agency officials interviewed felt that a developer's stake in a project gave them a narrow perspective and that some developers assumed wrongly that they could come into an agency, file an application, and push the agency rapidly through the process. Agencies resented and would resist this pressure. This would make the developers angry and lead them to

believe the agency was stalling, requiring too much information, and being uncooperative. Much of this conflict is due to misperceptions by industry and agency of each others role and function as well as being caused by miscommunication and distrust.

125. SOHIO paper, supra note 7, at notes 9-14.

126. BLM permitting study, supra note 44, at II 2, II 4, 5. The study describes the role of the Office of Special Projects (OSP) which was created in July, 1979. It notes:

> "This office provides a core of professional expertise to write and coordinate EISs for complex, controversial, multi-state energy projects. OSP offers high-level coordination for these projects with direct line communication to the Director and the Secretary. In addition, the Office contains full time EIS teams consisting of various resource specialists, production staff, and team leaders." Id. at II-2.

127. BLM permitting study, supra note 44, at II-2. The study described early problems with NEPA compliance. It stated:

> "Early attempts at compliance with NEPA resulted in voluminous EIS documents. Each proposed energy project usually resulted in an EIS being written. EIS teams were set up and team leaders appointed. Frequently, technicians had to be recruited from other BLM offices or hired from outside, thus causing delays from the outset. Direct reviews and approvals were required by BLM Washington Office and the Office of the Secretary, with final EIS approval given by the Secretary. Relations with State governments and knowledge of their respective requirements were limited. State and local laws often overlapped, creating a nearly impenetrable maze of environmental reviews and required permits. Major projects were abandoned and the government's environmental review and permitting process was blamed (at times unjustly) by the energy industry and the public."

The study noted that implementing the CEQ regulations and setting up OSP were two of six improvements that "have drastically improved and shortened the environmental review and permitting process by as much as 50 percent." Id.

128. U.S. Department of the Interior, Bureau of Land Management, Information Memorandum No. 80-126, "The Office of Special Projects" (March 6, 1980) (hereinafter referred to as OSP memo).

129. Id.

132. Some developer representatives interviewed distrusted any governmental coordinating body as being just another procedural layer and one more opportunity to cause problems for a project. State officials were opposed to remote Washington offices of federal agencies making decisions that affected states and local communities far removed from Washington.

133. Several interviewees felt that whatever agency was coordinating review or had major permitting responsibilities had to be a mediator or broker of the various interests or constituencies involved in a large-scale project. These interests included single-purpose agencies (e.g., in

California, the Coastal Commission, Air Resources Board, Water Control Board) developers, local politicians and community groups, and environmental groups. Other interviewees felt that decisionmaking by consensus would be a major improvement over the adversary system currently used in most agencies.

134. Various interviewees expressed the point that a project developer and the reviewing agencies must be sensitive to the concerns of local communities in which projects are sited. The federal agencies that, like BLM, delegated authority to state offices, recognized this concern.

135. See discussion, supra, text and notes, at notes 3-6.

136. See discussion in text, supra, notes 24-40.

137. Pub. L. 95-95, 91 Stat. 746, 42 U.S.C. § 7401-7642 (1979). The Clean Air Act is discussed in Rodgers, Environmental Law at 208-353 (West Pub. Co. 1978) and in Grad, Environmental Law, Sources and Problems, 3-83 to 3-253 (2d. ed. Matthew-Bender 1978).

138. 42 U.S.C. §§ 7501-08 (1979). See discussion in SOHIO paper, supra note 7, at notes 401-423.

139. 42 U.S.C. §§ 7470-79 (1979).

140. 42 U.S.C. §§ 7411 (1979).

141. 42 U.S.C. § 7410 (1979).

142. Cal. Health and Safety Code §§ 40400-40520 (West 1979).

143. Cal. Health and Safety Code §§ 39500-607 (West 1979).

144. The Southern California Air Quality Maintenance District (AQMD) recently issued new emission offset and new source review regulations that are even more stringent than the old ones and that may preclude construction of any new polluting industrial plants until attainment of air quality standards is achieved. Los Angeles Times, September, 1982.

145. This is because EPA has not delegated PSD permitting authority in all air basins in California. EPA also reviews PSD applications in other states, such as Arizona, within Region IX. Interviews with EPA officials, Region IX office, San Francisco, Ca, June, 1982.

146. Most of the coal-fired power plants proposed in the last 5 years by California utilities have been planned to be located in the California eastern desert (e.g. Cal. Coal (IVANPAH); Allen-Warner Valley) or were planned for sites in Nevada (Allen-Warner Valley) or Utah (Intermountain Power Project). All of these sites are located in rural areas with clean air. They are slated to be far away from the consumers of their power output in the heavily populated and polluted urban areas of Southern California.

147. Interviews, July, 1982.

148. This would be true in any air basin in which an air quality standard had been attained (achieved) for a specific pollutant (e.g. SO_2) even though air quality standards for other pollutants (e.g. hydrocarbons) were not attained. PSD review by EPA would focus on SO_2 in the example and the state agency, here AQMD, would focus its review on pollutants such as hydrocarbons for which federal standards were not met. The project application would thus have to satisfy both sets of standards.

149. Interviews, July, 1982.

150. Id.

151. Id.

152. See discussion, supra, at notes 12-24.

153. Interviews, July, 1982.

154. Pub. L. 92-500, 86 Stat. 816, as amended December 27, 1977, Pub. L. 95-217, 91 Stat. 1981, codified in 33 U.S.C. §§ 1251-1376. 33 U.S.C. § 1342 authorizes EPA to issue permits for the discharge of pollutants when consistent with the standards of the Act (33 U.S.C. §§ 1311, 1312, 1316, 1317, 1318, 1343). Section 1342 is entitled "the National Pollution Discharge Elimination System" [NPDES]. Permitting authority can be delegated to a state agency if the state program meets federal standards (§ 1342(b)).

155. Cal. Water Code §§ 13200-389, and especially §§ 13370-389 (1982).

156. 33 U.S.C. § 1344 (1979).

157. The "critical path" concept is used to identify those regulatory reviews or permits, in a multiple clearance system, that must be completed and approved before other permits can be issued. An example of this approach is the requirement that air quality permits may not be issued until the NEPA or state required environmental impact statement is prepared. Any holdup in preparing an EIS, or a successful challenge to the adequacy of an EIS, would also delay the air permit.

158. Flores and Appleman, supra note 12, at 8-15.

159. Schroeder, Wiggins, and Wormhoudt, "Five Design Applications of a Large Plant/Small Unit Power Plant Configuration: Research and Findings," at B-21-22, The Flex-Big Proposal, Berkeley Energy Facility Study Group, Methods and Applications in Planning (MAP), Berkeley, Ca; prepared for the U.S. Department of Energy, June 1, 1981.

160. Interviews, July, 1982.

161. "Synthetic Fuels and the Environment: An Environmental and Regulatory Impacts Analysis," U.S. Department of Energy, June 1980 at 4-14 to 4-16. (hereafter referred to as Energy Study).

162. Both the California Coastal Commission and the California Energy Commission have developed siting policies favoring inland locations for power plants and discouraging coastal locations. However, cooling water is abundantly available on the coast and is very scarce in the eastern desert areas of California that are preferable for power plant siting from an air quality standpoint. The state Water Resources Control Board has a contrary policy favoring coastal siting and opposing inland desert siting for water availability reasons. Interviews, July, 1982.

163. Interviews, July, 1982.

164. The Toxic Substances Control Act (TOSCA), Pub. L. 94-469, 90 Stat. 2003, Oct. 11, 1976, 15 U.S.C. §§ 2601-2629 (1976); TOSCA is administered by EPA; see also 42 U.S.C. § 300 F-J, the Safe Drinking Water Act, and Clean Water Act § 307a, 42 U.S.C. § 1317(a), authorizing EPA to identify and establish standards for discharges of toxic chemicals into the nation's waterways. See Hercules, Inc. v. Environmental Protection Agency, 598 F.2d 91 (D.C. Cir., 1978). EPA also administers these statutes.

165. Resource Conservation and Recovery Act, Pub. L. 94-580, Oct. 21, 1976, 90 Stat. 2796, 42 U.S.C. § 6921-6987; EPA is the implementing agency for RCRA. See also, The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (The "superfund" legislation) Pub. L. 96-510, 94 Stat. 2767, codified in 26 U.S.C. §§ 4611-4682, 42 U.S.C. §§ 6911a, 9601-9657(1982).

166. Most solid waste issues, other than hazardous wastes, arise in local land use planning and center on where to obtain landfills and how to manage and control the contents of landfills. Nevertheless the RCRA statute, supra, note 165, 42 U.S.C. §§ 6941-49, regulates solid waste and EPA has developed regulations for disposal of nonhazardous solid wastes. See 44 Fed. Reg. 32,915 June 7, 1979.

167. The Power Plant and Industrial Fuel Use Act of 1978, Pub. L. 95-620, 92 Stat. 3289, 42 U.S.C. §§ 8301-8483 (1981). This statute is administered by the Department of Energy.

168. The Endangered Species Act, Pub. L. 93-205, 87 Stat. 884, Dec. 28, 1973, 16 U.S.C. §§ 1531-1543 (1981).

169. The Occupational Safety and Health Act of 1970, Pub. L. 91-596, 84 Stat. 1590, 29 U.S.C § 651-678 (1981).

170. The Mineral Leasing Act of 1920, 30 U.S.C. 181-287. 30 U.S.C. § 185 governs right-of-way permits.

171. BLM permitting study, supra note 44, at VI, 1.

172. Id. at V 1,2.

173. Id. at II 2,3.

174. Id. at IV 1-12.

175. § 401, 42 U.S.C. 7171(a) of the Department of Energy Act, Pub. L. 95-91, 91 Stat. 565, Aug. 4, 1977, codified at 42 U.S.C §§ 7101-7352 (1981). Section 401 establishes FERC as an independent regulatory commission within the Department of Energy.

176. SOHIO paper, *supra* note 7, at notes 95-106. FERC had to review and approve conversion of an existing but unused natural gas pipeline to carry oil.

177. Interviews with F.E.R.C. officials, July 1982.

178. Section 402(d), 42 U.S.C. § 7172(D) (1981).

179. Intervenor representatives who were interviewed stated that they vigorously litigated the seismic safety issues before the California PUC and FERC. They also successfully challenged FERC's initial decision approving the LNG terminal in the District of Columbia Court of Appeals. That court reversed the initial decision and remanded the case back to FERC for more intensive consideration of seismic safety. This issue dealt with the propriety of constructing an LNG terminal in an area that has earthquake faults.

180. Many state agencies, such as the California Air Resources Board, and the regional Air Pollution Control Districts, are implementing permit authority delegated under the federal Clean Air Act and requiring enforcement of federal standards. Similarly, the regional Water Quality Control Boards in California implement NPDES permit reviews required under the Federal Water Pollution Control Act Amendments of 1972. NPDES authority has been delegated to them by EPA, the federal agency that administers both the air and the water acts.

181. *E.g.*, The California Energy Commission, established under Cal. Pub. Res. Code §§ 25500-25986, must approve the siting (§ 25500) of any thermal power plant (over 50 megawatts) and electric transmission lines running from those plants (§§ 25110, 25120).

182. *E.g.*, The California Public Utilities Commission was established pursuant to the Public Utility Act, Cal. Pub. Util. Code §§ 201-21-1 *et*. *seq*. (West 1981). The PUC is authorized to issue certificates of convenience and necessity to utilities. Cal. Pub. Util. Code §§ 1001-1011 (West 1981).

183. *E.g.*, The California Environmental Quality Act, Cal. Pub. Res. Code §§ 21000-176 (1981).

184. Cal. Pub. Res. Code §§ 25516 (NOI) and 25523 (AFC).

185. Cal. Pub. Res. Code §§ 25503, 25516, 25516.1 (West 1981).

186. Cal. Pub. Res. Code §§ 25510-514 (West 1981).

187. Cal. Pub. Res. Code § 25514(c).

188. Cal. Pub. Res. Code §§ 25519-523.

189. Cal. Pub. Res. Code § 25519(c).

190. Cal. Pub. Util. Code §§ 1001-1011 (West 1981).

191. This point was made repeatedly by interviewees in and out of government. If an agency is overlooked, real problems can result, such as filing late applications for a permit with that agency, or failure to consider a significant environmental impact in the EIS which could require preparation of a supplemental EIS. For a good discussion of the issues related to identifying agencies and statutes, see Friedman, Environmental Checklist and Outline of Impacts of Clean Air Act Amendments of 1977, 14 Real Property, Probate and Trust Journal 873 (1979).

192. Interviews with Office of Planning and Research (OPR) officials, June, 1982. An OPR official, Ron Bass, presented the author with a copy of his "Ten Practical Tips To Follow For Getting A Development Project Approved in California," set forth in full, infra, appendix C. OPR developed a permit handbook, mentioned in the Bass materials, to guide developer's in knowing what permits are required, what agencies must issue those permits, and what requirements they have. OPR also provides assistance to developers in working through the permit process. This is quite helpful to sponsors of industrial projects, refineries, mining projects and other non power-plant facilities which are outside the scope of the Energy Commission's jurisdiction, limited to electric generating facilities.

194. Flores and Appleman, supra note 12, at 8-14.

195. American Bar Association, "The Need for Power and the Choice of Technologies: State Decisions on Electric Power Facilities," June, 1981 at 12 (hereinafter referred to as A.B.A. study).

196. ABA study, supra note 195, at 16.

197. BLM study, supra, note 44; Wellborn and Williams, "Improving the Energy Facility Siting and Permitting Process," March, 1980, at 8-12, Policy Analysis Division, Office of the Environment, Department of Energy, prepared for the Seventh Energy Technology Conference, March 24-26, 1980, Washington, D.C. (hereinafter referred to as Wellborn and Williams); Energy Study, supra note 161, at 4-8 to 4-10; Friedman, "The Environmental Permitting Process: Some Thoughts on Procedure vs. Substance," speech, April 15, 1982.

198. Interviews, July, 1982.

199. Id.

200. SOHIO paper, supra, note 7, at notes 9-15.

201. Interviews, July, 1982.

202. BLM permitting study, supra note 44, at IV 1-6.

203. Report to the Congress of the United States by the Comptroller General, U.S. General Accounting Office, "The Effects of Regulation on the Electric Utility Industry," EMD 81-35, March 2, 1981, at 55-58.

204. The five subjects and governing statutes are: 1) *Hazardous Waste Management*, Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901-87, regulations codified in 40 CFR § 260-266; 2) *Underground Injection Control Program*, Safe Drinking Water Act, (CWA) 42 U.S.C. § 300F, regulations codified in 40 C.F.R. § 146; 3) *National Pollution Discharge Elimination System* (NPDES), Clean Water Act (CWA), 33 U.S.C. § 1251, 40 C.F.R. 125, 129, 133; 4) *Dredge or Fill Program*, § 404, 33 U.S.C. § 1251, 40 C.F.R. § 230; and 5) *Prevention of Significant Deterioration* (PSD), Clean Air Act (CAA), 42 U.S.C. § 7401, 40 C.F.R. 52.

205. Energy Study, *supra* note 161, at 4-32 to 4-34.

206. Wellborn and Williams, *supra*, note 197, note that

> "although environmental regulatory requirements are generally not the predominant cause of delay, they are beginning to play a more significant role. It is becoming increasingly difficult to obtain the siting approval and permits necessary to begin construction of facilities employing such environmentally controversial technologies as *coal combustion conversion*.
>
> "Data collected by the Federal Energy Regulatory Commission indicate that *permit requirements and legal problems have combined to cause 25% of all delays for new power plants*. While most facilities are eventually completed, serious regulatory delays have been experienced in several cases. . . .
>
> "The growing difficulties faced in certifying, siting and permitting new energy facilities may, in large part, be attributed to several basic institutional, economic and social developments: (1) the large and growing body of *environmental* laws to deal with specific environmental, health and safety risks, many of which are *associated with pollutants from coal* and synthetic fuel processes; *(2) competition from existing sources* of pollution and users of resources -- including water resources; (3) the *increasing geographic* area affected by the *environmental* impacts and resource requirements posed by large new energy facilities; and (4) *the increased willingness of public* and private parties to oppose, *by legal means, aspects of energy projects perceived as detrimental* to their interests, environmental or otherwise. . . . The concern is that existing approaches to certifying, siting and permitting non-nuclear energy facilities significantly *increase the delaying impacts* of these procedures because they *are inefficient in coping with them*. In other words, the procedural aspects of siting and permitting programs need to be made more efficient in resolving concerns without undermining the substantive environmental protection they provide." *Id.* at 1 (emphasis added).

207. Flores and Appleman, *supra*. note 12, at 13-14. The median (mean) timeline for completed permit actions for new coal-fired facilities /units was 5(7.36) when one permit was required, 26 (22.85) when two or three permits were required, and 28 (22.67) when three permits were required. *Id.* at 13. Wellborn and Williams, *supra* note 197, at 8-9 note

that "redundant information requirements" add costs and time to the application process because the same information is submitted on several applications.

208. Zimmerman, et al., "Draft Information Requirements Catalogue: NEPA Environmental Review Process for New Above Ground Energy conversion Technologies, Analysis of EPA Actions and Environmental Review Process for Major Non-Nuclear Energy Facilities," October 20, 1981, prepared for Stuart Sessions, Project Officer, Energy Policy Division, Office of Planning and Evaluation, U.S. Environmental Protection Agency, prepared by Lynn L. Zimmerman, et al. Radian Corporation at 1-3 to 1-4 (figure 1-1). See Appendix D. infra, for an example of such a decision schedule.

209. Interviews, July, 1982.

210. Report to the Congress by the Comptroller General of the United States, U.S. General Accounting Office," Impact of Regulations--After Federal Leasing--On Outer Continental Shelf Oil and Gas Development," EMD 81-48 February 27, 1981 (hereinafter referred to as OCS study).

211. OCS study, supra note 210, at 14-17, 49-50. The study noted that Army Corps of Engineers and EPA permits were most often delayed.

212. OCS study, supra note 210, at 50. It noted: "Congress should enact legislation to establish a standard, reasonable time within which federal agencies, particularly the Department of the Interior, the Environmental Protection Agency, and the Corps of Engineers are required to complete approvals and issue permits. A maximum turnaround time should be the general rule, including the time for state consistency reviews."

213. The Administrative Conference, in Recommendation No. 78-3, 1 C.F.R. § 305.78-3 (1982), stated "Congress ordinarily should not impose statutory time limits on an agency's adjudicatory proceedings. Statutory time limits may be appropriate, however, when the beneficial effect of agency adjudication is directly related to its timeliness, as may be true in certain licensing cases or in clearance of proposed private activities where a delayed decision would deprive both the applicant and the public at large of a substantial benefit." Id.

214. Several interviewees raised this objection. Interviews, July, 1982.

215. Interviews, July, 1982.

216. Interviews, July, 1982.

217. Cal. Pub. Res. Code § 21100.2 (State Agency), § 21151.5 (Local Agencies).

218. Cal. Pub. Res. Code §§ 25516.6, 25522, 25540.6 (1982).

219. The Permit Reform Act of 1981, Stat. 1981, c. 1087, operative Jan. 1, 1983, codified in Cal. Govt. Code §§ 15374-378 was enacted to "create a system of specific deadlines and procedures designed to expedite the process of obtaining permits and other forms of authorization and thereby

insuring the timely and efficient handling of permit applications." Cal. Govt. Code § 15374. All state agencies are required to adopt regulations with the following criteria:

> "(a) A period dating from the receipt of a permit application within which the agency must either inform the applicant, in writing, that the application is complete and accepted for filing, or that the application is deficient and what specific information is required.
>
> "(b) A period dating from the filing of a completed application within which the agency must reach a permit decision.
>
> "(c) The agency's median, minimum, and maximum times for processing a permit, from the receipt of the initial application to the final permit decision, based on the agency's actual performance during the two years immediately preceding the proposal of the regulation."

Cal. Govt. Code § 15376.

220. Cal. Pub. Res. Code § 21100.2 provides: "Each state agency shall establish, by resolution or order, time limits, not to exceed one year for completing and certifying environmental impact reports. . . ." In contrast, Cal. Pub. Res. Code § 25540.6, governing applications for cogeneration and other favored technology, requires the Energy Commission to reach a "final decision on the application within 12 months."

221. Cal. Pub. Res. Code § 21100.2 provides: "The resolutions or orders required by this section may provide for a reasonable extension of such time period in the event that compelling circumstances justify additional time and the project applicant consents thereto."

222. See, e.g. Cal. Govt. Code § 15376, (a), (b) set forth in full, supra note 219.

223. Interviews, July, 1982

224. Interviews, July, 1982

225. ABA study, supra note 195, at 70.

226. Id. at 10-13.

227. Interviews with governmental officials, developers, and intervenor group representatives, July, 1982. Members of all three groups agreed that controversy and project opponents efforts to stop a project could be quite effective and could cause real problems for a project developer. All of the "worst case" examples discussed, supra note 20, had active project opponents mounting challenges at the agency level and on judicial review.

228. Interviews, July 1982. See, e.g. SOHIO paper, supra, note 7, at notes 9-15.

229. Legal Times article, supra, note 4.

230. Interviews, July 1982.

231. Interviews, July 1982. Standard Oil of Ohio spent 50 million dollars in preparation costs on the SOHIO Pactex Pipeline Terminal case in a four year period (1975-1979). SOHIO paper, supra, note 7, at note 2.

232. ABA study, supra note 195, at 70. The study stated: "Unless interested participants are given more reason to view the process as fair and unbiased, they will have every incentive to prolong the proceeding, using delay as a tactical weapon. The remedy is to take the steps necessary to assure basic procedural fairness without losing sight of the goal of reaching and enforcing decisions. Prominent among these steps must be the free flow of information among all participants." Id.

233. Chevron letter, supra note 89; Friedman speech, supra note 197. Mr. Friedman, Vice President, Health and Environment, Occidental Petroleum Corporation, Los Angeles, California stated:

> "An area that many times is ignored in the entire permitting process is the involvement of a local community and indeed, the local environmental organizations. Nothing creates an environmentalist quicker than an action which affects someone's personal property values. Indeed, many people began their involvement in the environmental or conservationist movement this way. Local opposition should be defused as quickly and early as possible because the initial concern usually is not from an ideological commitment to stop a project, but rather a concern as to economic values. There is a rule of reason, of course, in determining when this discussion should begin. You don't want to begin too early and then get the local populace inflamed. Conversely, you don't want the process to begin so late that the population feels it is a fait accompli and the only answer is to pass the hat and start litigation. Rather, the time to make sure the populace and local groups are aware of the project is when you have a solid data base so that the various questions and legitimate concerns of the groups can be answered.
>
> "Whether their concerns are legitimate or not, the local groups must be brought in early. This is particularly important in the energy and mineral areas, especially today when there seems to be a strong feeling by these groups that the only way of protecting vital energy and mineral resources, as well as scenic values, is by litigation."

234. Legal Times article, supra note 4; Friedman speech, supra, note 197. Several other interviewees also made this point.

235. The public advisor's role is mandated by Cal. Pub. Res. Code § 25217.1 (1982). The public advisor's duties are specified in Cal. Pub. Res. Code § 25222 (1982) and are basically to "insure full and adequate participation by all interested groups and the public at large" in all Energy Commission proceedings.

236. Interviews with Energy Commission officials, July, 1982.

237. Interviews with intervenor group representatives, July, 1982.

238. ABA study, supra note 195, at 65-67.

239. Wellborn and Williams, supra note 197, at 6-8.

240. SOHIO paper, supra note 7, at notes 401-423.

241. Interviews, July, 1982. Wellborn and Williams, supra note 197, at 8-10.

242. Legal Times article, supra, note 4, at note 2. See cases discussed therein in which project opponents delayed projects with court challenges. SOHIO paper, supra note 7, at notes 9-14.

243. Interviews, July, 1982.

244. Cal. Pub. Res. Code § 25531(a) (1981) provides that Energy Commission decisions on Applications for Certification (AFC's) " shall be subject to judicial review in the same manner as the decisions of the Public Utilities Commission. . . ." Cal. Pub. Util. Code § 1756 (1975) provides for direct review of PUC decisions in the California Supreme court.

245. Cal. Pub. Res. Code § 21167 sets time limits (§ 21167 (a) 180 days, (b) 30 days) for filing actions in court challenging preparation of environment impact reports.

246. Cal. Pub. Res. Code § 21167.1 states a preference "over all other civil actions . . . in the matter of setting the same for hearing or trial, and in hearing the same. . . ." for lawsuits challenging compliance with provisions of the California Environmental Quality Act.

247. Interviews, July, 1982.

248. Interviews, July, 1982.

249. Cal. Pub. Res. Code § 21167.3(b) provides:

> "In the event that an action or proceeding is commenced as described in subdivision (a) but no injunction or similar relief is sought and granted, responsible agencies shall assume that the environmental impact report or negative declaration for the project does comply with the provisions of this division and shall approve or disapprove the project according to the timetable for agency action in Article 5 (commencing with Section 65950) of Chapter 4.5 of Divsion 1 of title 7 of the Government Code. Such approval shall constitute permission to proceed with the project at the applicant's risk pending final determination of such action or proceeding."

250. Interviews, July 1982. This approach is also advocated in the Legal Times article, supra, note 4.

251. The Alaska Natural Gas Transporation Act, Pub. L. 94-586, Oct. 22, 1976, 90 Stat. 2903, codified in 15 U.S.C. §§ 719-719o (1981). 15 U.S.C. § 719h contains the provision noted in the text. § 719h(c)(2) states:

> "Any such proceeding shall be assigned for hearing and completed at the earliest possible date, shall, to the greatest extent practicable, take precedence over all other matters pending on the docket of the court at that time, and shall be expedited in every way by such court and such court shall render its decision relative to any claim within 90 days from the date such claim is

brought unless such court determines that a longer period of time is required to satisfy requirements of the United States constitution."

252. Interviews, July, 1982.

253. Section 28, Mineral Leasing Act of 1920, 30 U.S.C. § 185, amended by the Act of November 16, 1973, Pub. L. 93-153, 87 Stat. 576, codified in 30 U.S.C. § 185. This amendment modified a strict statutory standard defining the maximum width of a pipeline right-of-way, and allowed the agency to approve a right-of-way that exceeded the previous maximum width. In so doing, Congress neutralized the impact of the court decision in Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir., 1973) cert. den. 417 U.S. 917 (1973) in which the court set aside a decision of the Secretary of the Interior approving a pipeline right-of-way for the Alaskan Oil Pipeline that exceeded the maximum allowable width under Section 28. In the same legislation, Congress exempted the Alaska Pipeline Project from any further scrutiny under NEPA (See § 43 U.S.C. § 1652(d)), thus allowing the project to be constructed and put into operation in 1977.

254. The Alaska Natural Gas Transportation Act, Pub. L. 94-586, Oct. 22, 1976, 90 Stat. 2903, codified in 15 U.S.C. §§ 719-719o (1981).

255. Title five, Public Utility Regulatory Policies Act. (PURPA) of 1978, Pub. L. 95-167, Nov. 9, 1978, 92 Stat. 3157, codified in 43 U.S.C. §§ 2001-12 (1981).

256. Ch. 81, 1979 Cal. Stat. §§ 1-5, urgency, eff. May 24, 1979; not codified but listed after Cal. Pub. Res. Code § 21167 (1981).

257. Ch. 855, 1977 Cal. Stat., effective Sept. 17, 1977, codified in Cal. Pub. Util. Code §§ 5550-5650 (1982).

258. Interviews with persons familiar with such legislation, both state and federal, July, 1982.

259. See, e.g., 43 U.S.C. § 2009(b) which requires federal agencies to issue required permits for the two pipelines (Northern Tier and Long Beach to Midland) within 30 days after enactment of the Act on Nov. 8, 1978, with one 90 day extension of the deadline allowed if the President authorizes such an extension.

260. See, e.g. 15 U.S.C. § 719f(d),(e)(1981) which requires Congress (by joint resolution (subsection d) and the President (subsection e) to find that an environmental impact statement has been prepared and that it complies with NEPA requirements. In addition, under § 719f(g), the President can recommend and Congress adopt by resolution proposals to waive the provisions of applicable law "in order to permit expeditious construction and initial operation of the approved transportation system." See also 43 U.S.C. § 2008 (1981) which contains similar provisions.

261. Both the Alaska Natural Gas Transportation Act, 15 U.S.C. § 719-719o, in sections 719e and 719f, and Title Five of PURPA, 43 U.S.C. §§ 2001-12, in 2007 (presidential decisions only), use this approach. Under 43 U.S.C. §

2008, the President can recommend waiver of applicable provisions of federal law which recommendation Congress must then adopt by joint resolution. Id.

262. Cal. Pub. Util. Code §§ 5551(d), 5581 (1982).

263. Ch. 81, 1979 Cal Stat. §§ 1-5 effective May 24, 1979. This statute provided a short 30 day time period within which to file an action in the Superior Court challenging agency decisions relating to the SOHIO Project. It also gave a statutory preference to such litigation over other civil actions, required use of the substantial evidence and abuse of discretion standards of review, and requested the California Supreme Court to take jurisdiction over any lawsuits filed in the superior court challenging the PACTEX Project. For further discussion of this statute, see SOHIO paper, supra note 7, at notes 279-98.

264. Interviews, July, 1982.

265. Title five, PURPA, supra, note 255, was enacted in November 1978, in the fourth year of agency consideration of the SOHIO Project. See SOHIO paper, supra note 7, Appendix.

266. See discussion, supra, note 253.

267. See citation, supra, note 255.

268. SOHIO paper, supra, note 7, at notes 9-14.

269. See discussion, supra, note 29.

270. SOHIO paper, supra, note 7, at notes 9-14, 279-98.

271. Cal. Pub. Util. Code §§ 5550-5650 (1982).

272. Interviews with PUC officials, June 1982.

273. Los Angeles Times, Tuesday, October 5, 1982.

274. This is assumed to be the case because of the strict deadlines in such legislation and because of action forcing provisions. However, there is no hard data to support this assumption.

275. This distortion occurs because of the waiver of federal law provisions and because the project is treated differently than similar projects not covered by the special legislation and its use of presidential decisionmaking or presidential recommendation and congressional decisionmaking. See discussion, supra, notes 259-61. The agency that normally reviews pipeline right-of-way permits, the Bureau of Land Management of the Department of the Interior, can not enforce uniform and consistent policy in all cases because of the special legislation. This is true even though BLM is required to make recommendations to the President because, e.g., as in 43 U.S.C. § 1652(b), the Secretary of the Interior was required by law to issue all permits for the Trans Alaska Pipeline System (TAPS).

276. E.g., 30 days after enactment of title five, PURPA, see discussion, supra, note 259.

277. Title five, PURPA, was such a statute requiring an incredibly short period of time for decision on federal permits in the Northern Tier and SOHIO Pactex Pipeline Projects. These periods were measured from enactment on Nov. 8, 1978. See critical analysis of this crisis deadline approach in SOHIO paper, supra, note 7, at notes 201-223.

278. See 43 U.S.C. § 1652(d), discussed, supra note 253.

279. H.R. 4985, discussed in House Report, 96-410 part 2, September 21, 1979, House Committee on Interstate and Foreign Commerce.

280. Interviews, July, 1982. Interviewees were specifically asked to evaluate the EMB proposal in the questionnaire; see appendix A, infra.

281. ABA Study, supra, note 195, at 11.

282. The Nuclear Regulatory Commission (NRC) must issue a construction permit and operating license before a developer can build and operate a nuclear power plant. However, even the NRC does not possess exclusive authority to regulate all aspects of nuclear power plant siting and permitting. Utilities must obtain NPDES permits from state or regional water pollution control agencies for thermal discharges of cooling water from the plants, and must have emergency evacuation plans approved by the Federal Emergency Management Agency (FEMA).

283. Cal. Stat. 1974, Ch. 276, effective January 7, 1975, codified in Cal. Pub. Res. Code §§ 25500-986(1982). Section 25500 states: "This division shall be known and may be cited as the Warren-Alquist State Energy Resources Conservation and Development Act."

284. Cal. Pub. Res. Code § 25500 (1977) set forth in full, supra, note 5.

285. See 1981 Biennial Report, California Energy Commission, entitled "Energy Tommorrow, Challenges and Opportunities for California." This report is prepared by the Commission for the Governor and Legislature of California. Cal. Pub. Res. Code §§ 25300-22 requires the Commission to engage in forecasting of demand, to obtain information from utilities, and to present those forecasts and other information in its report.

286. Conservation, Cal. Pub. Res. Code §§ 25400-405, 480-486; alternative technologies, Cal. Pub. Res. Code §§ 25600-615.

287. Cal. Pub. Res. Code §§ 25540-540.6 (1982). The time period is 18 months (9 months NOI, 9 months, AFC) under § 25540, and 12 months under 25540.2 (AFC only).

288. Interviews, July 1982. See Cal. Pub. Res. Code § 25403.5 which requires electrical utilities to utilize specified load management practices including encouraging use of electrical energy in off-peak hours.

289. Interviews, July 1982; ABA study, supra, note 195, at 29-34, especially 29. See discussion, supra, notes 184-189 describing the two-stage process for Energy Commission decisionmaking.

290. Interviews, July, 1982.

291. ABA study, supra, note 195, at 29-34.

292. Interviews, July, 1982. ABA study, supra, note 195, at 34.

293. ABA study, supra, note 195, at 32-34.

294. Flores and Appleman, supra note 12, at 9-15.

295. Interviews, July, 1982.

296. This is required by Cal. Pub. Res. Code § 25503 (1977).

297. Cal. Pub. Res. Code §§ 25503-516 (NOI); §§ 25517-524 (AFC).

298. Interviews, July, 1982; see also ABA study, supra note 195, at 29-34.

299. Cal. Pub. Res. Code § 25519 (1977).

300. Cal. Pub. Res. Code § 25523 (1977).

301. Interviews, July, 1982.

302. Wellborn and Williams, supra, note 197, at 7.

303. Cal. Pub. Res. Code §§ 25514 (NOI findings), 25523 (AFC findings).

304. Interviews, July, 1982. ABA study, supra, note 195, at 29-34.

305. Interviews, July, 1982.

306. 20 Cal. Admin. Code § 1701-06, especially § 1704 (1981).

307. 20 Cal. Admin. Code § 1709 (1981).

308. 20 Cal. Admin. Code § 1709(b)(2).

309. Developer representatives who were interviewed for this project favored this approach.

310. See discussion, supra, notes 137-154.

311. See discussion, supra, notes 137-150.

312. See discussion, supra, notes 153-156.

313. Established pursuant to statutory authority in Cal. Pub. Res. Code §§ 30000-30900 (1977).

314. Pub. L. 92-583, Oct. 27, 1972, 86 Stat. 1280, codified in 16 U.S.C. §§ 1451-1456a (1982).

315. Cal. Pub. Util. Code §§ 1001-1011, especially § 1005 (1977).

316. Cal. Pub. Res. Code § 25508 (1982) requires the Commission to consult with and render advice to BCDC as to AFC's for sites and facilities in the San Francisco Bay area.

317. Most cities and counties have general plans and adopt and enforce zoning ordinance schemes that restrict the types of uses that land can be put to in designated areas.

318. The Act specifies that the Energy Commission shall consult or render advice or obtain the approval, in appropriate circumstances, of the California Coastal Commission, see §§ 25507, 508, 514(a), and 526; the California Public Utilities Commission, see §§ 25501(a), 501.3(a), 505, 506, 512, 514.3, 518, and 519(b). In addition, the Energy Commission must ensure compliance with other state and federal laws, and should consult enforcing agencies to ensure compliance, see § 25523. All references are to the Cal. Pub. Res. Code.

319. Interviewees were asked to evaluate one-stop siting agencies in the questionnaire used by the author; see Appendix A, _infra_. Most interviewees thought that one-stop siting was not very effective. Those who did think it effective often assumed it had a "one application at one agency" design.

320. _E.g._, the Clean Air Act requires states to develop State Implementation Plans (SIPS) which, when approved by EPA, would result in enforcement authority being delegated by EPA to a state agency designated in the plan. Any change in such a plan, including a change in enforcing agency, would have to be approved by EPA after a request to amend a state's plan was made. See 42 U.S. (§ 7410(a) (SIP). Under subsection (a)(3)(A), revisions must be approved by the EPA administrator and must satisfy standards of the Clean Air Act.

321. _E.g._, The Legislature would have to amend the California Coastal Act, Cal. Pub. Res. Code §§ 30000-30900, to consolidate coastal zone protection and energy facility siting, or would have to amend the California Public Utility Act, Cal. Pub. Util. Code §§ 1001-1011 to consolidate the electrical utility certificate of necessity and convenience determination with energy facility siting under Cal. Pub. Res. Code §§ 25500-525.

322. Each existing agency has its own political constituency within the agency, the legislature, and among the public which would oppose any such change making it unlikely change would ever occur. Interviews, July, 1982. Also, the task of creating a superagency would be very complex requiring major rewriting of several statutory schemes.

323. Interviews, July, 1982. One of the criticisms of conventional siting agencies noted in interviews is that these lack the technical expertise and staff resources necessary to evaluate all of the environmental,

safety, need for power, and land use planning issues that can arise in a siting proceeding.

324. Interviews with Energy Commission officials, July, 1982. See description of "Common Forum" concept in "Power Plant Siting Policy paper" prepared by California Energy Commission, November, 1978 at 74-83.

325. See Discussion in text and notes, supra, notes 284-88.

326. Cal. Pub. Res. Code § 25523 (1977).

327. Interviews, July, 1982.

328. Interviews, July, 1982.

329. This joint policy statement provides procedures for determining compliance. It is set forth in Appendix D, infra. In addition the Energy Commission has recommended that it and the Air Resources Board reach agreement on substantive policies governing air quality and siting isues. Electricity Tomorrow, 1981 Final Report to the Governor and the Legislature by the California Energy Commission, at 388 (January, 1981).

330. This policy statement is set forth in Appendix D, infra.

331. ARB-CEC Joint Policy Statement, supra, note 329, at 1.

332. Agency officials interviewed spoke highly as to the value of and necessity for such agreements.

333. Interviews with Developers, July, 1982.

334. See 1981 Biennial Report, supra, note 285. The ABA study, supra, note 195, at 34-35 discusses the Energy Commission's forecasting process.

335. Interviews, July, 1982.

336. E.g., one controversy mentioned in interviews was over commission mandated standards for insulating newly constructed buildings in California. These were adopted by the Commission and opposed by construction industry representatives. The legislature delayed the effective date of those standards in its 1982 session.

337. See discussion in text and notes, supra, notes 285-286.

338. Interviews, July, 1982.

339. This is because policy making often requires an agency to make decisions adversely affecting the industry regulated by that agency. These decisions would prevent the agency from maintaining a neutral posture, as viewed by the industry.

340. All of these projects are outside the scope of energy commission jurisdiction under Cal. Pub. Res. Code § 25500 (1977). OPR is established pursuant to Cal. Gov't Code §§ 65025, 65037 et seq.

341. Many of the agencies that have input into power plant siting under the Warren-Alquist Act also must review and approve the types of projects described herein. See Appendix E, infra.

342. JRP has been discussed a lot in the last several years. See, 1) "Shale Will Affect All So Planning Is Comforting," Denver Post, Sunday, October 18, 1981, section 2G; 2) "Chevron Oil Shale Project is Sixth To Join Colorado's Queue for Permits," The Energy Daily, October 7, 1981; 3) "Joint Review Process Remains Popular" Rocky Mountain Business Journal, August 26, 1981, at section 3, page 2; 4) "An Amiable Way To Open A Mine: Business Week, May 18, 1981; and 5) Legal Times article, supra, note 4.

343. Interview with Adam Poe, Director, Colorado JRP, August, 1982.

344. "Colorado's Joint Review Process for Major Energy and Mineral Resource Development Projects," at 7-8 prepared by the Colorado Department of Natural Resources, December, 1980 (hereinafter referred to as JRP manual).

345. Id., at 8-9

346. Id., at 9

347. These are oil shale, metals, uranium, and coal. See Appendix G, infra, for copies of these decision schedules.

348. JRP manual, supra, note 344, at 9-10.

349. Id., at 11.

350. Interview with Adam Poe, August, 1982. This backing is essential to the success of the process.

351. Legal Times article, supra, note 4.

352. Interview with Adam Poe, August, 1982.

353. Id.

354. Id.

BACKGROUND REPORT FOR RECOMMENDATION 84-2
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PRODUCT RECALLS: A REMEDY IN NEED OF REPAIR

*Teresa M. Schwartz**
*Robert S. Adler***

The product recall is an effective tool that protects consumers as well as agencies, if public participation is secured promptly. This Article focuses on the recall programs of NHTSA, the FDA, and the CPSC that recall hazardous or unsafe consumer products. The authors propose specific statutory and administrative changes to make federal recall programs more efficient and to enhance public responsiveness. They conclude that coordination and uniformity among agencies is necessary to achieve these goals.

INTRODUCTION

EACH YEAR, manufacturers recall millions of consumer products—ranging from toys and household appliances to drugs and autos—under an array of federal health and safety statutes.[1] Manufacturers undertake most recalls voluntarily, either on their own initiative or at the urging of a federal agency with recall authority.[2] Extensive use of recalls began in the mid-1960's at the height of the consumer movement and continues, although somewhat abated, in the deregulatory environment of the early 1980's.

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* Professor of Law, The National Law Center, George Washington University. A.B., Stanford University (1965); J.D., George Washington University (1971).

** Adjunct Professor of Law, American University. A.B., University of Pennsylvania (1966); J.D., University of Michigan (1969). Mr. Adler is a former Consumer Product Safety Commission Attorney.

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[1] Levy, *A Record Year For Recalls*, 113 DUN'S REV., Jan. 1979, at 28. Perhaps as many as 50 million products were recalled in 1978. *Id.* In 1982, 4.5 million cars and over 12 million consumer products were recalled (excluding food, drugs, and medical devices). 1983 PROD. SAFETY & LIAB. REP. (BNA) 3.

[2] In addition to the three agencies examined in this Article, the other federal agencies primarily involved in product recalls are the Environmental Protection Agency (under

The vitality of the recall as an enforcement tool stems from a number of factors. Agencies tend to prefer the recall over enforcement tools such as product seizure or standard setting because it better protects consumers and requires fewer agency resources. In general, firms are motivated to recall products voluntarily to avoid not only the cost of agency enforcement proceedings and possible penalties, but also adverse publicity and product liability claims.

The recall remedy, although valuable as an enforcement tool, is difficult to use effectively. An agency must implement the remedy very promptly if it is to serve its purpose of preventing injury. Further, the agency must implement it in a way that encourages public response, for public participation is essential to effective recalls.

This Article examines the recall programs of three federal agencies: the National Highway Traffic Safety Administration (NHTSA), the Food and Drug Administration (FDA), and the Consumer Product Safety Commission (CPSC). All have active recall programs in the area of unsafe or hazardous consumer products, where effective use of the recall remedy is most needed—and most difficult.

For purposes of this Article, the term "recall" encompasses a variety of post-sale remedial actions by product manufacturers and sellers. These include notifying consumers of problems with products, offering to repair products, and offering to refund or replace products. Each of the three agencies has authority to order at least one of these post-sale remedial actions. In most other respects, however, the recall programs are quite diverse. The standards for ordering recalls, the scope of the remedy, and the administrative procedures of the programs vary among agencies. Some of the differences are statutorily based; others arise from the variety of methods used to implement the programs.

This Article recommends a number of statutory changes aimed

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the Clean Air Act, the Toxic Substances Act, and the Federal Insecticide, Fungicide, and Rodenticide Act), the Federal Trade Commission (under the FTC Act), and the Department of Agriculture (under the Meat and Poultry Inspection Act). Minutes of Interagency Meeting on Product Recalls 2 (Mar. 6, 1979) (on file with the *Case Western Reserve Law Review*) [hereinafter cited as Interagency Meeting]. Other agencies involved in recalls include the Department of Housing and Urban Development (under the National Mobile Home Construction and Safety Standards Act), the Federal Aviation Administration (under the Federal Aviation Act), and the United States Coast Guard (under the Federal Boat Safety Act). *See The Mindless Pursuit of Safety*, FORTUNE, Apr. 9, 1979, at 54-55.

at improving the agencies' abilities to negotiate recalls and proceed expeditiously when voluntary recalls are not forthcoming. In addition, it recommends more uniformity and coordination among agencies in implementing recall programs and dealing with the public. The broad goal of these recommendations is making better use of agency resources and enhancing public responsiveness to recalls, thereby increasing the overall effectiveness of federal recall programs.

I. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

Among the agencies most actively involved in product recalls is NHTSA. The National Traffic and Motor Vehicle Safety Act of 1966 (the Safety Act),[3] which granted NHTSA authority to order recalls of defective motor vehicles, was the first statute to contain a recall provision.[4]

Since the enactment of the Safety Act, an extraordinary number of motor vehicles and equipment have been recalled—roughly 133 million product units to date.[5] As under other statutes, nearly all the recalls have been undertaken voluntarily by manufacturers. And, as is often the case, return rates in response to recalls have been low.

A. *Recall Authority: Background*

Long before federal safety statutes mandated the recall of automobiles with safety-related defects, the auto industry recalled and repaired vehicles.[6] The government played no role in these recalls, which manufacturers did not publicize. During this, the era of the so-called "silent recall,"[7] manufacturers notified their dealers of defects and how to repair them, without informing car owners.[8] They left to the dealers the responsibility for owner notification.[9] Too often, however, owners neither learned of defects nor had them corrected unless they serviced their cars with dealers.[10]

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[3] Pub. L. No. 89-563, 80 Stat. 718 (codified as amended at 15 U.S.C. §§ 1381-1431 (1982)). The Safety Act authorizes the Secretary of Transportation to implement the recall provision. 15 U.S.C. § 1412 (1982). The Secretary, however, has delegated this authority to NHTSA. 49 C.F.R. § 501.2(a) (1983).

[4] The FDA obtained product recalls for many years before the enactment of the Safety Act but it lacked statutory authority to order recalls. *See infra* notes 307-13 and accompanying text.

[5] COMPTROLLER GEN., GOV'T ACCOUNTING OFF., DEPARTMENT OF TRANSPORTATION'S INVESTIGATION OF REAR BRAKE LOCKUP PROBLEMS IN 1980 X-BODY CARS SHOULD HAVE BEEN MORE TIMELY 3 (Aug. 5, 1983) [hereinafter cited as GAO X-BODY REPORT]. The total includes 101.4 million vehicles, 6.9 million replacement items, and 24.6 million tires recalled from 1966 through April 30, 1983. *Id*.

[6] The earliest known recall involved the 1903 model Packard and occurred at the turn of the century. Other early recalls involved the 1916 Buick and the 1924 Maxwell. Levy, *supra* note 1, at 117.

[7] *Id*.

By the mid-1960's, manufacturers had recalled a large number of cars.[11] About this time, industry members also began improving their product recall procedures, a move stimulated by congressional hearings on auto safety, growing public awareness of the silent recalls, and the large number of vehicles requiring recall.[12] But the industry initiatives came too late to stave off legislation mandating industry recall procedures.

1. *The National Traffic and Motor Vehicle Safety Act of 1966*

In 1966, several members of Congress introduced bills addressing auto safety; however, neither the major House bill[13] nor the Senate bill[14] contained a recall or defect notification provision. Only after concerns about the industry's failure to notify customers and repair defects surfaced in committee hearings did Congress consider amendments regarding recalls.[15]

The amendment ultimately adopted mandated that manufacturers notify initial purchasers of defects, but was silent regarding the manufacturers' duty to repair defects.[16] Congress thought that publicity accompanying defect notifications would, as a practical matter, assure free repairs by manufacturers.[17]

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[8] *See* Note, *Auto Recalls and the Pursuit of Safety: A Commonsense Approach*, 33 Stan. L. Rev. 301, 303 n.9 (1981).

[9] *Federal Role in Traffic Safety: Hearings Before the Subcomm. on Executive Reorganization of the Senate Comm. on Gov't Operations*, 89th Cong., 2d Sess. 78 (1973) [hereinafter cited as *Federal Role in Traffic Safety Hearings*].

[10] *See* Note, *supra* note 8, at 303 n.9.

[11] *Federal Role in Traffic Safety Hearings*, *supra* note 9, at 78. From 1960 to 1966, 426 recalls occurred involving over 8.7 million cars or 18.5% of all American cars manufactured during that period.

[12] General Motors (GM), for example, began notifying car owners directly of safety defects and offering repairs at no charge. *Id.*

[13] H.R. 13,228, 89th Cong., 2d Sess. (1966).

[14] S. 3005, 89th Cong., 2d Sess. (1966).

[15] Senator Mondale introduced an amendment requiring defect notification to eliminate secret recalls. *See* 112 Cong. Rec. 14,247 (1966). Other proposed amendments required both notification and repair. *See* 112 Cong. Rec. 18,792 (1966).

[16] National Traffic and Motor Vehicle Act of 1966, §§ 113(a), (b), Pub. L. No. 89-563, 80 Stat. 718 (current version at 15 U.S.C. § 1411(a) (1982)). The manufacturer was to send the notice by certified mail to the first purchaser or to the second purchaser in the case of a resale when a warranty had been transferred. The notice was to contain a clear description of the defect, an evaluation of the safety risk, and the measures required to repair the defect. *Id.* § 113(c) (current version at 15 U.S.C. § 1413(a) (1982)).

Following the statute's enactment, the industry practice was to pay for defect corrections.[18] However, in two notable instances, manufacturers did not offer free defect correction. In one case involving over 625,000 Corvairs with defective heaters, GM refused to pay the $200-per-vehicle repair costs and only 7.6 percent of the owners returned their cars for repairs in response to the recall campaign.[19] In another case involving Volkswagens manufactured from 1949 to 1969, VW also refused to pay for repairs.[20] Moreover, it notified only 220,000 of the 3.7 million owners affected, since its records of first purchasers dated back only to 1966, when the Safety Act's recordkeeping requirements took effect.[21] While there were smaller recall campaigns in which manufacturers refused to pay for repairs,[22] the Corvair and VW cases focused Congress' attention on the need for strengthening the recall provisions of the Safety Act.[23]

2. *The 1974 Amendments*

In 1974, Congress amended the Safety Act to require manufacturers to remedy safety defects without charge to the owner.[24] Addressing the inadequate notice of the VW recall, Congress also required manufacturers to provide defect notifications to all state-registered vehicle owners, not only first purchasers.[25] Congress hoped that these provisions not only would eliminate the problems exemplified by the VW and Corvair recalls, but also would improve the average response rate for all recall campaigns.[26]

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[17] *Auto Safety Repairs at No Cost: Hearings on S. 355 Before the Senate Comm. on Commerce*, 93d Cong., 1st Sess. 103 (1973) [hereinafter cited as *Hearings on No Cost Repairs*].

[18] The Administrator of NHTSA testified that the industry offered to repair about 90% of the 40 million vehicles recalled between 1966 and 1973. In 10% of the cases, the cost was borne by the owner or shared by the manufacturer and owner. *Id.* at 8.

[19] S. REP. NO. 150, 93d Cong., 1st Sess. 7 (1973). In addition to GM's refusal to pay for repairs, several factors contributed to the low rate of return by Corvair owners. First, owners had no assurance that the repairs would last. *Id.* Second, the market value of many of the recalled vehicles had fallen below $500 by the time GM sent the defect notice in 1971. Finally, the defect notification letter gave mixed signals because NHTSA allowed GM to include a denial that the Corvair was defective. *See Hearings on No Cost Repairs*, *supra* note 17, at 104-05 (testimony of Ralph Nader).

[20] S. REP. NO. 150, 93d Cong., 1st Sess. 7 (1973). A set screw in the windshield wiper system would loosen, causing the system to fail without warning.

[21] *Hearings on No Cost Repairs*, *supra* note 17, at 17.

[22] *See id.* at 341-42.

[23] The Senate viewed the two cases as the most "notable instances" in which the auto industry had reneged on its promise to remedy defects at no charge. S. REP. NO. 150, 93d Cong., 1st Sess. 7 (1973).

[24] 15 U.S.C. § 1411 (1982). Congress permitted only two exceptions to the repair-at-no-cost requirement. The requirement did not apply to defective vehicles purchased more than eight years before the defect notification was ordered, *id.* § 1414(a)(4), or to a defect determined by NHTSA to be "inconsequential as it relates to motor vehicle safety." *Id.* § 1417.

The 1974 amendments did not achieve the desired effect. Since their passage, owner response rates have dropped to about fifty percent.[27] To understand why the recall remedy has not worked as well as Congress had hoped requires a closer look at the nature of the recall authority and its implementation by NHTSA.

B. *Scope of Recall Authority*

The Safety Act provides for the recall of vehicles that do not comply with an applicable federal motor vehicle safety standard[28] or contain a "defect" which "relates to motor vehicle safety."[29] The courts, in a handful of cases, have interpreted the latter provision to give NHTSA broad recall authority.

1. *The Meaning of "Defect"*

In the leading case defining defect, *United States v. General*

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[25] *Id.* § 1413(c). If the manufacturer does not notify the registered owner, it must notify the most recent purchaser known to it. *Id.*

[26] The purpose of the 1974 amendments was to make it "as attractive and convenient as possible for a consumer to invest the energy and effort to get his or her vehicle fixed." S. Rep. No. 150, 93d Cong., 1st Sess. 7 (1973). At the time, recall response rates averaged 75%. H.R. Rep. No. 1191, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 6050-51.

[27] Gov't Accounting Off., Changes to the Motor Vehicle Recall Programs Could Reduce Potential Safety Hazards 15 (1982) [hereinafter cited as GAO Recall Report]. NHTSA's recall rates for 1975 through 1979 are as follows:

1975	54.2%
1976	51.1%
1977	40.1%
1978	50.4%
1979	54.8%
Average:	50.1%

Id. For the past several years, however, return rates have been above average. *See infra* note 134.

[28] 15 U.S.C. § 1412 (1982). Section 103 of the 1966 Safety Act, *id.* § 1392, provides for the issuance of motor vehicle safety standards to protect the public against unreasonable risks. Few recalls, however, are based on noncompliance with safety standards. In 1979, for example, only about 49,000 vehicles were recalled because of noncompliance with standards. NHTSA, U.S. Dep't. of Transp., Motor Vehicle Safety 1979, at 45-46 (on file with the *Case Western Reserve Law Review*) [hereinafter cited as 1979 NHTSA Annual Report].

[29] 15 U.S.C. § 1412 (1982).

Motors Corp. (Wheels),[30] the Court of Appeals for the District of Columbia Circuit ruled that a prima facie case of defect is made upon a showing of a significant number of failures during "normal operations," which includes circumstances of "reasonably foreseeable" owner misuse.[31] Proof of a significant number of failures (other than those due to age or expected wear and tear), the court held, creates a presumption that the failures occurred in normal use.[32] The manufacturer can only rebut the presumption by establishing an affirmative defense that the failures were due to "gross and unforeseeable" owner abuse or neglect.[33] As thus broadly interpreted by the court, defect means only that the vehicle failures must be systematic and not isolated incidents.

2. *The Meaning of "Motor Vehicle Safety"*

The Safety Act's requirement that the defect "relate to motor vehicle safety" limits the types of defects which trigger recall to those posing an "unreasonable risk" of accident or injury.[34] The concept of unreasonable risk, however, is not defined by the statute, and the legislative history suggests little more than that it requires a "commonsense"[35] balancing of safety benefits and economic costs. The courts have interpreted the unreasonable risk requirement liberally to promote the statute's safety aims.

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[30] 518 F.2d 420 (D.C. Cir. 1975). The case involved the failure of Kelsey-Hayes wheels in GM pickups. At the time of trial 436 wheel failures had been reported to NHTSA. *Id.* at 430. GM argued that the wheels were not defective and the failures were due to owner misuse in overloading the trucks contrary to GM's instructions. *Id.* at 426.

[31] *Id.* at 427. After examining the legislative history, the court concluded that Congress intended the statute to provide protection broad enough to cover even "lackadaisical" car owners who, for example, neglected regular car maintenance. *Id.* at 434.

[32] *Id.* at 438. The court did not require the government to pinpoint the cause of the failures. *Id.* at 427. Nor did the court quantify the term "significant," except to say that it was more than de minimis but need not be a substantial percentage of the total number of units. "Significant" would be determined case by case, based on the failure rate of a component compared to the rates of similar components, and the seriousness of the risk posed by the failures. *Id.* at 438 n.84.

[33] *Id.* at 438. The court's example of an unforeseeable use—loading a ¾-ton truck with 12,000 pounds—indicates the difficulty the defendant faces in proving widespread unforeseeable use. *Id.* at 438-39 n.88.

[34] The Safety Act defines "motor vehicle safety" as

> the performance of motor vehicles or motor vehicle equipment in such a manner that the public is protected against *unreasonable risk* of accidents occurring as a result of the design, construction or performance of motor vehicles and is also protected against *unreasonable risk* of death or injury to persons in the event accidents do occur, and includes nonoperational safety of such vehicles.

15 U.S.C. § 1391(1) (1982) (emphasis added).

[35] *Traffic Safety: Hearings on S. 3005 Before the Senate Comm. on Commerce*, 89th Cong., 2d Sess. 56 (1966). Although ill-defined, the term "motor vehicle safety" was considered one of the "critical" definitions delimiting the bill's scope. S. REP. NO. 1301, 89th Cong., 2d Sess. 6, *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 2713.

In the leading case of *United States v. General Motors Corp. (Pitman Arms)*,[36] the Court of Appeals for the District of Columbia Circuit ruled in a brief per curiam opinion that a defect "relating to motor vehicle safety" existed in the steering pitman arm of the 1959-60 Cadillac. The court based its finding on the government's showing that the manufacturer had replaced many more pitman arms for that model year than for adjacent model years, and failures could cause the driver to lose control of the car.[37] On these uncontradicted facts, the court reversed a denial of the government's summary judgment motion.[38] The government had demonstrated neither injury nor death resulting from pitman arm failures.[39] General Motors argued that the defect posed no unreasonable risk because failures only occurred at low speeds and so few 1959-60 Cadillacs were still in use that the risk of injury was minimal.[40] The court of appeals found that the government's evidence of one pitman arm failure, creating a dangerous situation, plus expert testimony on the danger of a sudden loss of steering even at low speeds,[41] not only established a prima facie case of unreasonable risk, but also overcame GM's evidence as a matter of law.[42]

The same court of appeals took a similar approach in *United*

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[36] 561 F.2d 923 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1033 (1978).

[37] *Id.* at 924.

[38] *Id.* The district court had denied summary judgment to both parties. 65 F.R.D. 115 (D.D.C. 1974).

[39] Sixty-four "confirmed" instances of pitman arm failures and two "reportable accidents" occurred. *Id.* at 937 (Leventhal, J., dissenting in part). However, this could represent a "minuscule sample" of the failures in light of the large number of replacement part sales. *Id.*

[40] GM had forecast less than a one percent chance of a fatality and only two possible injuries for those 1959-60 Cadillacs still in use over their remaining three-year life expectancy. *Id.* at 936.

[41] The government presented direct testimony of one driver who had experienced a steering loss during a 90-degree turn at 10-15 miles per hour. An expert testified that while the median reaction time to a brake failure was 1.6 seconds, a pitman arm failure during a 5-mile-per-hour, 90-degree turn could cause the car to enter the opposing traffic lane in only 1.5 seconds. *Id.* at 927.

[42] *But see id.* at 938 (Leventhal, J., dissenting in part). Judge Leventhal believed that the majority had improperly elevated facts giving rise to a "strong suspicion" of dangerousness to a "conclusive presumption" that the defect posed an unreasonable risk. He would have remanded the case on the grounds that the district court had erred in allocating the burden of proof. On remand, he would have permitted GM to dispel the "strong suspicion" that the defect was dangerous with proof that the failures did not occur in dangerous situations and thus the risk was inconsequential. *Id.*

States v. General Motors Corp. (Quadrajet), which involved risks of underhood fires caused by defective carburetor fuel plugs.[43] In upholding the district court's grant of summary judgment for the government, the court ruled that even if GM's risk analysis—showing negligible future failures, less than one injury, and no deaths—was valid, it would not defeat the government's case.[44] The court found that even an "exceedingly small" number of injuries from this admittedly defective and clearly dangerous carburetor appeared to be "unreasonably large."[45]

In theory, these cases give NHTSA expansive authority to order recalls even where safety-related defects pose minimal risk. In practice, however, the Agency's authority is more limited. An examination of NHTSA's implementation of the recall program reveals some of these limits.

C. *Implementing the Recall Authority*

1. *Finding the Defects*

NHTSA learns of possible safety-related defects in a variety of ways. It may discover defects through its own vehicle testing[46] or through service bulletins that the Agency requires manufacturers to submit.[47] Perhaps the most important source of information is its Auto Safety Hotline, which receives some 500 calls a day.[48] To obtain further information, NHTSA sends follow-up questionnaires to callers complaining about possible defects. The Agency stores the responses and complaint letters it receives—which may number 3,000 a month—in a computerized database that can identify trends and give the Agency early warning about possible safety-related defects.[49] Many defect investigations and subsequent recalls originate with consumer complaints.[50]

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[43] 565 F.2d 754 (D.C. Cir. 1977). Six hundred sixty-five incidents of underhood fires had been reported, and GM had conceded the existence of a "defect" in its carburetors. *Id.* at 756.

[44] *Id.* at 758. One reason for GM's anticipation of few additional incidents was that the administrative and litigation phases of the case had consumed so much time that many of the cars involved were no longer in use or the problem had corrected itself. *Id.* The court was necessarily reluctant to relieve the manufacturer of its statutory duty on this basis; to do so would "establish a system which encourages manufacturers to delay proceedings whenever possible . . . ." *Id.* at 759.

[45] *Id.* at 759.

[46] NHTSA tests a sampling of vehicles and equipment to determine compliance with safety standards. 1979 NHTSA ANNUAL REPORT, *supra* note 28, at 45. Few recalls, however, result from noncompliance testing. *See supra* note 28.

[47] 15 U.S.C. § 1418(a)(1) (1982) requires manufacturers to supply NHTSA with copies of all notices to dealers and purchasers "regarding any defect or failure to comply [with a standard]." NHTSA's regulations require manufacturers to submit all service bulletins and other communications with dealers, distributors, etc., regarding *any* defect or flaw "whether or not [it] is safety-related." 49 C.F.R. § 573.8 (1983). This requirement provides NHTSA with general information about potential defects that may warrant further investigation.

[48] *See* 1979 NHTSA ANNUAL REPORT, *supra* note 28, at 44; GAO RECALL REPORT, *supra* note 27, at 30-31.

Another important source of information about defects is the manufacturer. As in other recall programs, manufacturers are statutorily obligated to report defects and are subject to civil penalties for failing to do so.[51] The reporting requirement, however, has not been as important a factor in initiating recalls under the Safety Act as it has been under other acts,[52] and the civil penalty provision is largely unused.[53] This is because the Safety Act's reporting provision is narrower than others and does not require reporting of potential problems that "could create" a serious hazard.[54] The reporting obligation arises only when the manufacturer has determined "in good faith" that a defect relates to motor vehicle safety and the statute requires a recall.[55] Under this standard, manufacturers do initiate numerous recalls,[56] but these are generally on a smaller scale. The large-scale recalls are initiated primarily by the government on the basis of consumer complaints.[57]

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[49] GAO RECALL REPORT, *supra* note 27, at 30-31.

[50] Telephone Interview with David Allen, Office of General Counsel of NHTSA, in Washington, D.C. (July 14, 1983) [hereinafter cited as Allen Interview].

[51] Failure to notify NHTSA and recall defective products under 15 U.S.C. § 1411 (1982) are prohibited acts under § 1397(a)(1)(D) (1982), which subjects violators to civil penalties up to $800,000. 15 U.S.C. § 1398(a) (1982).

[52] In the CPSC's program, manufacturers' reports have been key factors in initiating recalls. *See infra* note 209 and accompanying text.

[53] Allen Interview, *supra* note 50. Penalties were assessed in the Toyota Hilux Pickup shimmy recall case, however, and NHTSA threatened additional penalties if the manufacturer did not agree to undertake the recall expeditiously. Interview with Raymond A. Peck, Jr., former Administrator, NHTSA, in Washington, D.C. (Oct. 4, 1983) [hereinafter cited as Peck Interview].

[54] 15 U.S.C. § 1411 (1982). Compare the Safety Act's requirement with that of the Consumer Product Safety Act, excerpted *infra* note 211.

[55] Section 151 of the Safety Act provides:

> If a manufacturer—
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> (1) obtains knowledge that any motor vehicle or item of replacement equipment manufactured by him contains a defect and determines in good faith that such defect relates to motor vehicle safety . . . he shall furnish notification to the Secretary and to owners, purchasers, and dealers . . . and he shall remedy [by repair, refund, or replacement] the defect . . . .

15 U.S.C. § 1411 (1982). The provision also calls for reporting noncompliance with safety standards and recalling those products as well. *See id.*

[56] Tobin, *Recalls and the Remediation of Hazardous or Defective Consumer Products: The Experience of the Consumer Product Safety Commission and the National Highway Traffic Safety Administration*, 16 J. CONS. AFF. 278, 288 (1982). Between 1966 and 1981, 3,265 auto recalls occurred, 83.4% of which were manufacturer initiated. *Id.*

NHTSA may not need to rely as heavily as other agencies upon manufacturer-supplied defect information, inasmuch as vehicle owners do complain and thus provide the Agency with a good database. Nevertheless, Congress should strengthen the Safety Act's reporting requirement. A provision resembling that of the Consumer Product Safety Act[58] or one imposing an affirmative obligation to report specific data such as warranty claims and product liability suits,[59] would improve agency efficiency and effectiveness. With a stronger provision, NHTSA would receive information about possible defects that complainants do not report.[60] Moreover, a more stringent requirement would reduce agency time and resources required to gather defect information.[61] This benefit is especially important if the remedy is to work, because of the need for dispatch in recall cases.[62] Additionally, the need for agency cost-cutting makes this benefit important.[63] Sanctions for failure to report would generate an additional benefit. As the CPSC has learned, an agency can use the threat of substantial timeliness penalties to induce otherwise recalcitrant manufacturers to undertake comprehensive product recalls.[64]

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[57] *Id.* at 289. Between 1966 and 1981, the number of vehicles in manufacturer-initiated recalls averaged 17,738, compared with 90,306 for government-initiated recalls. Over half of the vehicles recalled were in government-initiated recalls. *Id.*

[58] *See infra* note 211.

[59] For example, Congress could require manufacturers to notify NHTSA of lawsuits in which a defect is claimed, or to provide information on warranty claims which arise frequently enough to indicate a possible pattern of defect. Interview with Clarence M. Ditlow III, Director of the Center for Auto Safety, in Washington, D.C. (Sept. 29, 1983) [hereinafter cited as Ditlow Interview]. According to former NHTSA Administrator Peck, however, increased reporting requirements would add little additional information, since NHTSA is able to obtain all necessary data regarding warranty claims, consumer complaints, product liability suits, etc., by requesting it from the manufacturer early in the investigation of a potential problem. *See* Peck Interview, *supra* note 53. One difficulty with this view is that NHTSA may lack sufficient information to prompt it to request data from the manufacturer.

[60] Car owners may have no reason to inform NHTSA about problems with products covered by warranty, even though they may indicate a defect, if the manufacturer or dealer satisfactorily and promptly resolves warranty claims. Ditlow Interview, *supra* note 59.

[61] Although NHTSA seeks information from the manufacturer early in an investigation, see *supra* note 59, some manufacturers have construed NHTSA's requests narrowly and have failed to provide the necessary information. Additional requests or negotiations are then required. Ditlow Interview, *supra* note 59. This process could be streamlined by expanding the manufacturer's reporting obligation.

[62] The longer the delay in issuing the recall notice, the less effective the remedy becomes. *See infra* notes 92-95 and accompanying text.

[63] The Reagan Administration has made significant cuts in NHTSA's budget. Funding of NHTSA's defect investigation and enforcement activities, however, has remained at about the same level. Peck Interview, *supra* note 53.

2. *The Investigation Stage*

An automobile is a complex product with roughly 14,000 parts.[65] Thus, NHTSA's investigation of a potential safety defect can be complex and lengthy. While a manufacturer may agree to recall vehicles at any time during an investigation,[66] in the absence of voluntary recall NHTSA follows certain defect-investigation procedures. When it has grounds to believe that a safety-related defect exists, the Agency first undertakes an "informal inquiry"—a limited investigation consisting of meetings and telephone conversations with the car manufacturer to identify the problem.[67] If NHTSA decides to proceed further, it then undertakes an engineering analysis of the problem. Early in this stage, it sends the manufacturer an information request letter seeking detailed information about the item in question.[68] The staff examines other data as well, and may perform tests to determine the cause and scope of the problem.[69] This stage often takes years to complete. A notorious example is NHTSA's recent analysis of GM's X-body rear brake lockup problem, which spanned nineteen months.[70] Critics have attributed the overall delay to the Agency's past practice of opening more engineering analyses than were warranted or than it could handle.[71] A broader initial defect reporting requirement, as recommended earlier, might alleviate the problem somewhat, since NHTSA could then employ fewer engineering analyses for purposes of obtaining defect information from manufacturers.[72]

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[64] *See infra* notes 214-16 and accompanying text.

[65] *Recalls: Why They Occur, How to Answer One on Your Car*, NEW REPUBLIC, Dec. 5, 1983, at 6 (General Motors' advertisement) [hereinafter cited as *GM Recall Advertisement*].

[66] Ditlow Interview, *supra* note 59. The manufacturer may decide to recall before an investigation is begun or in the preliminary stages of an investigation.

[67] J. CLAYBROOK, J. GILLAN & A. STRAINCHAMPS, REAGAN ON THE ROAD: THE CRASH OF THE U.S. AUTO SAFETY PROGRAM 62 (Sept. 1982) [hereinafter cited as AUTO SAFETY REPORT]. The "informal inquiry" is a recent Agency creation designed to permit informal and prompt investigation of some problems without first undertaking an engineering analysis. Peck Interview, *supra* note 53.

[68] GAO X-BODY REPORT, *supra* note 5, at 40.

[69] GAO RECALL REPORT, *supra* note 27, at 31. NHTSA staff examines hotline complaints, accident reports, and the manufacturer's service bulletins. *Id.*

[70] *See* GAO X-BODY REPORT, *supra* note 5, at 8-9. The engineering analysis was inactive for 13 months from November 1979 to December 1980. Transmittal of the information request letter, which agency guidelines require during the first two weeks of the engineering analysis, did not occur until May 1980. *Id.*

[71] GAO RECALL REPORT, *supra* note 27, at 6-7. The ratio of about one recall to every five engineering analyses undertaken may indicate that the Agency opens analyses on the basis of too few complaints. The use of informal inquiries may reduce the number of engineering analyses that NHTSA must open. *See supra* note 67. *But see* AUTO SAFETY REPORT, *supra* note 67, at 63 (favoring engineering analyses as "essential tools for consumer groups and engineering firms interested in getting defects corrected").

Following the engineering analysis, an NHTSA review panel composed of staff from the Office of Defects Investigation and the Chief Counsel's Office determines whether a formal defect investigation should be opened.[73] If NHTSA chooses formal investigation, it notifies the manufacturer, issues a press release to inform and solicit information from the public,[74] and collects further data.[75] It may also conduct additional tests, interview vehicle owners, and gather tangible evidence such as vehicle parts, to establish legally and technically that a defect is safety related.[76] This stage also may be lengthy, especially when the defect is difficult to uncover.[77]

3. *Administrative and Judicial Proceedings*

At the close of a formal investigation, staff members prepare an investigative report for the Chief Counsel and recommend either making an initial determination of defect or closing the case.[78] If they recommend a defect determination and the Chief Counsel and Deputy Administrator concur, the NHTSA notifies the manufacturer of the determination and publishes a public notice in the *Federal Register*.[79] During the final stage of the administrative process, the manufacturer may dispute the initial determination of defect in a public administrative hearing.[80] If the determination is reaffirmed, the Agency orders the manufacturer to notify vehicle owners and dealers of the defect and provide a remedy without charge.[81] The notice must include a description of the defect, an evaluation of the risk, and information on how and when the defect will be remedied.[82]

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[72] Lack of information has been one impetus for NHTSA's numerous informal inquiries and engineering analyses. Ditlow Interview, *supra* note 59.

[73] *See* 49 C.F.R. §§ 554.1-.11 (1983).

[74] In a number of recent instances, NHTSA did not issue a press release although the regulations call for one. Ditlow Interview, *supra* note 59.

[75] *Id.*; *see* GAO RECALL REPORT, *supra* note 27, at 32.

[76] GAO X-BODY REPORT, *supra* note 5, at 41; *see also* 49 C.F.R. § 554.5 (1983).

[77] *See, e.g.*, GAO X-BODY REPORT, *supra* note 5, at 50-63 (describing some technical problems involved in testing for rear brake lockup in GM's X-body cars).

[78] *Id.* at 41-42.

[79] *Id.* at 42; *see* 15 U.S.C. § 1412(a) (1982).

[80] 15 U.S.C. § 1412(a)(2) (1982). At the hearing, the manufacturer and interested persons may present data and arguments regarding the initial defect determination or noncompliance with a standard, but no right to cross examination exists. Regulations governing the public hearing are set forth at 49 C.F.R. § 554.10(b)-(d) (1983).

[81] 15 U.S.C. § 1412(b) (1982).

If the manufacturer does not comply with the recall order, the government may bring an enforcement action in federal district court.[83] Review is de novo, with the burden on the government to establish the existence of a safety-related defect.[84] The district court will order the recall if the government prevails, and in some instances may impose civil penalties on the manufacturer.[85]

If a manufacturer knew of a safety-related defect but failed to recall the affected product, NHTSA may bypass the administrative hearing and seek a court-ordered recall directly.[86] The government recently took this approach in a proceeding against General Motors. Among the allegations is GM's failure to recall all 1980 X-body cars despite knowledge that the braking system was defective.[87] GM moved to dismiss, arguing that the government could not proceed in district court without first having conducted an administrative hearing; the court rejected this contention in denying the motion.[88] Nevertheless, cases of bad faith which would justify bypass of the administrative hearing are likely to be rare and hard to prove.

Generally, NHTSA must resort to a two-tiered procedural scheme requiring both an agency hearing and a trial de novo in district court. The process is time consuming even when it works smoothly, which often it does not. Delays at the investigation stage are not uncommon.[89] The manufacturer also has an inducement to delay the administrative process, since the statute of limitations on the no-charge repair requirement relieves the manufacturer of the obligation to repair defective vehicles more than eight years old at the time of defect notification.[90] If a case progresses through both administrative and judicial proceedings, it can easily span five or more years.[91] At that point, an effective recall is unlikely, since most injuries already have occurred. Furthermore, experience has shown that the rate of consumer response to recalls drops as vehicles age. In *Quadrajet*, for example, the court noted that by the time defect notification was ordered, most, if not all, defect-related injuries had already occurred.[92] The cars at issue in *Pitman Arms* were nearly twenty years old by the time the court of appeals ruled in favor of the government;[93] at the time of the *Wheels* decision the vehicles involved were ten to fifteen years old.[94] Not surprisingly, the response rates to the recalls in NHTSA's litigated cases have been low—ranging from 8 percent to 20.5 percent.[95]

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[82] *Id.* § 1413(a)(1)-(3) (1982). The notice must also describe consumer complaint procedures in the event the manufacturer fails to remedy the defect without charge. *Id.* § 1413(a)(6).

[83] *Id.* §§ 1415(a), 1399(a).

[84] *See* United States v. General Motors Corp., 518 F.2d 420, 426 & n.7 (D.C. Cir. 1975). NHTSA may require the manufacturer to issue a provisional notification of defect while the civil action is proceeding. 15 U.S.C. § 1415(b) (1982).

[85] 15 U.S.C. § 1415(c)(1) (1982). The manufacturer's failure to comply with an administrative recall order is a prohibited act under the statute which can subject the violator to civil penalties up to $800,000 for a related series of violations. *Id.* §§ 1397(a)(1)(D), 1398(a).

[86] Section 151 of the Safety Act provides that if the manufacturer obtains information that a defect exists and determines in "good faith" that it is safety related, it must notify NHTSA and recall the product. *Id.* § 1411; *see supra* note 55 (text of § 151). Failure to comply with this requirement is a direct statutory violation which a court may enjoin. *See id.* §§ 1397, 1399.

[87] Complaint for Declaratory and Injunctive Relief and for Civil Penalties at 3, United States v. General Motors Corp., No. 83-2220 (D.D.C. filed Aug. 3, 1983) (alleging (1) that before beginning production GM knew "or in good faith should have determined" that the braking system on 1980 X-body cars was defective; (2) that GM's 1981 and 1983 recalls were inadequate; and (3) that GM provided false statements to NHTSA during its investigation). The government seeks recall of about 1.1 million 1980 X-body cars and over $4 million in civil penalties. *Id.* at 10-13. For a further description of the claims, see GAO X-BODY REPORT, *supra* note 5, at 30.

[88] United States v. General Motors Corp., [1983] PROD. SAFETY & LIAB. REP. (BNA) 941-42 (D.D.C. Dec. 1, 1983).

4. *Implementation through Negotiation*

The vast majority of recalls are manufacturer initiated or negotiated by NHTSA without litigation.[96] The time-consuming procedural scheme provides the Agency with a strong incentive to settle its cases.[97] In addition, manufacturers' concerns about adverse publicity and risks of product liability claims encourage them to seek a prompt accord.[98]

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[89] *See* GAO RECALL REPORT, *supra* note 27, at 10-11.

[90] *See supra* note 24; *see also* Ditlow Interview, *supra* note 59.

[91] GAO RECALL REPORT, *supra* note 27, at 6, 45-46. NHTSA's litigated cases have taken from 67 to 86 months to complete. Even in relatively uncomplicated cases, the litigation phase alone can take three years, as in the case of defective windshield wipers in Mercury Capris which Ford did not appeal. Affidavit of Lynn L. Bradford, Associate Administrator for Enforcement of NHTSA, Joint Appendix at 335, Center for Auto Safety, Inc. v. Lewis, 685 F.2d 656 (D.C. Cir. 1982) [hereinafter cited as Bradford Affidavit]. In *Center for Auto Safety*, the court upheld NHTSA's decision to settle rather than litigate, in part because litigation would have taken at least four years. 685 F.2d at 663.

[92] 565 F.2d 754, 758 (D.C. Cir. 1977).

[93] 561 F.2d 923, 924 (D.C. Cir. 1977). The case involved 1959-60 Cadillacs. By 1974, an estimated 96% of the model's service life had expired. *Id.* at 935.

[94] 518 F.2d 420, 427 (D.C. Cir. 1975) (involving trucks manufactured from 1960 to 1965).

[95] *See* GAO RECALL REPORT, *supra* note 27, at 6, 46.

[96] Aside from a few early litigated cases, brought to establish the Safety Act's parameters, NHTSA has seldom used litigation to enforce the statute. GAO RECALL REPORT, *supra* note 27, at 46. The last trial under the recall provision occurred in 1978 and the last suit brought following an administrative hearing was filed in 1980 and settled in 1981. Allen Interview, *supra* note 50. The recent GM X-body case is therefore unusual not only

a. *Inducements to Recall.* Adverse publicity is of prime concern to manufacturers.[99] When a manufacturer resists a recall request and NHTSA pursues its investigation, considerable publicity may occur, causing an adverse effect on sales.[100] Ford Motor Company recently acknowledged that although two recent recalls hurt its image, to have moved slowly or not at all would have been far more damaging to the company's reputation.[101] Another inducement to manufacturer-initiated recalls is the risk of product liability claims, another major concern for manufacturers.[102] A prompt recall can prevent injuries and thus reduce, although not eliminate entirely, product liability claims.[103] Furthermore, if a manufacturer fails to recall a defective product promptly, it may be liable for punitive damages.[104]

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because of the legal issues raised, see *supra* note 87 and accompanying text, but also because such litigation is rare.

[97] Peck Interview, *supra* note 53. In the Fiat premature rust case, for example, NHTSA sought settlement after years of administrative and judicial proceedings, in part because the defective cars were 11 years old and the recall was rapidly becoming an ineffective remedy. In the end, the parties abandoned recall and repair in favor of repurchasing the cars at their retail price on the date proceedings commenced. *Id.*; *see also infra* note 122 and accompanying text (discussing Ford transmission case).

[98] *See infra* notes 99-104 and accompanying text.

[99] Panel Discussion, Recalls: FDA, CPSC, NHTSA, and Products Liability Considerations, ABA Annual Convention in Atlanta, Georgia (Aug. 2, 1983) (attended by author Schwartz) [hereinafter cited as ABA Panel Discussion].

[100] *See* Brown, *Industry on the Rebound: Detroit Has Learned Some Hard Lessons*, Wash. Post, Mar. 27, 1983, at F1, col. 4 (indicating that publicity surrounding NHTSA's investigation of X-body braking defects had caused sales to drop sharply in a single year). *But see infra* note 109 (recalls may not affect market share). GM recently announced plans to discontinue all X-body cars by 1986. Chicago Tribune, Feb. 16, 1984, at 4-1, col. 1.

[101] *Ford Finds Recall a Better Idea for Flaws*, Wash. Post, Mar. 13, 1983, at F1, col. 1.

[102] *See, e.g.*, Address by James T. O'Reilly, Proctor & Gamble Co., to Chemical Specialties Manufacturers Association (May 21, 1983), *reprinted in* [1983] PROD. SAFETY & LIAB. REP. (BNA) 321 (urging manufacturers to recall defective products quickly and efficiently to limit product liability claims).

[103] Not all car owners receive the recall notice, and many of those who do fail to respond. Moreover, receipt of a notice may not be adequate proof that an owner assumed the risk. *See infra* notes 151-54 and accompanying text (describing inadequacies of recall letters).

[104] A manufacturer who has learned of a dangerous defect and fails to correct it may incur liability for punitive damages. *See* Gillham v. Admiral Corp., 523 F.2d 102 (6th Cir. 1973).

b. *Inducements Not to Recall.* The same factors that encourage recalls also can work to discourage them. For example, once a manufacturer has recalled a product, its product liability exposure may actually increase. In a product liability trial, evidence of the recall campaign may be admissible to show that the automobile in question was defective when it left the manufacturer.[105] Furthermore, the publicity accompanying recalls often increases the number of claims by informing those who have had accidents involving recalled vehicles that the defect may have caused the mishap.[106] Thus, in situations where a recall would be large and expensive and anticipated product liability suits few, paying the claimants may cost less than a recall.[107] In these instances, the threat of product liability claims provides little inducement to recall. Finally, publicity may discourage recalls by giving a possible edge to competitors—they may use the manufacturer's recall rate to disparage its products, as demonstrated by a recent advertisement touting Chrysler's relatively low recall rate.[108] While manufacturers may overestimate the adverse impact of recall-related publicity,[109] this concern nevertheless deters them from reporting defects and undertaking voluntary recalls.[110]

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[105] *E.g.*, Kane v. Ford Motor Co., 450 F.2d 315, 316 (3d Cir. 1971); Manieri v. Volkswagenwerk A.G., 376 A.2d 1317, 1322 (N.J. Super. Ct. App. Div. 1977). *But see* Vockie v. General Motors Corp., 66 F.R.D. 57 (E.D. Pa.), *aff'd*, 523 F.2d 1052 (3d Cir. 1975); Landry v. Adam, 282 So. 2d 590 (La. Ct. App. 1973). One court has reasoned that given the millions of recall letters each year, refusing to admit evidence of the recall would be prejudicial to the plaintiff, since "failure to mention the letters might cause jurors to believe the claimed defect was a solitary one and did not in fact exist." Barry v. Manglass, 55 A.D.2d 1, 11, 389 N.Y.S.2d 870, 877 (1976).

[106] ABA Panel Discussion, *supra* note 99. Firms expect the number of product liability claims involving a recalled product to jump markedly soon after the recall announcement. *Id.*

[107] In a pending case involving the potential recall of 5.3 million GM cars with allegedly defective rear axles, the company has estimated that the $125 million recall would prevent some 16 injury-causing accidents—roughly $8 million in recall costs for each injury. Wall St. J., May 5, 1983, at 4, col. 2. If these projections are correct, they may suggest to GM that paying the product liability claims would be less costly than recall.

[108] N.Y. Times, Sept. 27, 1983, at A23, col. 1. Chrysler claimed in a full-page advertisement that it had recalled only 6% of its 1982-83 models compared with Ford's 26% and GM's 12%. GM responded with a full-page advertisement on its recall program, explaining that recalls by the nation's largest auto producer may be more noticeable. *See GM Recall Advertisement*, *supra* note 65.

[109] *See* Wayne & Hoffer, *Auto Recalls: Do They Affect Market Share?*, 8 ECON. 157 (1976) (concluding that unless recalls are highly concentrated in a short period of time, they have little impact on market share); *see also* Wall St. J., Oct. 5, 1983, at 31, col. 4 (describing Subaru's popularity despite the fact that Subaru has recalled more cars than it has sold).

[110] *Cf. infra* note 223 and accompanying text (publicity deters defect reporting).

c. *Resisting Settlement: The Ford Transmission Case*. On the whole, the informal negotiation process yields satisfactory results. If, however, a manufacturer refuses a recall request and exhibits a willingness to avoid recall by fully exhausting available administrative and judicial procedures, NHTSA has, as a practical matter, no satisfactory recourse. Absent recall, existing procedures do not provide an effective remedy.[111] The Agency can close the case[112] or try to negotiate a remedy short of a recall, but these solutions do not effectively further the aims of the Safety Act.

A case in point is NHTSA's recent settlement with Ford Motor Company. The case involved some twenty-three million Ford automobiles equipped with automatic transmissions manufactured between 1966 and 1979.[113] An alleged defect in the transmissions caused them to slip out of park into reverse—which in turn caused sudden, unexpected rearward movement of the cars, commonly when drivers were outside.[114]

The Ford transmission case began when the Center for Auto Safety forwarded two consumer complaints to NHTSA.[115] The Agency conducted a thirty-month investigation[116] during which it received over 23,000 reports of park-to-reverse incidents.[117] It made an initial determination of a safety-related defect and held a three-day public hearing.[118] Ford consistently maintained that its vehicles were not defective and refused to recall them.[119] Since over ninety percent of its automatic transmission cars made between 1966 and 1979 were involved, a recall would have cost about $130 million.[120] Ford left little doubt that it would fight the recall vigorously at every stage of the lengthy process.[121]

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[111] *See supra* notes 89-93 and accompanying text.

[112] The Agency has closed several cases after unsuccessfully urging recalls. Wall St. J., June 16, 1983, at 1, col. 6. Former NHTSA Administrator Peck explained, however, that NHTSA often urged manufacturers to undertake recalls before completing a thorough investigation. If the company agrees to recall, the Agency has saved resources; if it does not, further investigation may reveal no grounds for a recall and the case will be closed. Peck Interview, *supra* note 53.

[113] N.Y. Times, Mar. 7, 1983, at A11, col. 1. The figure represents nearly 20% of all vehicles on the road. Center for Auto Safety, Inc. v. Lewis, 685 F.2d 656, 660 (D.C. Cir. 1982).

[114] 685 F.2d at 657.

[115] *See* Letter from Clarence M. Ditlow III, Director of the Center for Auto Safety, to Joan Claybrook, Administrator of the NHTSA (July 6, 1977) (on file with the *Case Western Reserve Law Review*).

[116] The investigation has been characterized as "the largest and most difficult and complex . . . ever conducted by NHTSA." Bradford Affidavit, *supra* note 91, at 333. It encompassed six different automatic transmissions on all Ford makes and models from 1970 through 1979. *Id.* at 333-34.

[117] The complaints derived from a variety of sources such as state and local consumer groups, individual vehicle owners, and police reports. They also resulted from NHTSA surveys of vehicle fleet owners (police departments and commercial and government fleet operators) and persons who had called the Agency's hotline. Brief for Plaintiffs-Appellants at 5 n.1, *Center for Auto Safety*, 685 F.2d 656.

[118] Brief for Appellees at 7-9, *Center for Auto Safety*. Following the public hearing, NHTSA Administrator Claybrook intended to make a final determination that vehicles

NHTSA settled the case without negotiating a recall. Among the prominent factors leading to its decision were the time required to pursue the case[122] and the drain on agency resources that litigation would create.[123] Under the terms of the settlement, Ford was to mail vehicle owners a letter informing them of NHTSA's defect determination, along with a self-sticking warning label to affix to their dashboards. The label reminded drivers to put the gear in park, set the parking brake, and turn off the ignition before leaving the driver's seat.[124]

Consumer advocates unsuccessfully challenged the settlement. The Court of Appeals for the District of Columbia Circuit upheld the settlement, ruling that the Safety Act did not compel the recall

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containing four of the six transmission types investigated were defective. This would have required Ford to recall some 10 million vehicles. Memorandum from Joan Claybrook to the Secretary of the Department of Transportation 1 (Oct. 3, 1980), *reprinted in* Joint Appendix at 293, *Center for Auto Safety*. Regarding vehicles equipped with the remaining two types, the Administrator intended to negotiate with Ford before making a final determination because the remedy was simpler and settlement was a possibility. *Id.* at 15, Joint Appendix at 307. Neither the Secretary nor the Administrator had made a formal final determination of defect when the case was settled. *See infra* notes 122-24 and accompanying text.

[119] Ford contended that no mechanized defect existed, that the transmission slippage was caused by vehicle operators and occurred no more frequently in Ford cars than others, and that the number of reported failures was exaggerated due to NHTSA's publicizing of the cases. *See* Brief for Appellees at 9 and Joint Appendix at 138-82, *Center for Auto Safety*.

[120] N.Y. Times, Mar. 7, 1983, at A11, col. 1.

[121] Ford had stated throughout the process that it would seek judicial review of a recall order. During the administrative hearing, it had sought preenforcement judicial review of the investigation. Its suit was dismissed by stipulation. Brief for Appellees at 9, *Center for Auto Safety*.

[122] NHTSA estimated that the enforcement action would take at least four years, during which about six million of the defective vehicles would be retired from service. Bradford Affidavit, *supra* note 91, at 335-36.

[123] The amount of time devoted by NHTSA's engineering staff to this one case impaired investigations of other defects. In the six months before settlement, six members of NHTSA's professional investigation staff worked full time and 10 spent 30% of their time on the Ford investigation. *Id.* at 334. Another factor was that proof of a safety-related defect was made difficult because drivers' actions were a key factor in the vehicle malfunctions. *Center for Auto Safety*, 685 F.2d at 663. *But see supra* text accompanying notes 30-33 (discussing *Wheels*). A defect may be found where significant failures occur in "normal operations," a term that includes reasonably foreseeable operator misuse.

[124] 685 F.2d at 661 n.4.

of the vehicles absent the Agency's final determination that the defect related to motor vehicle safety.[125] The court also concluded that the settlement was not arbitrary, capricious, or an abuse of discretion in light of the factors that led the Agency to settle the case.[126]

Considerable criticism has followed the settlement and NHTSA's subsequent failure to monitor its effectiveness in preventing further injuries.[127] Consumer advocates have claimed that since the settlement, transmission failures have caused over fifty fatalities, but NHTSA has refused to reopen the case.[128]

Although the Ford transmission case may be unique,[129] the problems it typifies are not. The lengthy procedures of the auto recall program frustrate the safety aims of the program when they prevent the Agency from obtaining a recall. An expeditious alternative procedure is therefore needed in serious defect cases. A provision granting NHTSA authority similar to the CPSC's "imminent hazards" authority[130]—allowing the Agency to go directly to federal district court for a recall order—would be useful. Although this remedy probably would be used rarely, its availability could give the Agency an added advantage in the settlement process, one lacking under the current procedural scheme.

5. *Recall Effectiveness*

The average owner response rate for auto recalls is higher than that for other product recalls.[131] A primary reason is direct notice—most car owners receive a letter notifying them of the recall.[132] Such notice is seldom possible in other product recalls because individual owners cannot be identified. Another reason for the higher response rate for autos is their expense. The automobile is a major investment for most owners, who have an interest in its maintenance.[133] Even so, the response rate for auto recalls is still quite low. Over the years, the rate has averaged about fifty percent, although an upswing has occurred in recent years.[134] Vehicle owners fail to respond for several reasons: inadequate notice, perception that the risk of injury is low, and the inconvenience of taking a car in for repairs.

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[125] *Id.* at 662. The Agency had not made a final determination. *See supra* note 117.

[126] 685 F.2d at 663.

[127] Congressman Timothy Wirth called the dashboard sticker "gibberish." Wall St. J., June 16, 1983, at 23, col. 1. Whether NHTSA has monitored the settlement is disputed. *See* N.Y. Times, Mar. 7, 1983, at A11, col. 1. According to former Administrator Peck, the Agency did follow up on the fatalities reported after the settlement. Peck Interview, *supra* note 53.

[128] Ditlow Interview, *supra* note 59. Before the settlement, 98 deaths, 1,700 injuries, and 6,000 accidents had been attributed to the Ford transmission defect. Wall St. J., June 16, 1983, at 23, col. 1. According to former NHTSA Administrator Peck, however, given the low return rates for recalls, it is not at all clear that recall and mechanical correction of the problem would have provided a more effective remedy than the warning sticker. Peck Interview, *supra* note 53.

[129] The estimated cost of the requested Ford transmission recall was $130 million. N.Y. Times, Mar. 7, 1983, at A11, col. 1. A recall order might have posed a serious threat to the company's survival at the time. Wall St. J., June 16, 1983, at 1, col. 6. In addition, the parties settled the case near the end of the Carter Administration, giving rise to speculation that the policymakers wanted to secure some remedy in the case before leaving office.

[130] *See infra* notes 190-91 and accompanying text.

[131] While about 50% of car owners respond to recalls, *see infra* note 134 and accompa-

a. *Lack of Notice*. Owners state that lack of notice is a major reason for not responding to recalls.[135] One study showed that nearly a quarter of those not responding claimed they had not been notified.[136] The authors of the study concluded that some members of that group probably had received notice but had forgotten, especially if they had perceived the defect as trivial.[137] In addition, the study theorized that some may have used lack of notice as a socially desirable excuse for not having responded to a recall.[138] Others obviously had not received notice due to difficulties inherent in using the mail to reach every car owner. Manufac-

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nying text, only about 10% of consumers respond to recalls under the CPSC's jurisdiction. *See infra* note 175 and accompanying text.

[132] *See supra* note 25 and accompanying text (Safety Act's notice requirements).

[133] A CPSC study demonstrated that recalls of costly products are more likely to be effective than recalls of less expensive items. *See infra* notes 283, 285.

[134] GAO RECALL REPORT, *supra* note 27, at 15. The overall average return rate between 1966 and 1979 was 53.5%. *Id.* The return rate in 1981 was 67.2% and the 1982 rate is also expected to be well above average. Telephone interview with Bobby Boaz, NHTSA Office of Public Affairs (Sept. 30, 1983).

[135] U.S. DEP'T OF TRANSP., STUDY TO DETERMINE WHY VEHICLE OWNERS RESPOND TO OR IGNORE RECALL NOTIFICATIONS 24 (1980) (prepared by Market Facts, Inc. for NHTSA) [hereinafter cited as DOT RECALL STUDY]. The targets of 25 recall campaigns in 1977 and 1978 comprised the sample for the study, during which the authors completed over 6,000 interviews with responders and nonresponders.

[136] *Id.* For some campaigns the figures were even higher—more than 50%—and in one case up to 81% of the nonresponding owners claimed they had not received notice. *Id.* at 23.

[137] For example, in one recall involving merely the replacement of a label, 46.2% of those who had returned their cars for service claimed not to have received a recall notice. *Id.* at 20. Undoubtedly they had received the notice and forgotten.

[138] Indirect evidence of this phenomenon is found in cases in which nonresponders thought the defect was serious. Of this group, 24% claimed they had received no notice. Only 8.8% of the nonresponders who thought the defect was trivial cited this excuse. Since it is unlikely that actual receipt would depend on the seriousness of the defect, a plausible explanation is that the nonresponders sought a socially acceptable justification for their inaction.

turers send notices based on state vehicle registration information which is never completely up to date when the manufacturers obtain it.[139] In recalls of older cars, notification is especially difficult because of the likelihood that the cars have changed owners.[140]

In any event, lack of notice is not always an important reason for a low response rate. In the well-publicized Pinto recall, for example, nearly half the owners did not respond[141] and only 0.8% gave lack of notice as their excuse.[142] A large percentage (22%) failed to respond because of the time or inconvenience involved.[143] Although a certain percentage of owners might ignore a recall notice under almost any circumstances, the low response rate nevertheless casts doubt on whether the notice does an adequate job of informing owners of the risk.

b. *Inadequate Notice*. Current regulations carefully prescribe the contents of recall letters,[144] thereby eliminating NHTSA's practice of allowing manufacturers to draft their own recall letters, which sometimes included denials that a defect existed.[145] The regulations cover all recall letters, whether NHTSA ordered or manufacturer initiated.[146] The letter must describe the defect,[147] evaluate the risk,[148] specify measures for remedying the defect,[149] and state that owners may file a complaint with NHTSA if the defect is not corrected.[150]

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[139] Ditlow Interview, *supra* note 59.

[140] *Id*.

[141] GAO Recall Report, *supra* note 27, at 44.

[142] DOT Recall Study, *supra* note 135, at 25. The Pinto recall was among those examined in the study.

[143] *Id*. Other reasons given for not responding were that the car was sold before the recall (29.4%), the parts were not in stock or service was bad (7.6%), there was nothing wrong with the car (1.7%), or the car already had been serviced (23.5%). *Id*.

[144] *See* 49 C.F.R. § 577.1-.9 (1983).

[145] Believing that the disclaimers would not "normally" affect owner response to recalls, NHTSA had allowed the practice to continue for a number of years. *See* 38 Fed. Reg. 22,126 (1973). The Agency later reversed itself, finding that such disclaimers might effectively discourage owner response. 41 Fed. Reg. 56,815 (1976); *see also supra* note 19 (providing example of effects of this practice).

[146] 49 C.F.R. §§ 577.5(c), .6(a) (1983).

[147] *Id*. § 577.5(e). The description must identify the vehicle system or item affected and describe the potential malfunction, the conditions that may cause the malfunction, and the precautions the owner should take before repair. *Id*.

[148] *Id*. § 577.5(f). If a crash without warning is a risk, the letter must so state; if a warning may occur before a crash the letter must describe it, along with an admonition that failure to heed the warning may result in a crash. If the risk does not involve a crash, the manufacturer must describe the type of injury that may result. *Id*.

[149] *Id*. § 577.5(g)(1). The letter must indicate that the remedy will be provided without charge, give the earliest date when repair or replacement will be available, describe the necessary work, and estimate the amount of time required to correct the defect.

Although the requirements for the recall letters are detailed and exhaustive, they have not substantially increased owner response rates. Indeed, a GAO study attributed some lack of response to the style used in drafting recall letters.[151] Not only do manufacturers write the letters at reading levels too advanced for most adults,[152] but they also fail to highlight safety risks to impress the reader.[153] GAO concluded that owners fail to respond to recalls because they underestimate the importance of having the defect corrected.[154] To remedy the inadequacy, GAO recommended lowering the reading level of the letter,[155] highlighting the safety consequences of the defect,[156] and mailing a postcard reminder shortly after the first recall letter is sent.[157] In response to the first recommendation, NHTSA has begun making the letter more understandable.[158] This is a positive development which should help increase response rates. The increase may not be marked, however, because even when owners fully understand the risks many do not return their vehicles for repair.[159]

c. *Risk Perceptions*. Many vehicle owners fail to perceive the safety-related defect as serious or likely to injure them. Often this perception is correct. Even NHTSA concedes that "relatively few recalls in fact represent extremely grave or urgent elements of risk or exposure."[160] Recalls for windshield wiper failures exemplify the nonurgent case.[161] Moreover, in some cases only a few of the thousands of cars recalled actually contain a defect.[162] Owners who return their cars for repairs only to be told that no defect exists may be less likely to respond to future recalls.[163] Owners who do not respond and never encounter the problem described in the recall letter also may be less likely to respond to future recalls.

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[150] *Id.* § 577.5(g)(1)(vii)(A), (B)(1). The letter must provide NHTSA's name and address and indicate that the owner should file a complaint if the manufacturer did not correct the defect free of charge or within 60 days after the owner first tendered the vehicle for repair.

[151] *See* GAO RECALL REPORT, *supra* note 27, at 16-24.

[152] An analysis of 11 recall letters demonstrated that the letters were written at levels requiring between 12.4 years of education (December of 12th grade) to 16.4 years (senior year of college). About 54% of the adult population reads at or below the 11th grade level. *Id.* at 18.

[153] *Id.* at 19. The information about safety consequences is buried in the last line of a paragraph near the middle of the text.

[154] *Id.* at 14.

[155] *Id.* at 24. In the study, GAO converted a typical recall letter from 12th grade level to 5th grade level, demonstrating that it could convey the same information more logically and comprehensibly. *Id.* at 20-21.

[156] The proposed recall letters would begin with a notice about how the safety defect could cause the vehicle to fail and result in a crash. This notice would be printed in capital letters and boxed for emphasis. *Id.* at 21.

[157] The GAO based this recommendation on the successful use of follow-up postcards to increase response rates in public opinion surveys. *Id.* at 14.

[158] The Agency hired a private firm to write a readable letter, provoking criticism for being unable to write one itself and for paying the firm approximately $23,000. *See Why Uncle Sam Can't Write*, Wash. Post, Mar. 5, 1983, at A22, col. 1.

[159] *See supra* notes 141-43 and accompanying text (discussing Pinto recall).

GAO's recommended approach to the risk perception problem is increased emphasis in recall letters on the safety consequences of the defect.[164] This approach, however, involves the risk of exaggerating the danger and ultimately diminishing the overall impact of recall letters. Another suggested approach is reducing the number of recalls by raising the threshold of risk which warrants a recall.[165] Using the recall remedy to address only the most serious defects would give individual recall campaigns more force. This approach, however, deprives consumers of a benefit they currently enjoy under the Safety Act—free repair of less serious safety-related defects.

A compromise approach is preserving the broad scope of NHTSA's recall program while developing a recall classification system to identify high-risk, imminent hazard recalls. This would aid owners in assessing the danger of a defect. NHTSA would thus follow the example of the FDA, which for years has classified recalls by risk in order to communicate the seriousness of a problem to the public.[166] Although the classification system does have drawbacks, especially during the recall negotiation phase,[167] if it could improve response rates in serious defect cases (even if it reduced them in the less serious cases), it would be worth the effort.[168]

Aside from the defect notification letter, NHTSA imposes no obligation to improve owner response even when the response rate is low and the risk high.[169] Fortunately, manufacturers do take extra steps to encourage owners to return their cars for repairs.[170] Nevertheless, NHTSA should experiment with other devices for improving return rates in high-risk recalls. The Agency might further publicize recalls where owner response has been low, or require manufacturers to send follow-up mailgrams or pay for notices sent by NHTSA.[171] Notice from a government authority can have extra clout with consumers, impressing upon them the importance of responding to a recall.[172]

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[160] GAO RECALL REPORT, *supra* note 27, at 43.

[161] *See* DOT RECALL STUDY, *supra* note 135, at 20.

[162] Peck Interview, *supra* note 53. Most autos are recalled for flawed or improperly manufactured components, although some are recalled for defective designs as well. The manufacturer may find the flaws in only a small number of the cars it recalls. *Id.*

[163] *Id.*

[164] *See supra* note 156 and accompanying text.

[165] *See generally* Note, *supra* note 8.

[166] *See infra* notes 409-13 and accompanying text.

[167] The FDA's classification system has inhibited settlement, and the Agency has considered abandoning it. *See infra* notes 448-51 and accompanying text.

[168] The FDA has never evaluated its classification scheme. *See infra* note 453. Other agencies need to test the system to determine whether its implementation would be practicable and whether it would improve recall response rates in serious defect cases.

Some owners will not respond to a recall even when the notice is received, adequately informs the owner of the risk, and reveals that the risk is high.[173] For these owners, little, if anything, can be done short of an enforcement scheme penalizing the failure to respond. Such a scheme is technically possible—for example, federal law could prohibit states from registering vehicles that have been recalled but not repaired.[174] This scheme certainly would improve recall response rates; it might be even more effective if applied only to high-risk recalls so as not to burden the states unduly.

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[169] NHTSA monitors all recalls but imposes no additional requirements on manufacturers when the return rate is low. In some cases, however, the Agency encourages manufacturers to mail out additional notices. Peck Interview, *supra* note 53.

[170] Ditlow Interview, *supra* note 59. Concerns about product liability claims partially motivate manufacturers to achieve high return rates. *See GM Recall Advertisement*, *supra* note 65 (GM goes beyond federal requirements by sending follow-up letters to owners not responding to initial recall notice).

[171] Ditlow Interview, *supra* note 59. NHTSA could also require manufacturers to offer prospective used car buyers data on whether individual cars have been recalled and repaired. This information is readily available to manufacturers. GM's Computerized Recall Identification System (CRIS), for example, can reveal instantly based on the vehicle identification number whether recall work has been performed. *GM Recall Advertisement*, *supra* note 65. Publicizing the availability of this information might provide another incentive for owners to respond to recalls.

[172] For example, the Attorney General of Indiana aids auto dealers in their recall efforts by sending his own letter, which urges vehicle owners, "[P]rotect yourself and your family by taking [your] vehicle to your dealer as soon as possible." The letter stresses that failure to have the vehicle repaired "could have an effect on your auto liability insurance." Since this assistance from the Attorney General's Office became available in January, 1982, many dealers have utilized it and customer response rates have improved substantially. Letter from Eric M. Cavanaugh, Deputy Attorney General of Indiana, to Sam Zagoria, Commissioner of the Consumer Product Safety Commission (Nov. 5, 1982) (on file with the *Case Western Reserve Law Review*).

[173] The Pinto recall best exemplifies this phenomenon. *See supra* notes 141-43 and accompanying text.

[174] Based on manufacturers' records kept according to vehicle identification numbers, the state could determine whether a car had been repaired. Ditlow Interview, *supra* note 59.

D. *Recommendations*

The auto recall program should continue to operate largely on a voluntary basis. However, three statutory amendments would help to reduce delays in the negotiation process, thereby enhancing recall effectiveness. The first is to add a provision similar to that contained in the Consumer Product Safety Act, requiring manufacturers to notify NHTSA of defects that could create hazards. This provision would give the Agency early warning of a problem and reduce its information-gathering burden. The second is to revoke the eight-year statute of limitations on no-charge repairs, which can encourage dilatory tactics in the investigation of defects. The third is to add a provision granting NHTSA authority to bypass the administrative hearing and seek court-ordered recalls in cases of serious, imminent hazard.

To increase recall effectiveness, NHTSA should improve its notification letter and consider classifying recalls according to risk, tailoring the recalls' requirements to meet that risk. This approach might help consumers more accurately assess the risks of safety-related defects, without limiting NHTSA's use of the recall remedy or the opportunity for no-cost repairs afforded under the Safety Act.

II. THE CONSUMER PRODUCT SAFETY COMMISSION

The CPSC is the newest and smallest of the three Agencies with recall authority. Since its establishment in 1972, it has participated in roughly 3,000 recalls involving approximately 300 million product units.[175] These figures reflect the Agency's

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[175] TABLE I

FISCAL YEAR	NUMBER OF RECALLS*	NUMBER OF PRODUCTS INVOLVED	PERCENTAGE RETURNED
1982	91	2,570,117	17.4%
1981	40	2,475,455	25.6%
1980	132	23,310,834	15.6%
1979	198	53,555,927	8.3%
1978	128	35,112,116	16.6%
1977	89	27,281,798	4.2%
1976	162	12,289,631	15.5%
1975	124	12,186,228	25.4%
1974	145	12,205,799	18.9%
1973	3	49,999	99.8%
Total	1,112	181,137,904	12.5%**

* Under § 15(a)(2) of the Consumer Product Safety Act, 15 U.S.C. § 2064(a) (1982).

** Average percentage

preference for the recall as an enforcement tool, as well as the diversity and breadth of the Commission's jurisdiction.[176] Recalls by the CPSC generally address many products, are undertaken voluntarily by manufacturers, and yield low consumer return rates.

A. *Recall Authority*

The CPSC enforces five federal statutes: the Consumer Product Safety Act (CPSA),[177] the Federal Hazardous Substances Act (FHSA),[178] the Flammable Fabrics Act (FFA),[179] the Poison Prevention Packaging Act (PPPA),[180] and the Refrigerator Safety Act (RSA).[181] The latter four are often referred to as the "transferred acts" because other agencies had enforced them before creation of the CPSC.

1. *The Transferred Acts*

Of the four transferred acts, only the FHSA contains specific

TABLE II

FISCAL YEAR	NUMBER OF RECALLS*	NUMBER OF PRODUCTS INVOLVED	PERCENTAGE RETURNED
1982	72	830,197	22.7%
1981	251	906,810	35.6%
1980	456	3,189,775	19.3%
1979	347	4,478,863	6.6%
1978	149	4,652,293	15.4%
1977	58	16,222,526	10.4%
1976	85	78,083,419	0.5%
1975	67	353,270	33.0%
1974	124	1,640,679	42.1%
1973	394	—	—
Total	1,899	109,809,648	4.5%**

* Under CPSA, FHSA, and FFA regulations

** Average percentage

The average return rate for all products is 9.8%. By excluding fiscal year 1976, an aberrational year, the average rises to 13.1%. Interview with David Thome, Director of the Division of Corrective Actions, Directorate for Compliance and Administrative Litigation, CPSC, in Washington, D.C. (Sept. 22, 1983) [hereinafter cited as Thome Interview].

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[176] Estimates of the number of products under the Agency's jurisdiction range from 10,000 to 15,000. H.R. REP. No. 114, 98th Cong., 1st Sess. 3 (1983).

[177] Pub. L. No. 92-573, 86 Stat. 1207 (1972) (codified as amended at 15 U.S.C. §§ 2051-2083 (1982)).

[178] Pub. L. No. 86-613, 74 Stat. 372 (1960) (codified as amended at 15 U.S.C. §§ 1261-1276 (1982)).

[179] Ch. 164, 67 Stat. 111 (1953) (codified as amended at 15 U.S.C. §§ 1191-1204 (1982)).

[180] Pub. L. No. 90-601, 84 Stat. 1670 (1970) (codified as amended at 15 U.S.C. §§ 1471-1474, 1476 (1982)).

[181] Ch. 890, 70 Stat. 953 (1956) (codified at 15 U.S.C. §§ 1211-1214 (1982)).

recall authorization.[182] Until 1981, the Act included a rigid recall provision mandating repurchase of *every* noncomplying product, no matter how insignificant the hazard or degree of noncompliance.[183] In 1981, Congress replaced the provision with one modeled on the CPSA's recall requirements.[184]

For a number of years, the Commission had maintained that the FFA implicitly authorized recalls as part of the injunctive relief available to restrain ongoing violations of the Act.[185] In *Congoleum Industries, Inc. v. Consumer Product Safety Commission*, however, the United States Court of Appeals for the Ninth Circuit ruled that absent specific authorization by the FFA, no recalls could be ordered.[186] In the staff's view, however, section 15 of the CPSA empowers the Commission to recall dangerously flammable products.[187]

2. *The CPSA*

Congress enacted the CPSA in 1972, at the end of the "consumer decade"—a decade marked by high expectations about the government's ability to correct safety problems and passage of numerous health and safety statutes.[188] The CPSA gave the Commission enormously broad jurisdiction over consumer products and an equally broad range of enforcement tools,[189] including the most expansive recall powers authorized at the federal level.

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[182] The CPSC's authority to recall under the RSA has never been tested because virtually all refrigerator manufacturers have complied with the statute. Interview with Robert Poth, Director of the Division of Regulatory Management, Bureau of Compliance, CPSC, in Washington, D.C. (Sept. 19, 1983) [hereinafter cited as Poth Interview]. Likewise, neither the PPPA, the FHSA nor the FFCA contains recall authority; however, CPSC staff have argued that in an appropriate case involving a severe hazard, the Commission could seek the recall of noncomplying PPPA packaging under § 15 of the CPSA since the packaging would be a consumer product. The Commission has not yet attempted to use this section because in the few instances where it might have applied, companies recalled voluntarily. Normally, however, the CPSC does not seek consumer-level recalls for noncomplying packaging under the PPPA. Interview with Michael Gidding, Staff Attorney for the CPSC, in Washington, D.C. (Nov. 10, 1983).

[183] 15 U.S.C. § 1274 (1982).

[184] *See* Consumer Product Safety Amendments of 1981, Pub. L. No. 97-35, § 1211(f)(1), 95 Stat. 703, 721 (1981) (codified at 15 U.S.C. § 1274 (1982)). As amended, the FHSA authorizes the recall of banned hazardous substances after a hearing similar to that mandated by § 15 of the CPSA.

[185] The FFA authorizes the CPSC to enjoin future violations by issuing cease and desist orders under the Federal Trade Commission Act, 15 U.S.C. § 1194 (1982).

[186] 602 F.2d 220 (9th Cir. 1979).

[187] Interview with Philip Bechtel, Director of the Division of Administrative Litigation, Directorate for Compliance and Administrative Litigation, CPSC, in Washington, D.C. (June 16, 1983) [hereinafter cited as Bechtel Interview]. The staff's recall theory for the FFA is the same as its theory for the PPPA. *See supra* note 182.

[188] *See* Schwartz, *The Consumer Product Safety Commission: A Flawed Product of the Consumer Decade*, 51 GEO. WASH. L. REV. 32, 33-34, 42-45 (1982).

a. *Imminent Hazards—Section 12*. The CPSC may seek recall under two provisions of the CPSA. Under section 12, it can proceed directly to federal district court in the case of an "imminently hazardous" consumer product.[190] An imminently hazardous product is one presenting an "imminent and unreasonable risk of death, serious illness, or severe personal injury."[191] Since its inception, the CPSC has filed only four imminent hazard actions. Three of the cases—which involved a "trouble light" posing an electrocution hazard,[192] an amusement park ride with defective door latches,[193] and an automatic pitching machine that activated without warning even when turned off[194]—were settled before final court rulings. The fourth, involving aluminum wire, was dismissed on jurisdictional grounds after years of litigation and appeals.[195]

One writer, noting that courts have insisted on lengthy, full-fledged evidentiary hearings in imminent hazard cases, has suggested that section 12 is not the emergency procedure envisioned by Congress.[196] However, this judgment is probably premature. In three of the four cases, the Commission obtained either an immediate temporary restraining order or an informal agreement by the defendants to halt further distribution of the allegedly hazardous products pending the outcome of the case. Moreover, the satisfactory settlement of three of the four cases commends the process,[197] suggesting that court action expedites settlement and thereby produces the desired result—prompt recall of the products.

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[189] *See id*. at 43-44 (describing CPSC's administrative powers and authority to seek various forms of judicial relief).

[190] 15 U.S.C. § 2061 (1982). The Commission may bring an imminent hazard case in its own name, and need not use Justice Department lawyers, who may lack knowledge about the facts of a case or the applicable law.

[191] *Id*. § 2061(a).

[192] CPSC v. A-K Elec. Co., No. 74-1026 (D.D.C. filed Sept. 9, 1974).

[193] CPSC v. Advance Mach. Co., No. 77-1323 (D.D.C. consent judgment May 8, 1978), *discussed in* PRODUCT HAZARDS: A CASE HISTORY GUIDEBOOK 93-97 (S. Coffin ed. 1981) [hereinafter cited as PRODUCT HAZARDS].

[194] CPSC v. Chance Mfg. Co., 441 F. Supp. 228 (D.D.C. 1977) (consent decree signed Nov. 30, 1978), *discussed in* PRODUCT HAZARDS, *supra* note 193, at 107-11.

[195] CPSC v. Anaconda Co., 3 CONSUMER PROD. SAFETY GUIDE (CCH) ¶ 75,284 (D.C. Cir. Jan. 7, 1982). The court held that since branch circuit aluminum wiring systems are not customarily sold or distributed to consumers as distinct articles of commerce, they are not "consumer products" within the CPSA.

[196] *See* Madden, *Consumer Product Safety Act Section 15 Substantial Product Hazards*, in PRODUCT HAZARDS, *supra* note 193, at 5, 27.

[197] Bechtel Interview, *supra* note 187.

b. *Substantial Product Hazards—Section 15.* The authority most often used for recalls under the CPSA is section 15.[198] The provision has become the Commission's favorite enforcement tool, its use far eclipsing the issuance of safety standards and product bans.[199] Section 15 authorizes the CPSC to seek recall of "substantial product hazards," products that create a "substantial risk of injury to the public" either because they fail to comply with a consumer product safety rule or because they contain a defect.[200]

Congress offered scant guidance as to what constitutes a defect under section 15 and no court has interpreted its meaning. In 1978, the Commission promulgated a detailed interpretive rule codifying its view of the recall provision.[201] The rule broadly defines defect to include design deficiencies as well as product flaws due to quality control problems.[202] It also provides examples of defective products, including those that fail to perform as advertised, those made dangerous by inadequate warnings about foreseeable product use and misuse, and those exhibiting a pattern of failure even though the specific cause of the problem cannot be pinpointed.[203] The Commission indicated that it would determine defectiveness under a balancing test, weighing the risk of injury against such factors as the product's utility, necessity, and type of risk presented.[204]

Not every safety rule violation presents a "substantial product hazard," nor does every defective product. To present a substantial product hazard, the defect must create a "substantial risk of injury to the public"[205] because of the "pattern of the defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise."[206] The Commission views these factors as disjunctive, only one need be demonstrated to prove a substantial product hazard. Thus, a product presenting the risk of minor injury with great frequency could pose a substantial product hazard, as could a product presenting a severe but infrequent hazard.[207]

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[198] 15 U.S.C. § 2064 (1982).

[199] *See* Schwartz, *supra* note 188, at 69.

[200] 15 U.S.C. § 2064 (1982). Although this provision limits recalls to products posing substantial risks and thus precludes recalls for minor violations of consumer product safety rules, the CPSC may seek a court order permitting it to seize offending goods or to prevent their further manufacture or distribution. *Id.* § 2071. The Commission may also seek civil penalties for knowing violations of consumer product safety rules. *Id.* § 2069. In the rare case where the Commission proves a knowing and willful violation after notice of noncompliance, criminal sanctions are available. *Id.* § 2070.

[201] 16 C.F.R. § 1115 (1984).

[202] *Id.* § 1115.4. For an example of a design defect case, see *infra* note 260 and accompanying text.

[203] 16 C.F.R. § 1115.4 (1984). For an example of a case where a defect could not be pinpointed, see *infra* note 259 and accompanying text.

[204] 16 C.F.R. § 1115.4 (1984).

B. *Implementing the Recall Authority*

1. *Identifying Defects*

The CPSC learns of potential hazards from many sources, including agency inspections and accident investigations, news reports, and complaints from consumers and manufacturers' competitors.[208] Its most important sources, however, are manufacturers of consumer products obliged to report hazards and potential hazards under section 15(b) of the CPSA.[209]

The reporting obligation under section 15(b) is broader than that under the National Traffic and Motor Vehicle Safety Act.[210] A company must report under the CPSA not only when it discovers that a product presents a substantial product hazard, but also when it obtains information that "reasonably supports the conclusion" that a product defect "could create" a substantial product hazard.[211] Failures to report can subject violators to civil fines up to $500,000[212] and possibly to criminal penalties.[213] While the Commission has only infrequently imposed civil penalties,[214] it has used its civil penalty authority more than NHTSA has used similar authority.[215] The Commission has done so both to deter reporting violations and in some cases to negotiate more effective recalls.[216]

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[205] 15 U.S.C. § 2064(a)(2) (1982).

[206] 16 C.F.R. § 1115.4 (1984). Under the interpretive rule, the "pattern of defect" refers to the source of the defect, i.e., the design, construction, packaging, warnings, etc., and the conditions under which the defect manifests itself. *Id.* In the Commission's view, the "number of products distributed in commerce" can be miniscule—even one defective product—if injury is likely and/or serious. In judging the "severity of the risk," the Commission considers the gravity and likelihood of injury, taking into account the number of reported injuries, the intended or reasonably foreseeable use of the product, and the population group exposed to the product (children, elderly, handicapped). *Id.*

[207] *See, e.g.*, cases cited *infra* note 258.

[208] Memorandum from David Schmeltzer, Director of the Directorate for Compliance and Administrative Litigation, CPSC, to Stuart Statler, Commissioner of the CPSC 2 (May 26, 1983) (on file with the *Case Western Reserve Law Review*) [hereinafter cited as Schmeltzer Memorandum]. A sizeable number of cases of noncompliance with agency regulations begin with "trade complaints" from competitors. Poth Interview, *supra* note 182.

[209] 15 U.S.C. § 2064(b) (1982). Roughly 60% of CPSC-conducted recalls of defective products (excluding those involving safety rule violations) result from § 15(b) reports. Many of these reports are stimulated by the Commission's "pre-section 15(b)" letters, which inform companies of injury or accident reports brought to the CPSC's attention. Each letter reminds the company of its reporting obligations under the CPSA. Thome Interview, *supra* note 175.

[210] *See supra* note 55 and accompanying text.

To stimulate reporting and provide guidance to those subject to section 15(b), Congress and the Commission have identified two situations that must be reported immediately[217]—failure of a product to comply with a consumer product safety standard or ban[218] and a product defect that has caused or could help cause death or grievous bodily injury.[219] In addition, the Commission has listed a number of circumstances that companies should study and evaluate in determining whether they must report.[220]

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[211] Section 15(b) provides:

> Every manufacturer of a consumer product distributed in commerce, and every distributor and retailer of such product, who obtains information which reasonably supports the conclusion that such product—
>
> (1) fails to comply with an applicable product safety rule; or
>
> (2) contains a defect which could create a substantial product hazard described in subsection (a)(2) of this section,
>
> shall immediately inform the Commission of such failure to comply or of such defect, unless such manufacturer, distributor, or retailer has actual knowledge that the Commission has been adequately informed of such defect or failure to comply.

15 U.S.C. § 2064(b) (1982).

[212] Failure to report is a prohibited act under § 2068(a)(4), for which civil penalties can be imposed. *Id.* § 2069.

[213] Criminal sanctions can be imposed only for knowing and willful violations after notice of noncompliance. *Id.* § 2070. The Commission has yet to confront a case warranting action under this section.

[214] As of mid-1983, the Commission had obtained civil penalties from manufacturers for failures to make timely reports in 14 cases. This number reflects the Commission's general inclination not to pursue de minimis violations. *See infra* note 225 and accompanying text. Most assessments have been above $70,000, with several over $300,000. Bechtel Interview, *supra* note 187.

[215] *See supra* note 53 and accompanying text.

[216] *See, e.g.*, *In re* Bassett Furniture Indus., CPSC No. 78-51 (hazard determination Jan. 24, 1978); CPSC No. 78-81 (hazard determination May 3, 1978), *discussed in* PRODUCT HAZARDS, *supra* note 193, at 134-39 (Commission negotiated very effective recall plan and agreed to relatively small civil penalty as part of settlement); *see also infra* note 294 and accompanying text.

[217] *See* 15 U.S.C. § 2064(b) (1982). The Commission defines "immediately" as within 24 hours of determining that a reporting obligation exists. While the obligation does not arise when a company has only a vague hint that it may have a problem, it may arise before a company has completed investigating the problem. According to the Commission:

> [T]he 24-hour period begins when the subject firm has information which reasonably supports the conclusion that its consumer product fails to comply with an applicable consumer product safety rule or contains a defect which could create a substantial product hazard. Thus, a firm could report to the Commission before the conclusion of a reasonably expeditious investigation and evaluation if the reportable information becomes known during the course of the investigation.

16 C.F.R. § 1115.14(e) (1984).

Although the reporting requirement is broad, only a small number of section 15(b) reports are submitted yearly. The number of reports decreased in 1980, 1981, and 1982, but rebounded in fiscal 1983.[221] The decline may reflect a general perception by business that the severe budget and staff cuts following the 1980 election had substantially reduced the CPSC's capacity to enforce the statute, reducing the risk of not reporting.[222] Other factors also discourage reporting. These include the risk of adverse publicity regarding even minor problems[223] and the possibility that the Commission will view a defect that a firm believes not to be hazardous as serious enough to warrant a recall, or deem a report untimely and impose penalties.

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[218] A product's failure to comply with a regulation under one of the transferred acts must be reported if it constitutes "a defect that could create a substantial product hazard" under § 15(b). *See id.* § 1115.2(c).

[219] *Id.* §§ 1115.12(a), (c). In the latter case, a company need not report if it determines that its investigation does not support the existence of a product defect which could create a substantial product hazard.

[220] Under the Commission's rule, companies should make further inquiries when information from the following sources suggests either noncompliance with a safety rule or existence of a potential safety problem: (1) engineering, quality control or production data, (2) safety-related production or design changes, (3) product liability suit(s), (4) independent laboratory tests, (5) complaints from a consumer or consumer group, and (6) information from the CPSC or another agency. *Id.* § 1115.12(e). The Commission takes the position that investigations and evaluations generally should not exceed 10 days. *Id.* § 1115.14(d). If a firm reasonably could conclude that it is obliged to report before the end of the 10-day investigation and evaluation period, it must so report. *See supra* note 217.

[221] The number of § 15(b) reports filed with the CPSC since its establishment is as follows:

Year	Number of Reports
1983	131
1982	96
1981	121
1980	147
1979	201
1978	118
1977	74
1976	99
1975	119
1974	120
1973	3

Bechtel Interview, *supra* note 187.

[222] *Id.*

[223] For years, companies had argued that adverse publicity presented an extremely strong disincentive to § 15(b) reports and urged the Commission to keep all such reports confidential. *See* 43 Fed. Reg. 34,995-96 (1978).

CPSC officials have attempted to minimize these disincentives by giving the benefit of the doubt to firms that report safety problems promptly[224] and by ignoring de minimis reporting violations.[225] Moreover, the Commission has made clear that filing a section 15(b) report is not an admission that a substantial product hazard exists.[226] Finally, Congress virtually eliminated the risk of adverse publicity in 1981, by amending the CPSA to bar release of information submitted under section 15(b) except in very limited circumstances.[227] Despite the paucity of reports filed with the CPSC, section 15(b) has been useful, not only providing the Commission with early information about potential problems, but also giving it additional leverage in negotiating recalls when section 15(b) arguably has been violated.[228]

2. *The Investigative Stage*

The CPSC follows different investigative procedures for products violating safety rules than for those containing defects.

a. *Products Violating Safety Rules.* Since determining whether a product violates a rule or ban is generally easy, the Commission has delegated responsibility for these cases to its regional offices.[229] The regional staff makes an initial investigation and, if warranted, collects a sample and forwards it to headquarters for testing. If testing confirms a violation, the regional office sends the firm a "letter of advice" advising it of the violation and requesting that it stop distributing the product.[230] If the regional office in conjunction with headquarters decides that a recall is appropriate, it asks the firm to present a recall plan. Typically, companies have ten days to respond to letters of advice.[231] The regional office monitors the corrective action plan until completion, at which time the regional compliance officer closes the case. If the matter is of sufficient magnitude, approval from headquarters may be required.[232]

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[224] Bechtel Interview, *supra* note 187.

[225] For example, in *In re* McGraw-Edison, CPSC No. 77-26 (defect reported July 21, 1977), *discussed in* PRODUCT HAZARDS, *supra* note 193, at 82-83, the Commission did not pursue the company for a possible eight-day reporting delay where the company, when alerted by quality control, found a possible problem, immediately embargoed further production, and fully investigated the problem. CPSC staff concluded that the evidence then available to the company indicated the minor nature of the hazard. *See supra* note 214 and accompanying text.

[226] The Commission's reporting rule provides that companies need not admit and may specifically deny that the information they report reveals a substantial product hazard or noncompliance with a safety rule. 16 C.F.R. § 1115.12(a) (1984).

[227] 15 U.S.C. § 2055(b)(5) (1982). The CPSC may not release any information submitted to it under under § 15(b) unless: (1) it files a complaint against the reporting firm; (2) it enters into a written remedial settlement agreement with the firm; (3) the firm agrees to the release of the information; (4) the Commission has filed an imminent hazard case under § 12 of the CPSA; (5) it has reasonable cause to believe that the information concerns a product in violation of § 19(a) of the CPSA, 15 U.S.C. § 2067(a); or (6) the information is revealed in the course of or concerning a judicial proceeding.

[228] *See supra* note 216 and accompanying text.

[229] Schmeltzer Memorandum, *supra* note 208.

b. *Product Defects*. Normally, greater judgment is required to determine whether a defective product presents a substantial hazard. Thus, the Commission's decisionmaking process for those cases is more centralized. In a typical case, the CPSC assigns a compliance officer at headquarters to investigate the suspect product. If, after consulting with agency epidemiologists and engineers, the officer determines that a substantial hazard may exist, he sends a letter to the manufacturer (or importer) requesting injury information, production figures, and other pertinent data. In the alternative, the officer can assign an inspector to visit the firm and gather this information.[233]

If the data reveal a substantial hazard, the officer recommends that the Director of the Division of Corrective Actions make a preliminary determination that the product presents a substantial hazard. If the Director agrees, the compliance officer sends a "case opening letter" to the manufacturer indicating the preliminary finding and requesting the firm to submit a proposed corrective action plan.[234]

At this stage, the compliance officer, in consultation with the Director of the Corrective Action Division, classifies the product according to the CPSC's three-tiered hazard classification system. This system, designed primarily for internal use,[235] ranks products as A, B, or C hazards based on severity and likelihood of injury.[236] The higher a product's hazard rating, the more likely it is to receive the Commission's attention. As a policy matter, the Commissioners are immediately notified of class A hazards and continuously apprised of developments in those cases. In recalls of products with high hazard ratings, the Commission is likely to require individual notice to consumers, widespread publicity, explicit descriptions of the hazard in recall letters, and close agency scrutiny of the company's progress in implementing the recall.[237]

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[230] *Id.*

[231] *Id.*

[232] The CPSC devotes resources commensurate with risk in rule-violation cases, but does not use the three-tiered system for hazards described *infra* notes 236-37 and accompanying text. Thome Interview, *supra* note 175.

[233] Schmeltzer Memorandum, *supra* note 208.

[234] *Id.*

[235] Generally, the Commission does not disseminate its product hazard ratings, either to the companies involved or to the public. CPSC staff is reluctant to share its hazard rating judgments because ratings change as information accrues and because firms that know their products have received relatively low ratings might be reluctant to undertake comprehensive recalls. Bechtel Interview, *supra* note 187.

Once the CPSC has approved a corrective action plan, a regional office normally monitors it.[238] Recommendations to close a case must be approved by the Director of the Corrective Action Division and reviewed by the Director of Compliance and the Executive Director.[239] In class A recalls, the Commissioners must approve the closing of the case.[240]

3. *Administrative Hearing and Judicial Review*

If a case cannot be settled, the Commission must adjudicate the matter. Both the CPSA and the FHSA require a formal administrative hearing to determine whether a recall is warranted.[241] An administrative law judge presides, cross examination is permitted, and the ruling may be appealed to the Commission.[242]

If, based on the hearing, the Commission finds a substantial product hazard under the CPSA, or determines under the FHSA

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[236] Schematically, the CPSC classification may be depicted as follows:

Hazard Priority Classification

	Hazard Priority Class	*Class A*	*Class B*	*Class C*
1.	Severity*	● ● ◒	● ◒ ○	○ ◒ ○
2.	Likelihood**	● ◒ ●	○ ◒ ●	◒ ○ ○

* ● - Death or grievous injury
◒ - Serious injury or illness
○ - Moderate injury or illness
** ● - Very likely
◒ - Likely
○ - Not likely, but possible

Memorandum from David Thome, Acting Director of the Corrective Action Division, Directorate for Compliance and Administrative Litigation, CPSC, to the Commission, attachment A at 4 (Jan. 6, 1981) (on file with the *Case Western Reserve Law Review*) [hereinafter cited as Thome Memorandum].

[237] *Id.* attachment A at 4-6.

[238] Schmeltzer Memorandum, *supra* note 208.

[239] *Id.*

[240] Thome Memorandum, *supra* note 236, attachment B at 3-4.

[241] 15 U.S.C. § 2064(d) (1982) (CPSA); *id.* § 1274(b) (FHSA). The Commission may seek recalls under the FHSA only for banned hazardous substances.

[242] *See generally* CPSC Rules of Practice for Adjudicative Proceedings, 16 C.F.R. § 1025 (1984). At one point, the Commission permitted commissioners to act as presiding officers, but later forbade commissioners from engaging in this practice. *See id.* § 1025.3(i).

that recall of a banned hazardous substance would be in the public interest, it may order the respondent to provide notification of the hazard and/or the recall. It may order various forms of notification, including public notice, notice by mail to those in the distribution chain, and/or mailed notice to consumers.[243] In contrast to NHTSA,[244] the CPSC enjoys substantial flexibility as a result of these notification provisions. Since the products under the CPSC's jurisdiction are so diverse, no one method of notification suits all recalls.

The CPSC also may fashion the recall remedy to fit the circumstances. While the respondent must repair, replace, or refund the purchase price of the product,[245] it may elect any of the three, provided the Commission approves its recall plan.[246] The Commission has yet to order a recall in a case adjudicated under these provisions. It dismissed a group of cases,[247] and the handful of others were settled during litigation.[248]

Neither the CPSA nor the FHSA contains explicit provision for judicial review of an agency recall order following an administrative hearing.[249] Thus, the Administrative Procedure Act (APA) governs and its "substantial evidence" standard of review should apply.[250] Jurisdiction is under the APA in federal district court with review by a United States court of appeals.[251] Two levels of judicial review seem unnecessary, given the formal adjudicative hearing at the agency level. Further, this multilevel review is likely to cause delay that can undermine the effectiveness of a recall.[252] Thus, Congress should amend the CPSA and the FHSA to provide for direct review of CPSC recall orders by a United States court of appeals. This approach would assure fairness to the parties and better serve the safety aims of these acts.

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[243] 15 U.S.C. § 2064(c) (1982) (CPSA); *id.* § 1274(a) (FHSA). Direct consumer notification goes to those known to have been sold or taken delivery of the product.

[244] *See* 15 U.S.C. § 1413 (1982); *supra* notes 144-50 and accompanying text (discussing NHTSA notice regulations).

[245] 15 U.S.C. § 2064(d) (CPSA); *id.* § 1274(b) (FHSA).

[246] *Id.* §§ 2064(c), 1274(b).

[247] *See* cases cited *infra* note 257.

[248] Bechtel Interview, *supra* note 187. The CPSC currently is litigating two substantial product hazard cases. *Id.*

[249] In the absence of appeal by the respondent, the Commission may sue in federal district court seeking either civil penalties or criminal sanctions for noncompliance with a final order. *See* 16 C.F.R. § 1025.57(c) (1984).

[250] Judicial review likely would be in accordance with § 706(2)(E) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(E) (1982). Interview with Alan Schoem, Assistant General Counsel of the CPSC, in Washington, D.C. (Sept. 27, 1983).

[251] *See* 5 U.S.C. § 702 (1982).

[252] Delay makes locating products and notifying owners more difficult. In general, recall rates are lower for old products than for recently purchased products. *See infra* note 283 and accompanying text.

4. *The Settlement Process*

a. *Background*. Since its creation, the CPSC's use of recalls as an enforcement tool has far exceeded the level anticipated by Congress.[253] In its early years, for example, the CPSC was criticized for failing to implement the standard-setting provisions of the CPSA,[254] but its use of section 15 recalls was considered a great "success story."[255] By the early 1980's, when rulemaking had come into general disfavor, the CPSC touted its use of section 15 as an efficient and effective alternative to rulemaking.[256]

Over the years, the CPSC has broadly interpreted its authority under section 15. In case after case, the Commission has obtained recalls before a single injury has occurred.[257] It also has obtained recalls when the number of injuries is small but the type of potential injury is severe or widespread.[258] Furthermore, the CPSC has obtained recalls when neither it nor the manufacturer could pinpoint the injury-causing product defect.[259] Finally, the Commission has claimed that industry-wide design defects can present a substantial product hazard warranting industry-wide recall.[260] Responding to contentions that it has used section 15 improperly as a "standard-setting" tool in such cases,[261] the Commission argues that it is within its discretion to proceed by adjudication.[262] Most courts would agree that an agency has such discretion.[263]

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[253] Most observers anticipated that the CPSC's activities would be concentrated on standard setting—the "heart of the CPSA." Scalia & Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 U.C.L.A. L. REV. 899, 906 (1973).

[254] Schwartz, *supra* note 188, at 62, 71.

[255] *Regulatory Reform—Volume IV Consumer Product Safety Commission, National Highway Traffic Safety Commission, Federal Trade Commission: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 2d Sess. 63 (1976) (testimony of Richard O. Simpson, former Chairman, CPSC).

[256] *Consumer Product Safety Commission Reauthorization: Hearings Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 97th Cong., 1st Sess. 22 (1981) (testimony of Susan King, former Chairman, CPSC).

[257] *See, e.g.*, *In re* Mylar Star Kites, CPSC No. 75-16 (Sept. 16, 1977), *discussed in* PRODUCT HAZARDS, *supra* note 193, at 47. The case involved long-tailed aluminized polyester kites that could cause (but had not) an electric shock to the user if it became entangled in high-voltage power lines. The Commission ruled that the action should have been brought under the Federal Hazardous Substances Act. Subsequently, it promulgated under the FHSA a rule banning long-tailed aluminized polyester kites. *See* 16 C.F.R. § 1500.18(c)(1) (1984).

Other cases involving recalls but no reported injuries include *In re* Parkway Fabricators, CPSC No. 78-41 (file opened Dec. 19, 1977) (defective scuba regulator that could cut off diver's air supply); *In re* Nevco, Div. of U.S. Indus., CPSC No. 78-16 (file opened Nov. 11, 1977) (hot pot for heating water that could cause electric shock due to corrosion of wires in heating element); and *In re* Wham-O Mfg. Co., CPSC No. 77-1 (filed Mar. 11, 1977) (crossbow with defective latch that could release arrow unintentionally).

[258] *See, e.g.*, *In re* Hillerich & Bradsby Co., CPSC No. 75-9 (filed Nov. 5, 1975); *In re* Pepsico, Inc. & Wilson Sporting Goods, CPSC No. 75-10 (filed Nov. 5, 1975); *In re* Lannom Mfg., CPSC No. 75-11 (filed Nov. 5, 1975); *In re* Reynolds Metals Co., CPSC No. 75-12 (filed Nov. 5, 1975); *In re* Aluminum Co. of Am., CPSC No. 75-13 (filed Nov. 5, 1975); *In re* Eaton Corp., CPSC No. 75-14 (filed Nov. 5, 1975). All six cases involved aluminum

b. *Inducements to Settlement*. All recall programs entail similar inducements to settlement. Like NHTSA, the CPSC wants a prompt recall agreement so that consumer response is maximized.[264] Because of difficulties in recalling products at the consumer level, this incentive is particularly strong for the CPSC.[265] Moreover, the Commission wants to avoid litigation to conserve agency resources. Since the CPSC is a small agency with a limited

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bats with rubber grips that could deteriorate and detach, possibly causing the bat to fly from the swinging batter's hand. Two injuries and one death from roughly 4.8 million bats had been reported when the recalls were undertaken.

[259] *In re* North Am. Sys., CPSC No. 77-19 (file opened Jan. 24, 1977). Neither the CPSC nor the company could pinpoint the cause of several fires and mechanical failures in automatic drip coffeemakers. Due to the vast number of complaints, the CPSC nevertheless insisted that the company recall the product and redesign it to minimize future problems. In targeting those coffeemakers to be recalled, the parties relied on the pattern of complaints filed with the company to estimate the period during which the bulk of defective items were produced.

[260] For example, during 1981 CPSC staff wrote to every known manufacturer of electric clamp lamps, informing them of its conclusion that lamps without certain safety features constituted a substantial product hazard. Although the Commission's action prompted a horde of angry protests, most manufacturers agreed to redesign their lamps.

[261] *See* Letter from James N. Pearse, Group Vice President of Engineering of Leviton Manufacturing Co., to Linda Glatz, Division of Corrective Actions of the CPSC (June 8, 1981) (on file with the *Case Western Reserve Law Review*). Mr. Pearse wrote, "We believe it is inappropriate for the Commission to threaten Section 15 action on the basis of not complying with a generic, design standard imposed by the staff without complying with traditional notice and comment procedures and without reviewing any substantive facts concerning a manufacturer's particular product." *Id*. at 2.

[262] The issue is currently being litigated in a CPSC action against manufacturers of mesh-sided cribs. *See infra* note 300; *see also* R. David Pittle, Standards-Setting: Section 15 v. Section 7. Remarks at the Seminar on the Federal Regulatory Process (sponsored by Law and Business, Inc.), in Washington, D.C. (Feb. 10, 1981).

[263] *Cf*. NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974); SEC v. Chenery Corp., 332 U.S. 194 (1941); Saavedra v. Donovan, 700 F.2d 496, 499 (9th Cir.), *cert. denied*, 104 S. Ct. 236 (1983); Montgomery Ward & Co. v. FTC, 691 F.2d 1322, 1329 (9th Cir. 1982). *But cf*. Ford Motor Co. v. FTC, 673 F.2d 1008 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 358 (1983).

[264] Delays reduce response rates under the recall programs of both agencies. *See supra* notes 91-95 and accompanying text (NHTSA); *infra* notes 283-86 and accompanying text (CPSC).

[265] *See infra* note 286 and accompanying text.

budget to carry out its very broad mandate,[266] this incentive may be even more compelling for the CPSC than for NHTSA.

Recall incentives for consumer product manufacturers are the same as those for auto makers. To avoid litigation, consumer product firms have agreed to recalls even though they did not believe their products created a substantial hazard.[267] The threat of product liability suits prompts them to avoid the formal agency finding of "substantial product hazard" that may be admissible in such suits.[268] Negotiated corrective actions are not equivalent to an admission that a defect or hazard exists.[269] Further, the cost and delay of defending a lawsuit can be very high. Most companies faced with the uncertainty of litigation and the opportunity to negotiate the terms of a voluntary recall opt for the latter approach.[270] Companies also are induced to recall promptly to avoid negative publicity that can stigmatize not only the recalled product, but also the company's entire product line.[271] Finally, the wide range of enforcement tools available to the Commission may have an important impact on the settlement process. Two of the tools—section 12 actions for imminent hazards and civil penalties for reporting violations[272]—have been used infrequently, but their availability may give the Commission extra clout in negotiating effective recalls.

These inducements have resulted in even less recall litigation at the CPSC than at NHTSA.[273] In a 1980 report, a Commission task force on recalls was critical of this reliance on negotiated settlements.[274] It recommended that the Commission bring more test cases "to push recall authority to its limits of creativity and effectiveness," and that it step up litigation "to make clear that it will seek formal remedies if negotiations break down . . . ."[275] The first recommendation seems misplaced, since the Commission already enjoys expansive recall authority.[276] The second recommendation has more merit[277]—there is some indication of a general correlation between an agency's willingness to take enforcement actions and the amount of voluntary cooperation an agency receives from the private sector.[278]

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[266] The CPSC is the smallest of the health and safety agencies and has only a fraction of most agencies' budgets. *See* Schwartz, *supra* note 188, at 44 n.81. Nevertheless, Congress has charged the CPSC with the major responsibility of "[protecting] the public against unreasonable risks of injury associated with consumer products." 15 U.S.C. § 2051(b)(1) (1982).

[267] For example, to avoid litigation Sears agreed to recall seven-year-old fans that overheated, although it did not believe the fans posed a substantial hazard. Hollerman & Couric, *Consumer Agencies Fretting About Poor Product Recalls*, Legal Times of Wash., Mar. 3, 1980, at 1.

[268] Madden, *supra* note 196, at 22.

[269] In any subsequent litigation, companies can claim that they recalled a product out of an abundance of caution and not because it posed a serious hazard.

[270] For example, in the Sears recall of overheating fans, *supra* note 267, Sears was able to negotiate a recall by advertisement rather than notice sent to credit card customers with monthly bills. Hollerman & Couric, *supra* note 267, at 1.

Although the CPSC's recall provision has not been judicially interpreted, NHTSA's requirement, which resembles the CPSC's, has been very broadly interpreted. *See supra* notes 30-47 and accompanying text. This also may discourage legal challenges by manufacturers.

[271] Madden, *supra* note 196, at 22.

[272] *See supra* notes 190-95, 214, 216 and accompanying text.

5. *Recall Effectiveness*

The average response rate for recalls at the CPSC has been about thirteen percent.[279] Return rates vary markedly from recall to recall, however, depending on a wide range of variables.[280] A 1978 Commission study found the most significant variables to be: (1) the price of the product, (2) the expected useful life of the product, (3) the number of units in distribution, (4) the age of the product, (5) the type of corrective action—repair or refund—offered by the manufacturer, and (6) the level of direct consumer notification.[281] The study was unable to correlate recall effectiveness with another variable that common sense might suggest is important: the severity of the hazard.[282]

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[273] The CPSC has never issued a recall order following an administrative hearing. *See supra* notes 246-48 and accompanying text.

[274] Consumer Prod. Safety Comm'n, Report of the Recall Effectiveness Task Force 3 (Aug. 25, 1980) (available from the Office of the Secretary of the CPSC) [hereinafter cited as Task Force Report].

[275] *Id.*

[276] See *supra* notes 257-60 and accompanying text for a sampling of defective products recalled at the CPSC's urging. In fact, the Commission never adopted this recommendation. *See Consumer Product Safety Commission Reauthorization: Hearings Before the Subcomm. for Consumers of the Senate Comm. on Commerce, Science, and Transportation*, 97th Cong., 1st Sess. 336 (1981) (statement of Stuart Statler, acting Chairman of the CPSC).

[277] CPSC staff opinion is split on whether the Commission has been sufficiently aggressive in its recall program. The current compliance director, although generally satisfied with the CPSC's program, believes that the Agency must be prepared to litigate more quickly when hazards are life-threatening. Moreover, while recognizing that some firms will not agree to corrective action programs until their liability for timeliness violations has been resolved, he is reluctant to trade reduced civil penalties for corrective action agreements. Interview with David Schmeltzer, Associate Executive Director for Compliance and Administrative Litigation, CPSC, in Washington, D.C. (Nov. 10, 1983).

[278] In 1981, the number of voluntary recalls under the FDA's program dropped sharply when the number of enforcement actions did the same. *See infra* notes 440, 441 and accompanying text.

[279] *See supra* note 276.

[280] Consumer Prod. Safety Comm'n, Office of Strategic Planning, Recall Effectiveness Study 6 (May 1978).

The study concluded that recalls are least effective when the product costs under two dollars, its useful life is less than two years, the number of recalled units exceeds 100,000, or the product has been in distribution for over five years.[283] It indicated that recalls which entail direct consumer notice are generally effective, and that the most effective recalls involve repairs made in consumers' homes.[284] Recalls with limited or no direct notification are normally less than twenty percent effective, unless the recall involves a very expensive unit or is geographically limited.[285] Finally, recalls of products still in the distribution chain are far more effective than recalls of products in consumers' hands.[286]

Several of the most important variables determining recall effectiveness are beyond the Commission's control—the price of a product, its useful life, and the number of products distributed. However, the Commission has some influence over other variables. Product age and the percentage of units in consumers' hands can be controlled by negotiating a prompt and effective recall.[287] The Commission has considerable control over the variables of notice and type of corrective action.

a. *Notice*. Notice is a critical issue for the CPSC and manufacturers alike. The Commission generally seeks to have recall notices drafted in stark, direct, and dramatic terms and disseminated widely. Manufacturers fear that unduly strong notices will cause consumers to overreact and discourage future sales. Thus, much of the controversy in recall negotiation centers on notice.[288]

For some consumer products, especially durable goods, notice can be mailed to consumers who have returned warranty cards, but many consumers fail to return them.[289] For products whose purchasers cannot be identified, notice of the recall must be directed to the general public with the hope that the purchasers will see it.

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[281] *Id.*

[282] The data showed that median case effectiveness remained similar at all hazard severity levels. The most likely explanation is that consumers' risk perceptions did not coincide with the CPSC's. *Id.* at 20.

[283] *Id.* at 3.

[284] *Id.* In cases of home repairs, 90% of the units will be repaired.

[285] *Id.*

[286] Task Force Report, *supra* note 274, at 19.

[287] The recall must occur before the product is distributed widely to consumers. *Id.*

[288] For example, in the Sears recall, *see supra* note 270, the CPSC wanted recall notices sent to credit card holders along with monthly bills. Sears successfully resisted, arguing that the notices would undermine other bill-stuffer advertisements. *See* Hollerman & Couric, *supra* note 267, at 1.

The Commission has been innovative in its approach to notice. Early in its existence, the Commission sought a court order requiring paid advertising to notify the public in an imminent hazard case.[290] Although the district court refused because, in its view, sufficient publicity had been generated,[291] the CPSC subsequently obtained paid advertising agreements in numerous recalls.[292] Gradually, however, the Commission discovered that general media notice often costs more and produces less effective results than "targeted" media notice. The Commission has thus sought notice in diving magazines for allegedly defective scuba gear and gardening magazines for an allegedly dangerous rototiller.[293] In cases involving severe risks, the Commission has obtained multiple forms of targeted notice. For instance, the manufacturer of two crib models alleged to present a strangulation hazard agreed to place warnings in magazines directed to parents of newborns, to mail notice to every United States household known to have children up to the age of twenty-one months, and to mail warning posters to all known pediatric clinics and maternity wards in the country.[294] As a result, recall rates improved significantly.[295]

The CPSC has developed other techniques to alert the public to product hazards. One is the use of bounties or rewards to motivate consumers, as well as distributors and dealers, to participate in the recall. For example, in the recall of an allegedly defective smoke alarm that had been factory-installed in mobile homes, the manufacturer offered mobile home park owners three dollars for every alarm returned.[296] A lawn and garden tractor manufacturer offered an "early completion allowance" to dealers who found and corrected allegedly defective products in inventory.[297] Similarly, the manufacturer of allegedly defective thermostats for gas water heaters offered dealer's bonuses both for locating and for replacing the thermostats.[298] In the mesh-sided crib case, the manufacturer offered a reward to *anyone* identifying an unmodified crib.[299]

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[289] To counter this failing, one manufacturer rewards consumers for returning warranty cards. Letter from Robert I. Yeoman, Vice President of Worthington Industries, Inc., to Sam Zagoria, Commissioner of the Consumer Product Safety Commission (October 25, 1979).

[290] *See* CPSC v. A-K Elec. Co., No. 74-1026 (D.D.C. filed Sept. 9, 1974).

[291] *Id.*

[292] For a listing of cases, see PRODUCT HAZARDS, *supra* note 193, at 271.

[293] *In re* Roper Corp. & Sears, Roebuck & Co., CPSC No. 82-1 (file opened Feb. 24, 1982) (rototiller); *In re* Parkway Fabricators, CPSC No. 78-41 (file opened Dec. 19, 1977) (scuba gear).

[294] *In re* Bassett Furniture Indus., CPSC No. 78-51 (file opened Jan. 24, 1978); CPSC No. 78-81 (file opened May 3, 1978). The Commission accepted a comprehensive consent order against the company. *See id.*, CPSC No. 80-CO-002 (Feb. 7, 1980).

[295] The response rates in the two recalls ranged from 24% to 45% and from 77% to 86%. PRODUCT HAZARDS, *supra* note 193, at 139.

The press conference is another form of notice used by the CPSC, albeit infrequently. Such publicity enables the Commission to illustrate visually the hazard potential of a product, and indicates strong agency concern regarding the danger.[300] In several instances, the Commission has determined to hold a conference whether or not the company agrees. This right was recognized in a case involving an imminent hazard.[301]

b. *Consumer Resistance*. Consumers do not always respond to recalls. In a survey of hairdryer owners following a highly publicized recall of hairdryers containing asbestos, CPSC staff found that while eighty-five percent of the owners were aware of the recall, only one-third of those whose hairdryers contained asbestos stopped using them. Of the latter group, only four and one-half percent took advantage of the repair, refund, or replacement remedy offered by the manufacturers.[302] Of those consumers surveyed who believed asbestos presented a serious or somewhat serious problem, only slightly more than half (53.6%) had attempted to determine whether their hairdryers contained the substance.[303] Thus, as in the case of auto recalls, a certain level of "recall resistance"[304] cannot be overcome, despite the best efforts of the Commission and manufacturers to publicize a problem and provide generous relief. Some consumers may believe that the injury associated with the recall will not happen to them. Others may have adopted a fatalistic attitude, having become "saturated" with news of hazards.[305]

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[296] *In re* BRK Elec., CPSC No. 76-155 (file opened Aug. 24, 1976).

[297] *In re* International Harvester, CPSC No. 77-40 (file opened May 2, 1977).

[298] *In re* Emerson Elec., CPSC No. 80-66 (file opened Mar. 7, 1980).

[299] *In re* Bassett Furniture Indus., CPSC No. 78-51 (file opened Jan. 24, 1978); CPSC No. 78-81 (file opened May 3, 1978).

[300] CPSC staff held a press conference to announce its view that manufacturers of mesh-sided cribs had not warned sufficiently about the dangers of suffocation if a side is left down and the child rolls between the mattress and the loose mesh side. Wash. Post, Oct. 15, 1983, at A3, col. 1.

[301] Subsequent to filing a complaint in the automatic pitching machine case, *see supra* note 193, the Commission indicated that it planned to hold a press conference warning of the machine's hazards. The manufacturer objected that a press conference during the pendency of litigation was unfair. In a bench ruling, District Court Judge Thomas Flannery refused to bar the press conference, indicating lack of judicial authority. Interview with Catherine Cook, former Director of the Division of Administrative Litigation, CPSC, in Washington, D.C. (Oct. 16, 1983).

[302] Task Force Report, *supra* note 274, at 20-28. The survey sample consisted of 600 nationwide telephone calls.

C. *Recommendations*

Few changes in the CPSC's broad recall authority are necessary to make it work more efficiently and expeditiously. However, some modifications in the transferred acts and minor revisions in the CPSA would be beneficial. In addition, the Commission should consider at least one change in its own procedures. First, the Commission should be granted specific recall authority under the Federal Hazardous Substances Act, the Flammable Fabrics Act, and the Poison Prevention Packaging Act similar to that under the CPSA.[306] This would promote uniformity and reduce delay by enabling the Commission to address the risks posed by all products within its jurisdiction under its section 15 authority. Second, Congress should correct the absence of a judicial review provision for recall orders under the CPSA and FHSA. It should provide for judicial review in United States courts of appeals under the "substantial evidence" test, thereby eliminating the duplicative, two-tiered review procedure. Third, as a means of improving consumer response to serious hazard recalls, the CPSC should consider publicly classifying its recalls according to risk, either by employing its internal classification system or by devising a simpler, perhaps two-tiered system. This approach would enable the Commission to inform consumers of the relative risk of recalled products, thus helping them to make more informed decisions on how to respond to recalls.

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[303] Those who perceived the risk as serious were, however, far more inclined to determine if their hairdryers contained asbestos, and to discard them or seek corrective action if they did. *Id.* at 22.

[304] *See Recalls: Why So Many Are Flops*, 34 CHANGING TIMES 29, 32 (Oct. 1980).

[305] *See The Failure of Product Recalls*, 46 CONSUMER REP. 45 (1971); *Adequate Notice, But Not Many Returns*, 13 QUALITY PROGRESS 11 (1980); *Product Recalls, How Many Listen?*, Louisville Times, Sept. 2, 1982, at B1, col. 1.

[306] 15 U.S.C. § 2079(a) (1982). To conduct recalls under the transferred acts, the Commission must promulgate a rule under § 30(d) of the CPSA, *id.* § 2097(d), reflecting its determination that the risk should be addressed under the CPSA. It then may initiate an action for a recall in accordance with § 15 of the CPSA. *See supra* notes 190, 195 and accompanying text.

III. The Food And Drug Administration

The FDA, a part of the Department of Health and Human Services (HHS), has been involved in product recalls longer than any other federal agency, and boasts perhaps the most elaborate recall program. Each year, it conducts many hundreds of recalls of products within its jurisdiction.[307] Ironically, the FDA lacks statutory authority to order most of these recalls. It relies largely on voluntary recalls by manufacturers, sometimes using its authorized enforcement mechanisms, such as seizures, to encourage recalls.[308] The recall has become one of the FDA's major tools for enforcing the statutes it is charged with administering.[309]

A. *Recall Authority: Background*

Although FDA product recalls date back to the 1930's,[310] the Agency did not encourage voluntary recalls as part of its law enforcement program until the 1950's.[311] Initially, manufacturers only recalled products posing serious hazards. Later, they began recalling products that posed less serious risks, and eventually those that posed no risk at all but were in violation of the statute.[312] Recalls burgeoned from fewer than 100 per year in the early 1960's to over 1,000 recalls per year by the end of that decade.[313]

In the early 1970's, Congress criticized the FDA for its failure to establish guidelines or procedures to govern what had become an enormous yearly volume of recalls.[314] In the late 1970's, the FDA instituted procedural guidelines.[315] Congress also considered but never enacted legislation granting the FDA broad recall authority.[316] Instead, Congress has addressed the issue on a piecemeal basis, giving the FDA limited recall authority under three different statutes enacted between 1968 and 1976.

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[307] Off. of Pub. Affairs, Food & Drug Admin., Talk Paper 2 (Dec. 6, 1982) (data collected by FDA's Emergency and Epidemiological Operations Branch for fiscal years 1977 to 1982).

[308] *See infra* notes 427-30 and accompanying text.

[309] H.R. Rep. No. 585, 92d Cong., 1st Sess. 3 (1971) [hereinafter cited as House Recall Report]. In 1945, the FDA had relied mostly on seizures—over 3,000 a year—to enforce its statute; by 1969 the yearly number of seizures had fallen to 383, and the agency was relying largely on the recall remedy. *Id.* at 3, 8.

[310] One of the earliest recalls, involving "elixir sulfanilamide," occurred in 1937. The drug contained poison and had caused over a hundred deaths. The tragedy led to the 1938 amendments to the Food, Drug, and Cosmetic Act, requiring that manufacturers prove their drugs are safe before marketing them. Levy, *supra* note 1, at 117-18.

[311] House Recall Report, *supra* note 309, at 3.

[312] *Id.*

[313] *Id.* From January 1962 to June 30, 1964, the FDA participated in only 43 recalls, compared with 1400 in 1970.

[314] *Id.* at 17, 20. The FDA also was criticized for overusing the recall tool and neglecting its statutory sanctions such as seizures and injunctions.

[315] *See* 21 C.F.R. §§ 7.40-.59 (1984).

B. *Statutory Authority*

1. *The Radiation Control for Health and Safety Act*

a. *Scope of Authority.* The broadest recall provision is contained in the Radiation Control for Health and Safety Act (RCHSA).[317] It authorizes recall of radiation-emitting products which "fail to comply with an applicable standard . . . [promulgated under the Act or] have a defect which relates to the safety of use of such product. . . ."[318] Under the FDA's interpretation, defective products are those that create a risk of injury, including genetic injury, when the emissions are unintended or unnecessary, or fail to meet the manufacturer's own emission standards.[319]

b. *Implementing Procedures.* The RCHSA's broad reporting requirement obligates manufacturers to inform the Secretary immediately upon discovering a defect or failure to comply with a standard.[320] The FDA may also uncover defects or noncompliance through its own inspections or testing.[321] If, after studying the problem, the FDA finds the product to be defective or not in compliance, it notifies the manufacturer and gives it an opportunity to contest the finding.[322] The manufacturer may obtain an informal administrative hearing on request.[323] In the case of noncompliance, the manufacturer must rebut the presumption that deviation from a standard presents a significant risk.[324] The FDA has the burden of proof in cases of alleged defects.[325] Since enactment of the RCHSA, only one administrative hearing has been requested and held.[326]

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[316] *See* H.R. 5170, 94th Cong., 1st Sess., 121 CONG. REC. 7407-09 (1975) (statement of Rep. Koch).

[317] 42 U.S.C. §§ 263b-263n (1982).

[318] *Id.* § 263g.

[319] 21 C.F.R. § 1003.21 (1984).

[320] 42 U.S.C. § 263g(a)(1) (1982). Manufacturers also must submit copies of service bulletins to the Secretary. *Id.* § 263g(d). This requirement resembles that imposed by NHTSA. *See supra* note 47 and accompanying text. When the manufacturer notifies the FDA, simultaneously it may seek an exemption from the notice requirements. 42 U.S.C. § 263g(a)(2) (1982). To obtain an exemption the manufacturer must show that the product does not create a significant risk of injury. *Id.*

[321] *See* FOOD & DRUG ADMIN., REGULATORY PROCEDURES MANUAL pt. 5, at 2 (1982) [hereinafter cited as FDA MANUAL].

[322] 42 U.S.C. § 263g(e) (1982). The FDA must supply the manufacturer with its findings and the data on which they are based. *Id.* In cases involving a defective product, a health hazard evaluation committee assesses the significance of the public health hazard; in cases involving violation of a standard, the health hazard is presumed. FDA MANUAL, *supra* note 321, pt. 5, at 2.

[323] Interview with Thomas Moore, Special Assistant to the Director of Compliance

When recall is required, the manufacturer must notify its dealers, distributors, and consumer purchasers and their transferees who are known or identifiable through reasonable inquiry.[327] Under the Act, the manufacturer must remedy the problem at no cost by repair, replacement, or refund.[328] The FDA permits the manufacturer to design its own corrective action plan, subject to FDA approval.[329] The implementing regulations detail the contents of the notification letter[330] and specify a warning to appear on the mailing envelope.[331]

If the manufacturer fails to implement an FDA-ordered recall, the government may sue in federal district court to restrain the manufacturer's violation of the order.[332] As in the case of auto recalls, trial is de novo, with the burden on the government to establish that the product is defective.[333] The court may likewise

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Operations of the National Center for Devices and Radiological Health, FDA, in Silver Spring, Md. (Nov. 6, 1983) [hereinafter cited as Moore Interview].

[324] *Id.* Since the FDA had found the safety risk to exist during proceedings to establish the standard, noncompliance with the standard is presumed to create a risk unless the manufacturer can show otherwise under the circumstances.

[325] *Id.*

[326] *Id.* The case involved microwave ovens manufactured by General Electric. GE contested the FDA's measurement of microwave emissions, but ultimately agreed to recall the ovens. *Id.*

[327] 42 U.S.C. § 263g(a)(1), (b) (1982) (implementing regulations at 21 C.F.R. § 1003.10(b) (1984)). The manufacturer must notify the consumer by certified mail. 21 C.F.R. § 1003.21(c) (1984).

[328] 42 U.S.C. § 263g(f) (1982) (implementing regulations at 21 C.F.R. § 1004.1(a) (1984)).

[329] *Id.* § 263g(f) (implementing regulations at 21 C.F.R. § 1004.1(b) (1984)); *see also* FDA MANUAL, *supra* note 321, pt. 5, at 3.

[330] The letter must identify the product, describe the problem, provide an evaluation of the hazard in clear, nontechnical terms, and include prescribed language that the remedy will be without charge. *See* 21 C.F.R. § 1003.21(a) (1984).

[331] The envelope must bear the legend "IMPORTANT—ELECTRONIC PRODUCT RADIATION WARNING." The regulation also specifies the size, print, and location of the legend. *Id.* § 1003.21(b).

[332] 42 U.S.C. § 263j(a)(2) prohibits the failure to furnish defect notifications or provide repair, refund, or replacement of noncomplying or defective products. The federal district courts have jurisdiction to restrain such prohibited acts. *Id.* § 263k(a).

[333] Both the RCHSA and the National Traffic and Motor Vehicle Safety Act grant jurisdiction to the district courts "for cause shown" to restrain statutory violations. *See* 15 U.S.C. § 1399(a) (1982); 42 U.S.C. § 263k(a) (1982); *see also supra* text accompanying notes 83-84.

impose civil penalties for failure to carry out the recall.[334]

The FDA's recall program, like those of NHTSA and the CPSC, operates almost entirely on a voluntary basis.[335] This is due not only to broad statutory recall standards, which the other agencies share, but also to the fact that the FDA has promulgated performance standards for every major category of radiation-emitting products, thereby easing identification and proof of recall cases.[336] Moreover, the FDA has readily taken these cases to court, seeking recalls and penalties when negotiation has failed.[337] In every case, the parties reached a recall agreement before trial.[338]

2. *The Medical Device Amendments of 1976*

a. *Scope of Authority.* The Medical Device Amendments[339] contain a recall provision that is narrower than that of the RCHSA. It does not require repair, replacement, or refund in every case and mandates notification only when a device presents an "unreasonable risk of substantial harm to the public health"[340] and "no more practicable means is available" under the statute to minimize the risk.[341] Before the FDA may require notification, it must consult informally with the obligated party.[342] The Agency may require that notice be given to health professionals who use or prescribe the device, distributors and sellers of the device, and device users (unless notice poses greater danger to the individual than no notice).[343]

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[334] A penalty of $1,000 for each product involved in the violation may be assessed, up to a maximum of $300,000. 42 U.S.C. § 263k(b)(1) (1982). Similar civil penalty authority should be provided under the other FDA-administered statutes. *See infra* note 436 and accompanying text.

[335] Moore Interview, *supra* note 323. The FDA's nine performance standards cover such products as televisions, diagnostic X-ray machines, microwaves, and sunlamps. *Id.*

[336] *Id.* Since the burden in noncompliance cases shifts to the manufacturer to show absence of a health risk, the FDA's job is simplified in such cases. *See supra* note 324 and accompanying text.

[337] Moore Interview, *supra* note 323. Approximately 20 complaints have been filed under the RCHSA. *Id.*

[338] *Id.* The parties have settled during discovery, obviating a court-ordered penalty or recall under the Act.

[339] Pub. L. No. 94-295, § 2, 90 Stat. 539, 540 (1976) (codified at 21 U.S.C. § 360c (1982)). Devices are to be classified by risk into three categories and regulated accordingly. Class III devices present the greatest risk and require premarketing approval. *Id.* § 360c(a)(1)(C). Class II devices require performance standards to assure their safety and effectiveness. *Id.* § 360c(a)(1)(B). Class I devices involve the least risk and require only general controls to prohibit misbranding and adulteration. *Id.* § 360c(a)(1)(A).

[340] *Id.* § 360h(a)(1).

[341] *Id.* § 360h(a)(2).

[342] *Id.*

The FDA also may order the manufacturer to repair, replace, or refund the price of defective devices.[344] It may do so only if after providing for an informal hearing it finds that: (1) the device presents an unreasonable risk of substantial harm to the public health; (2) the device was improperly made "with reference to the state of the art" at the time of manufacture; (3) the unreasonable risk is not created by the user; and (4) notification alone is insufficient to eliminate the risk.[345] Since these findings are difficult to make in some cases, the Amendments thus substantially limit the Agency's recall authority. For example, devices that complied with the state of the art when made but subsequently are found to be dangerous are not subject to recall.[346] Improper use, the source of many device failures, also prevents the FDA from pursuing the full recall remedy.[347]

b. *Finding the Defects.* The Medical Device Amendments require that manufacturers report product defects to the FDA.[348] Nevertheless, for years after their passage, the Agency failed to propose regulations to implement this requirement.[349] The FDA has been criticized for this delay and for long relying on an inadequate system of voluntary reporting supplemented by agency inspection of manufacturers' complaint files.[350] Predictably, the voluntary system has generated reports of only a small percentage of manufacturer-initiated recalls.[351] Many reports reach the FDA months after manufacturers have conducted the recalls.[352] The Agency has acknowledged that few device manufacturers report problems with their products[353] and that they often delay reporting until after completing recalls or taking other remedial action.[354]

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[343] *Id.* When notification might be harmful to the user (for example, in cases of defective pacemakers), the notification order should require that the health professional who prescribed the device inform the user of the problem and the steps necessary to reduce or eliminate the risk.

[344] *Id.* § 360h(b)(2).

[345] *Id.* § 360h(b)(1)(A).

[346] For example, tampons which complied with the state of the art when made but later were suspected of causing toxic shock syndrome may not have been subject to a recall order. Since the manufacturer agreed to a comprehensive recall plan, the FDA's authority was not tested. Consent Agreement 2-11, *In re* Procter & Gamble Co. (consent agreement Sept. 26, 1980) (on file with the *Case Western Reserve Law Review*).

[347] Two leading causes of device failure are improper use and inadequate maintenance. COMPTROLLER GEN., GOV'T ACCOUNTING OFF., REPORT TO THE CONGRESS OF THE UNITED STATES, FEDERAL REGULATION OF MEDICAL DEVICES—PROBLEMS STILL TO BE OVERCOME 30-31 (Sept. 30, 1983) [hereinafter cited as GAO DEVICE REPORT].

[348] 21 U.S.C. § 360i(a).

[349] The FDA first proposed regulations to implement the reporting provision on November 18, 1980. 45 Fed. Reg. 76,183 (1980). These were withdrawn and new ones proposed on May 27, 1983. 48 Fed. Reg. 24,014 (1983).

[350] SUBCOMM. ON OVERSIGHT & INVESTIGATIONS OF THE HOUSE COMM. ON ENERGY & COMMERCE, 98TH CONG., 1ST SESS., MEDICAL DEVICE REGULATION: THE FDA'S NEGLECTED CHILD 21-27 (Comm. Print 1983) [hereinafter cited as DEVICE OVERSIGHT REPORT]. In a 1982 survey, FDA staff inspected 40 manufacturers' complaint files and found that 60% were either "poor or unusable." *Id.* at 25. FDA staff discovered that the files

The legislative history of the Amendments indicates that Congress intended to pattern the reporting requirements after those of the Motor Vehicle Safety Act, the CPSA, and the RCHSA.[355] However, the reporting requirements under these statutes vary—from the broad provisions of the CPSA and the RCHSA to the more restrictive provision of the Motor Vehicle Safety Act.[356] In its first proposed reporting rule in 1980, the FDA set forth broad requirements[357] similar to those under the CPSC's reporting regulations.[358] Responding to criticism that the proposed rule was overbroad and unduly burdensome on manufacturers, the following year the FDA placed it in abeyance for further study.[359]

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contained accounts of 3 deaths, 20 injuries, and 48 hazards that had not been reported under the Agency's voluntary system. *Id.*

[351] Perhaps only 15% of recalls are reported. *Id.* at 22; *see also FDA Oversight: Medical Devices: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 97th Cong., 2d Sess. 147 (1982) (testimony of Sidney M. Wolfe, Director of Health Research Group, Public Citizen) [hereinafter cited as *FDA Oversight Hearing*] (FDA systematically has failed to implement reporting requirements of Medical Device Amendments).

The low reporting rate is not surprising, given the possible adverse consequences—recall, adverse publicity, and increased product liability claims. *See supra* note 223 and accompanying text. Even when reporting is mandatory, manufacturers are reluctant to comply. *See supra* note 221 and accompanying text.

[352] *FDA Oversight Hearing*, *supra* note 351, at 147. Public Citizen's Human Research Group found that an average of three months elapsed between the time a manufacturer notified its customers of a recall and publication of the recall in the FDA's Weekly Enforcement Report. *Id.*

[353] Problems reported by manufacturers often concern competitors' products, not their own. 48 Fed. Reg. 24,014 at 24,016 (1983) (FDA statement accompanying reproposed reporting regulation).

[354] *Id.*

[355] H.R. Rep. No. 853, 94th Cong., 2d Sess. 21 (1976).

[356] *See supra* notes 55, 211, 319-20 and accompanying text.

[357] 45 Fed. Reg. 76,183 (1980). The proposed rule would have required device manufacturers and distributors to submit reports to the FDA concerning devices (1) that may have caused death or injury; (2) that may have a deficiency that could cause death or injury or give misinformation resulting in improper treatment; or (3) that are subject to remedial action. Remedial action included all steps by a manufacturer to correct any suspected or confirmed device deficiency. *Id.*

[358] *See supra* note 211 and accompanying text.

[359] 46 Fed. Reg. 57,568 (1981). The Agency explained that it needed to review com-

The FDA did not propose a new reporting rule for public comment until May 1983.[360] The reproposed rule is narrower than the first, requiring reports only when the manufacturer becomes aware of an allegation, or has information that "reasonably suggests,"[361] that a device "has caused or contributed to a death or serious injury or has malfunctioned, if recurrence of the malfunction is likely to cause or contribute to a death or serious injury."[362] "Serious injury" is broadly defined to include not only life-threatening and permanent injury, but also "unanticipated temporary impairment" of a bodily function or structure.[363]

Under the statute, failure to report a device defect renders the device misbranded[364] and subject to seizure or condemnation.[365] The FDA can also enjoin a failure to report[366] and criminally prosecute those responsible.[367] The proposed rule indicates that the FDA will use these enforcement tools to ensure compliance with the reporting requirements.[368]

c. *Implementing Procedures.* The recall procedures under the Device Amendments may be the most cumbersome of any enacted. If the FDA wishes to invoke the notification requirement, it need merely consult with the manufacturer before ordering notification. If it wishes to order both notice and corrective action, however, it must hold an informal hearing[369] and make the four

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ments on the proposal, to review the proposal in light of an executive order requiring cost-benefit and regulatory impact analyses, and to complete an inspection of company complaint files to determine if inspections adequately could replace some of the proposed reporting requirements.

[360] 48 Fed. Reg. 24,014 (1983).

[361] *Id.* at 24,015.

[362] *Id.*

[363] *Id.* at 24,018. This category of injuries would include "electrical shocks, severe lacerations, or broken bones"— injuries that are "not generally accepted as part of the risk of using a device and are avoidable." *Id.*

[364] 21 U.S.C. § 352(t) (1982).

[365] *Id.* § 334.

[366] *See id.* §§ 331(k), 332; *see also id.* § 331(q)(1) (making failure to report a violation of the FDA Act which may be enjoined under § 332).

[367] *Id.* § 333. A civil penalty provision, which the Device Amendments lack, might be useful, especially in cases in which criminal prosecution seems unduly severe. *See infra* note 436 and accompanying text.

[368] 48 Fed. Reg. 24,014 at 24,022 (1983).

[369] An informal hearing requires, inter alia, that the parties be given (1) "reasonable notice of the matters to be considered at the hearing," (2) a comprehensive explanation of the basis for the proposed action, (3) a "summary of the information which will be presented," and (4) the opportunity to conduct questioning and present relevant oral and written information. 21 U.S.C. § 321(y) (1982).

findings discussed previously.[370] If the FDA affirms its findings following the hearing, it must permit the manufacturer to submit a corrective action plan for its approval,[371] and hold another informal hearing before it may disapprove the plan.[372] If the Agency does disapprove, it cannot mandate its own plan until it has allowed the manufacturer to submit a revised plan and has provided yet another informal hearing.[373]

If the manufacturer fails to comply with a recall order, the FDA may bring an action in federal district court for an injunction compelling the recall[374] or initiate criminal proceedings.[375] The FDA also has authority to obtain court-ordered seizures of adulterated or misbranded devices,[376] and to retain the devices administratively for a short time until a court action can be instituted.[377]

d. *Voluntary Settlements.* If the procedures for securing a recall under the Device Amendments were widely used, they would render the scheme unworkable. But they were not intended to be used often—Congress designed the agency-ordered recall as a remedy of last resort, to be used only when voluntary actions would not eliminate device risks.[378] Indeed, the FDA's use of recall orders has comported with congressional intent. The Agency has relied extensively on voluntary recalls—roughly 1,500 of them since the Device Amendments were enacted.[379] Seldom has the FDA used its administrative authority, ordering defect notification only three times, although it threatened administrative procedures in another twenty-one cases, thereby inducing voluntary recalls.[380] It has ordered no-cost repair only once.[381] The FDA, like the CPSC, has had far more success with its recall authority than with its standard-setting authority under the Device Amendments.[382]

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[370] *See supra* notes 344-46 and accompanying text.

[371] 21 U.S.C. § 360h(b)(1)(A) (1982). The Agency may direct that a combination of persons, such as the manufacturer, importer, and distributor, devise the plan, and may even designate the person to make the final decision regarding the plan. *Id.*

[372] *Id.* § 360h(b)(1)(B).

[373] *Id.*

[374] Failure to give the required notification or remedy is prohibited under 21 U.S.C. § 331(q) and can be enjoined under § 332(a).

[375] *Id.* § 333.

[376] *Id.* § 334(a)(2)(D).

[377] *Id.* § 334(g).

[378] DEVICE OVERSIGHT REPORT, *supra* note 350, at 11 (citing Bureau of Medical Devices, summary of regulatory activities from fiscal year 1976 through the first quarter of fiscal year 1982).

[379] *Id.* at 11-12.

[380] *Id.* at 11.

[381] *Id.* at 12. In 1978, the FDA ordered the manufacturer of a defibrillator to repair a switch on the device.

3. *The Infant Formula Act of 1980*

Following widely publicized recalls of several chloride-deficient infant formulas in 1979,[383] Congress passed the Infant Formula Act of 1980.[384] The Act lists the nutritional ingredients that infant formula must contain[385] and requires manufacturers to certify compliance with the Act before processing a formula.[386] The Act does not give the FDA authority to order recalls of infant formula. However, it anomalously includes provisions usually associated with recall authority, requiring manufacturers to report product defects to the FDA and prescribing procedures to be followed once a manufacturer decides to recall.

The reporting obligation arises when a manufacturer has "knowledge which reasonably supports the conclusion" that a formula either does not provide the statutorily required nutrients or is adulterated or misbranded and, as such, presents a risk to human health.[387] "Knowledge" is defined as actual knowledge or knowledge that a reasonable person would have had or obtained in the exercise of due care under the circumstances.[388] Once a manufacturer files a report, the FDA decides, under its general voluntary recall guidelines,[389] whether the manufacturer should recall the formula; since the Infant Formula Act itself does not establish criteria for initiating a recall. If the manufacturer voluntarily undertakes a recall, however, the Act prescribes certain requirements that it must meet and authorizes the Secretary of Health and Human Services to prescribe others by regulation.[390]

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[382] The FDA has not promulgated any performance standards under the Device Amendments. GAO DEVICE REPORT, *supra* note 347, at 40; *see supra* notes 253-56 and accompanying text (CPSC experience).

[383] As a result of consuming the formulas, over 130 infants suffered injury from a rare chemical imbalance with unknown long-term effects on their growth and development. H.R. REP. NO. 936, 96th Cong., 2d Sess. 4 (1980). For a discussion of events leading up to the enactment of the Infant Formula Act, see Note, *Food and Drug Law: The Infant Formula Act of 1980*, 15 AKRON L. REV. 752 (1982).

[384] 21 U.S.C. § 350a (1982).

[385] Pub. L. No. 96-359, § 2, 94 Stat. 1190 (1980) (codified at 21 U.S.C. § 350a(g) (1982)). The Secretary of Health and Human Services may revise the list. *Id*.

[386] *Id*. § 350a(b)(2).

[387] *Id*. § 350a(c)(1).

[388] *Id*. § 350a(c)(2).

[389] *See infra* notes 409-12 and accompanying text.

[390] 21 U.S.C. § 350a(d)(1) (1982).

During a recall, the manufacturer must report bi-weekly on its actions, and the Secretary must review such actions every fifteen days until the recall is terminated.[391] The regulations outline the steps manufacturers must take in their recalls, giving them leeway to tailor recalls to fit the circumstances.[392] The regulations also require that if a recall is to be undertaken, the manufacturer promptly notify the FDA by telephone.[393] The manufacturer must assess the seriousness of the human health hazard posed by the formula, devise a recall strategy appropriate to the risk, and promptly notify consignees to return the products.[394] It must furnish the FDA with copies of its hazard evaluation, recall strategy, and all recall notifications it has distributed.[395] If the Agency finds the strategy inadequate, it requires that further steps be taken, such as a broader recall or more effectiveness checks.[396] After the recall has begun, if the FDA finds that consignees did not receive recall notifications or disregarded them "in a significant number of cases," it may require additional notifications.[397] The Agency must approve the termination of the recall efforts.[398]

The recall provisions of the Infant Formula Act seem at odds with the goals of the Act. By not requiring recalls and imposing additional obligations on companies that undertake voluntary recalls, the statute creates a disincentive to voluntary recall. It is not clear, however, that giving the FDA authority to order recalls would add significantly to the current incentives to recall under the FDA's general recall program.[399]

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[391] *Id.* § 350a(d)(1)(A) & (B). *Id.* § 350a(d)(1). These requirements stem from findings that the FDA did not monitor adequately the recall of chloride-deficient formulas. H.R. REP. No. 936, 96th Cong., 2d Sess. 5 (1980).

[392] 21 C.F.R. §§ 7.70-.75 (1984). Congress intended that the "FDA . . . develop necessary flexibility into their regulations to permit the tailoring of recall requirements to the appropriate degree of risk." H.R. REP. No. 936, 96th Cong., 2d Sess. 9 (1980).

[393] 21 C.F.R. § 7.72(a) (1984).

[394] *Id.* § 7.71(a)-(c). The recall communication to consignees must be distinctive and reflect the degree of hazard. It must instruct the consignees to report whether they possess the recalled product, and must explain how the products may be returned to the manufacturer or otherwise disposed of. A follow-up communication must be sent to consignees that do not respond to the first one. *Id.* § 7.71(c).

[395] *Id.* § 7.71(d).

[396] *Id.* § 7.74. On the basis of its own or the firm's hazard evaluation, the FDA also may conclude that the extent of the recall is inadequate.

[397] *Id.* § 7.74(c).

[398] *Id.* § 7.73.

[399] *See infra* notes 426-30 and accompanying text.

C. *The Voluntary Recall Program*

1. *Background*

The FDA's general recall program was prompted by a series of poisonings in the mid-1950's. After issuing a public warning, the FDA permitted the company to remove the product from the market.[400] Although initially the FDA limited its activities to hazardous products, in the 1960's it expanded its activities to products that posed no health risk or other serious problem but nevertheless violated the Food, Drug, and Cosmetic Act.[401] The Agency made no distinction between recalls involving trivial problems and those addressing serious hazards. Inevitably, recalls became so numerous that they could not be monitored properly, drastically undercutting the effectiveness of all recall efforts.[402]

In the mid-1960's, the FDA began publishing a weekly list to provide regular public notification of recalls.[403] Until 1971, however, the FDA's recall program functioned without published regulations governing its operation. Following congressional hearings critical of the program,[404] the FDA published its first recall policy,[405] establishing two categories of recall. One contained products posing an imminent health risk, and the other products posing a potential risk.[406] The FDA's monitoring procedures varied according to the risks posed.[407] When congressional critics deemed this policy inadequate, the FDA reevaluated its recall program. As a result, it instituted a three-category system and classified recalls by degree of product hazard.[408] The three-tiered program, which remains in effect, is unique among the major agency recall programs.

2. *Recall Guidelines*

Under the FDA guidelines, Class I recalls are reserved for products that pose a "reasonable probability" of causing serious adverse health consequences or death.[409] Class II recalls cover products that may cause temporary or medically reversible adverse health consequences, and those presenting a remote risk of such harm.[410] Class III recalls involve products not likely to cause adverse health consequences.[411] The classification system applies to medical devices as well as to products over which the FDA lacks specific recall authority.[412] The FDA publicizes all recall classifications in its weekly report, which explains the classification system and lists recalls by class. The Agency's Public Affairs Office originated the classification scheme as a means of informing the public of the relative hazard posed by recalled products.[413]

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[400] *Recall Procedures of the Food and Drug Administration: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 92d Cong., 1st Sess. 30-31 (1971) [hereinafter cited as *FDA Recall Hearings*].

[401] *Id.* at 5-6. Products misbranded as to the weight of their contents, for example, were covered by the recall program, although they presented no health risk or other serious problem. *Id.* at 6. *See also* H.R. REP. No. 585, 92d Cong., 1st Sess. 6 (1971).

[402] *FDA Recall Hearings*, *supra* note 400, at 6-8.

[403] HOUSE RECALL REPORT, *supra* note 309, at 4. Unfortunately, the Weekly Enforcement Report often lists recalls after they have occurred. *See supra* note 352.

[404] *See supra* note 314 and accompanying text.

[405] 36 Fed. Reg. 11,514 (1971).

[406] *Id.*

[407] *Id.*

[408] 21 C.F.R. §§ 7.40-.59 (1984).

The FDA requests recalls only in "urgent situations" when the manufacturer has not initiated one.[414] FDA-requested recalls are usually Class I,[415] and require high-level Agency approval.[416] The FDA develops an overall recall strategy for each case and invites the firm to do likewise.[417] The plan is tailored to the severity of the risk and the product's distribution level. It specifies the depth of the recall (*i.e.*, whether to the wholesale, retail, or consumer level),[418] the necessity for public warning (usually reserved for urgent situations),[419] and the level of effectiveness checks, which ranges from level A (100% of consignees contacted) to level E (no effectiveness checks).[420]

The FDA guidelines include general directives regarding the format and contents of recall notices.[421] Often only consignees, not ultimate consumers, need be notified because the recall has been initiated before the products reached the consumer.[422] The format and method of notification vary with the seriousness of the risk.[423] The firm must report its recall activities to the FDA at specified intervals[424] until the recall has been terminated.[425]

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[409] FDA MANUAL, *supra* note 321, pt. 5, at 6.

[410] *Id.*

[411] *Id.* The FDA assesses the health risk on the basis of a number of factors and assigns the recall classifications. 21 C.F.R. § 7.41 (1984).

[412] 43 Fed. Reg. 26,202 (summary statement of basis and purpose).

[413] Interview with Gary Dykstra, Special Assistant to the Associate Commissioner for Regulatory Affairs of the FDA, in Washington, D.C. (Oct. 5, 1984) [hereinafter cited as Dykstra Interview]. The Agency, however, never has studied whether the classification system has had an impact on recall responsiveness. *Id.*

[414] FDA MANUAL, *supra* note 321, pt. 5, at 2.

[415] Dykstra Interview, *supra* note 413. Only about 5% of the recalls of products under FDA's jurisdiction fall into the Class I category.

[416] The Associate Commissioner for Regulatory Affairs approves most FDA recall requests. FDA MANUAL, *supra* note 321, pt. 5, at 2.

[417] *See* 21 C.F.R. §§ 7.45(b), .46 (1984); Dykstra Interview, *supra* note 413.

[418] FDA MANUAL, *supra* note 321, pt. 5, at 6.

[419] *Id.* at 8. Although recall actions are published in the FDA Weekly Enforcement Report, the FDA or the recalling firm may release additional warnings to the general public when serious health hazards or other circumstances dictate that such publicity is in the public interest. *Id.*

[420] *Id.* at 7-8.

3. *Inducements To Recall*

Like those regulated by NHTSA and the CPSC, manufacturers subject to the FDA's jurisdiction undertake recalls to avoid or minimize product liability claims and adverse publicity.[426] The FDA also boasts an array of enforcement tools, in addition to administrative recall authority, for use in obtaining voluntary recalls. For example, the FDA may seek court-ordered seizure of misbranded or adulterated products to remove them from the market.[427] It may also obtain injunctions prohibiting the distribution and sale of such products,[428] and criminal penalties for statutory violations.[429] To obviate these proceedings, the manufacturer may agree to a recall.[430]

In practice, the FDA's statutory enforcement tools have not always been effective. Seizure is frustrated because the products are frequently distributed by the time the action is filed,[431] and because several actions may be required when distribution is nationwide.[432] While it may be procedurally superior in cases of nationwide distribution, the injunction is inferior to seizure because of its prospective application—the decree normally restrains further sale or distribution and does not remove products from the market. The government has sought injunctive relief in the form of court-ordered recall, but its statutory authority to do so is unclear.[433] It has used criminal penalties infrequently.[434]

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[421] 21 C.F.R. § 7.49 (1984).

[422] Dykstra Interview, *supra* note 413.

[423] Notice may be by telegram or first class letter. The envelope must bear notice in bold red type that the letter concerns a recall, and also must be marked "URGENT" in Class I and Class II recalls. 21 C.F.R. § 7.49 (1984).

[424] The reporting interval is from two to four weeks, depending on the recall's urgency. *Id.* § 7.53(a).

[425] The recall is completed when "the firm has actually retrieved and impounded all outstanding product that could reasonably be expected to be recovered, or has completed all product corrections." FDA MANUAL, *supra* note 321, pt. 5, at 9.

[426] For example, the prompt recall of Tylenol capsules after criminal tampering with their containers had caused several deaths, helped reduce adverse publicity and allowed the manufacturer to regain its market share—although at considerable expense. BUS. WK., Nov. 29, 1982, at 36; ABA Panel Discussion, *supra* note 99.

[427] 21 U.S.C. § 334 (1982).

[428] *Id.* § 332.

[429] *Id.* § 333. This is strict criminal liability without proof that the violation was committed knowingly or willfully. *See* HOUSE RECALL REPORT, *supra* note 309, at 7-8.

[430] The FDA has made clear its intent to use seizure or other court action when a company refuses an FDA recall request. *See* FDA Recall Policy, 21 C.F.R. § 7.40 (1984). Strict criminal liability can be a powerful incentive to voluntary recalls. Interview with Leonard Stauffer, Chief of the Recalls and Notification Branch, National Center for Devices and Radiological Health, FDA, in Silver Spring, Md. (Nov. 6, 1983).

[431] *See* GOV'T ACCOUNTING OFF., LEGISLATIVE AND ADMINISTRATIVE CHANGES ARE NEEDED TO IMPROVE REGULATION OF DRUG INDUSTRY 12-13 (Apr. 5, 1983) [herein-

More effective enforcement devices would indirectly serve to improve the recall program. Useful additional tools under the Food, Drug, and Cosmetic Act include: (1) specific authorization for the FDA to seek court-ordered recalls in injunctive actions,[435] (2) civil penalties for violations now subject only to criminal penalties,[436] and (3) authorization for the Agency to issue ex parte detention orders against products until a seizure action can be filed.[437] If these tools are provided, giving the FDA general recall authority would be unnecessary and perhaps counterproductive. Following the example of the Medical Device Amendments,[438] Congress might require cumbersome administrative hearing procedures before the Agency could exercise its recall authority,

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after cited as GAO DRUG REGULATION STUDY]. In a survey of 35 FDA-recommended seizures, the study found that products were seized in only nine cases. By the time the FDA had approved the actions (an average of 61 days), the U.S. Attorney's Office had brought them, and the court orders had been issued (an average of 34 days), the products already had been shipped. *Id.*

[432] *See generally* Schwartz, *Protecting Consumer Health and Safety: The Need for Coordinated Regulation Among Federal Agencies*, 43 GEO. WASH. L. REV. 1031, 1037-38 (1975) (discussing disadvantages of seizure action).

[433] Courts are split on whether they may order recalls under the injunction provision of the Food, Drug, and Cosmetic Act. *See* United States v. C.E.B. Prods., 380 F. Supp. 664, 667-68 (N.D. Ill. 1974) (statute contemplates "only negative injunctions," not affirmative recall remedy). *But see* United States v. K-N Enters., 461 F. Supp. 988, 990 (N.D. Ill. 1978) (statute's injunction authority is broad enough to include affirmative relief; court's general equity power is sufficient to order recalls since statute does not preclude it).

[434] From 1977 to 1981, the yearly number of criminal prosecutions averaged 23, compared with over 450 yearly seizures. Off. of Pub. Affairs, Food & Drug Admin., Talk Paper 3 (Aug. 25, 1982) [hereinafter cited as Talk Paper].

[435] *See supra* note 433.

[436] Criminal penalties, a harsh sanction, are pursued infrequently. *See supra* note 434. Civil penalties, however, can be effective. *See supra* notes 214, 216 and accompanying text (CPSC experience). The FDA can seek civil penalties under the RCHSA. *See supra* note 334 and accompanying text.

[437] The power to detain products pending seizure would make the seizure action more effective and a viable alternative to recall in more cases. *See* GAO DRUG REGULATION STUDY, *supra* note 431, at 15 (recommending that FDA be given administrative detention authority over drug products).

[438] *See supra* notes 369-73 and accompanying text.

thereby lengthening the time involved in obtaining a recall under the voluntary program. The administrative recall authority contained in the Device Amendments and the RCHSA has not greatly enhanced the FDA's ability to negotiate recalls under those statutes. Given the long history and maturity of the FDA's voluntary program, administrative recall authority is currently unnecessary.[439]

Recall effectiveness demands more than mere availability of an array of statutory enforcement tools. The FDA must use its tools with sufficient frequency to convince manufacturers that voluntary recalls are warranted. Nevertheless, FDA enforcement actions have become less frequent,[440] apparently signaling manufacturers that they may avoid adverse consequences if they do not report or agree to a recall. A sharp drop in the number of voluntary recalls has accompanied the FDA's decreased enforcement efforts.[441] The Agency must utilize its enforcement powers to enhance the effectiveness of its voluntary recall program. A wider range of enforcement options would assist in that attempt.

4. *Reporting Defects*

Aside from the specific reporting requirements under the RCHSA,[442] and the Infant Formula Act,[443] manufacturers have no general statutory obligation to report product hazards and defects to the FDA. Although there is an adverse reaction reporting provision for prescription drugs,[444] items such as cosmetics and foods are not covered. A general reporting requirement should be imposed to provide the Agency with early notice of problems and enable timely publicity of recalls.[445] Without such a requirement, companies lack the incentive to report,[446] and fail to do so.[447]

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[439] The FDA has been deterred from seeking administrative authority to order recalls, partly by the fear that additional administrative procedures could delay recalls. Interview with Linda R. Horton, Deputy Chief Counsel for Regulations and Hearings of the FDA, in Rockville, Md. (July 22, 1983) [hereinafter cited as Horton Interview].

[440] *See* PUBLIC CITIZEN HEALTH RESEARCH GROUP, REPORT ON DECREASED FDA LAW ENFORCEMENT DURING 1981 (1982). In 1981, there were 577 enforcement actions, compared with an average of 1,041 for the years 1977 to 1980, a decrease of 45%. *Id.* at 1; *see also* Talk Paper, *supra* note 434, at 3-4 (showing similar drop in enforcement actions).

[441] *See* Talk Paper, *supra* note 434, at 4. From 1977 to 1980, the number of recalls averaged over 1,000 a year; in 1981 there were 658 recalls. The FDA has attributed the decrease to long-term trends such as improved manufacturing practices, greater industry cooperation in complying with the law, and clarification of the legal requirements by the FDA. *See id.* Critics maintain that these factors do not explain the sudden, sharp drop in FDA enforcement actions and recalls during 1981. Interview with Allen Greenberg, Staff Associate of the Public Citizen Health Research Group, in Washington, D.C. (Oct. 12, 1983). Since 1981, however, the number of enforcement actions has risen steadily. Dykstra Interview, *supra* note 413.

[442] *See supra* note 320 and accompanying text.

[443] *See supra* notes 387-88 and accompanying text. Reporting requirements also have been proposed for the Medical Device Amendments. *See supra* note 349 and accompanying text.

5. *Classifying Recalls*

The FDA's recall classification system has been recommended for adoption by NHTSA and the CPSC to improve public awareness of the relative risks of recalled products. Ironically, the FDA has considered abandoning the system because it makes negotiating recalls more difficult.[448] Companies resist Class I designation because of the potential impact on product liability suits and the possibility of adverse publicity.[449] Companies view the designation as punitive, prompting agency concern that it discourages voluntary reporting and product recalls.[450] When the classification issue prolongs recall negotiations, it delays and diminishes recall effectiveness.[451] In fact, classification may be less important for the FDA than for the CPSC and NHTSA—unlike those of the other two Agencies, FDA recalls do not often reach the consumer level,[452] where a classification system would be most useful. Nevertheless, before abandoning classification, the FDA should study its effect on recall response rates.[453]

6. *Recommendations*

The FDA should continue operating under its voluntary recall program but with additional statutory enforcement tools for use when voluntarism fails. Congress should authorize the Agency to detain products pending a seizure action, to seek court-ordered recalls, and to pursue civil penalties where only criminal penalties are now available.[454]

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[444] *See* 21 U.S.C. § 335(i), (j) (1982).

[445] Recalls often appear in the Weekly Enforcement Report after they have occurred. *See supra* notes 352, 354 and accompanying text.

[446] The threat of adverse publicity and product liability claims discourages reporting, Dykstra Interview, *supra* note 413; thus firms are unwilling to make reports not required by statute. ABA Panel Discussion, *supra* note 99.

[447] *See supra* notes 353-54 and accompanying text.

[448] Dykstra Interview, *supra* note 413.

[449] *Id.*

[450] *Id.*

[451] The longer it takes to negotiate a recall, the more likely the products will be distributed and the more difficult it will be to recall them. *Id.*

[452] In food recalls, which frequently never reach the consumer level, a 50% return rate is considered very good. In drug and device recalls, institutional users and medical professionals often must be notified instead of consumers. *Id.*

[453] The FDA never has studied the impact or importance of its classification system. *Id.*

Although the FDA administers a hodgepodge of recall provisions under three statutes, this scheme has not created serious difficulties. The one area warranting uniformity, however, is reporting; companies should be obligated by statute to notify the FDA of defects and statutory violations that could create health or safety risks. Finally, the Agency should continue to classify and publicize the classification of its recalls.

IV. Conclusions and Recommendations

Although NHTSA, the CPSC, and the FDA make extensive use of recalls to implement their statutes, recalls have inherent limitations as enforcement tools. Consumers can and sometimes do render them ineffective by failing to respond. Moreover, recalls are generally successful only if promptly (*i.e.*, voluntarily) undertaken. Recalcitrant firms can thwart them merely by invoking available administrative procedures and, indeed, have good reason to do so. Companies cannot insure against product liability claims by recalling defective products—to the contrary, recalls can stimulate additional lawsuits and bring adverse publicity. Recalls also can be very expensive, requiring refunds or replacements of products that have already been produced and marketed. Ultimately, what may be most surprising is the frequency with which companies agree to recalls without litigation.

Because of its superior effectiveness, the recall remedy remains the major enforcement mechanism of the three Agencies. Recalls have virtually supplanted standards as the primary regulatory tool of the CPSC, for example. From the agencies' standpoint, their popularity stems from several factors. First, recalls promote safety. Although response rates are lower than agencies would like, consumers in significant numbers do return, discard, or take greater precautions with recalled products. Second, agencies can use recalls to set quasi-standards, establishing precedent for what constitutes an unacceptably hazardous product. Third, recalls are quicker and more efficient than standard-setting—government and industry often share a sense of urgency in removing a hazardous product from the marketplace. This has led agencies to adopt informal, flexible settlement procedures that encourage firms to agree to recalls. Industry also may prefer recalls to standards because recalls generally affect only manufacturers of unsafe products. Unlike many standards, recalls do not impose across-the-board certification requirements and may involve less burdensome recordkeeping.

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[454] *See supra* notes 435-37 and accompanying text.

Agencies must reconcile numerous and often competing interests when implementing recall programs. They must take care not to inundate the public with recalls at the risk of creating consumer apathy. They must stress voluntary agreements to achieve prompt and effective recalls, yet be willing to use their enforcement powers when voluntary efforts stall. They must be flexible in negotiating the terms of recalls to encourage voluntarism, yet ensure adequate notice and remedy for product owners.

In addition to the agency-specific recommendations discussed throughout, this Article suggests that agencies work together to develop a more uniform approach to recalls.[455] Despite vast differences among the agencies' programs, they have common characteristics and goals. All must deal with the general public. Agencies would benefit from sharing their knowledge about recalls, and the public would benefit from more consistency in the recall programs. The following recommendations should help to achieve these goals. First, an interagency recall liaison group consisting of representatives from all agencies with recall programs should be established. Its purpose would be to educate members about each other's programs and to research areas of common interest, such as how to improve consumer response rates and how to use new technology to improve recall notification.[456] Second, the liaison group could explore the possibility of coordinating the agencies' classification systems. This would permit agencies to use similar methods of assessing risk and designating risk level. Third, a central hotline switchboard for consumer inquiries and complaints is needed. Consumers do not always know which agency takes complaints or has information about recalls. A central switchboard could refer all calls to the appropriate agency for experienced operators to handle. Fourth, the agencies should publish prompt weekly reports of recalls. Only the FDA regularly publishes a list of recalls. Each agency should provide this information and distribute it to bodies such as state and local consumer offices and public interest consumer groups.[457] The implementation of these general recommendations, along with the agency-specific ones, could make the recall a more effective remedial device.

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[455] In 1979, the CPSC convened a meeting of representatives from six agencies engaged in product recalls (FDA, EPA, USDA, FTC, NHTSA and CPSC) to explore coordinating recalls and improving interagency communications. *See, e.g.*, Letter from Susan B. King, Chairman of the CPSC, to Donald Kennedy, Commissioner of the FDA (Feb. 15, 1979).

[456] There is precedent for such a group. On September 26, 1977, the CPSC, the Environmental Protection Agency, the FDA, and the Occupational Safety and Health Administration established an Interagency Regulatory Liaison Group (IRLG) to pursue cooperative efforts among the Agencies. One of the specific cooperative efforts was compliance and enforcement, although no work on recalls was undertaken. At the expiration of the IRLG's four-year charter, the Reagan Administration substituted a substantially trimmed liaison body called the Regulatory Work Group on Science and Technology. The new group has no compliance and enforcement component. In the interagency meeting on recalls, see *supra* note 455, the participants targeted areas for joint exploration to improve recall effectiveness but established no ongoing working group to pursue them. Interagency Meeting, *supra* note 1; Horton Interview, *supra* note 439.

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[457] The National Association of Consumer Agency Administrators (NACAA) compiles information on the recalls of NHTSA, the FDA, and the CPSC which it publishes monthly in its Recall Clearinghouse Service. Subscribers include state and local consumer offices and agencies. Telephone interview with Claudia J. Sturges, Director of Member Services of the NACAA (Oct. 18, 1983). Data on recalls are not easy to collect from the agencies, even for the knowledgeable staff of NACAA. *Id.* To make this information more accessible, the agencies should publish it on a regular and timely basis.

BACKGROUND REPORT FOR RECOMMENDATION 84-3

IMPLEMENTATION AND EFFECTS OF THE FEDERAL GOVERNMENT IN THE SUNSHINE ACT

by

David M. Welborn
University of Tennessee-Knoxville

William Lyons
University of Tennessee-Knoxville

Larry Thomas
University of Baltimore

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IMPLEMENTATION AND EFFECTS OF THE FEDERAL GOVERNMENT IN THE SUNSHINE ACT

Before the Government in the Sunshine Act went into effect in early 1977, members of the 50 or so boards, commissions, corporations and authorities subject to its provisions were free to gather, discuss and decide much as they preferred. After 1977 the act's provisions regulating the conduct of meetings circumscribed what could be dealt with collectively without an opportunity for the public to be present. Furthermore, meetings allowed by the act to be closed were regulated in various ways to make some information about their content available to the public. Based upon the severity of mandated change in core administrative processes of numerous agencies, clearly the sunshine law ranks among the most sweeping enactments in the history of the Federal administrative establishment.

The purpose of this analysis is to examine the implementation and effects of the portions of the act regulating meetings. Those pertaining to ex parte communications are not treated. Seven sections follow. The first sketches the background and major provisions of the law and the expectations of its advocates and those who expressed reservations regarding it. Research procedures are described in the second. The third and fourth focus on aspects of the act's implementation. Next the effects of the law on relations between agencies and their publics and on decision-making processes are examined, followed by an exploration of variations in effects and experiences. The last section contains a summary assessment of experience under the act.

The Sunshine Act

Essentially the Government in the Sunshine Act[1] does the following:

-Applies to agencies "headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate."
-Regulates meetings, defined as "the deliberations of at least the number of individual agency members required to take action in behalf of the agency when such deliberations determine or result in the joint conduct or disposition of official agency business."
-Requires that "every portion of every meeting of an agency shall be open to public observation" unless the subject matter is exempted.
-Specifies ten categories of exempt information which may be considered in meetings closed to the public. They pertain to:

--national defense and foreign policy;
--personnel rules and practices;
--information explicitly protected from disclosure by statute;
--trade secrets and privileged or confidential commercial information;
--accusations of criminal conduct or the formal censure of an individual;
--information of a personal nature the disclosure of which would be an invasion of privacy;
--investigatory records used in enforcement;

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[1] 5 U.S.C. 552b.

--information generated in the regulation of financial institutions;
--material the premature disclosure of which would produce financial speculation or threaten the stability of a financial institution, and that which would "be likely to significantly frustrate implementation of a proposed agency action;"
--issuance of subpoenas, participation in civil, international or foreign actions or proceedings, and dispositions of adjudicatory matters.

-Sets forth procedures for the announcement of open and closed meetings.
-Defines procedures for closing meetings.
-Specifies the record to be kept of closed meetings and procedures for public access to those records.
-Lays out ground rules for judicial review of alleged violations of the act.

Various analyses have explored the language of the law and grappled with uncertainties as to the precise meaning of certain of its provisions, especially the definition of meetings and the scope of several of the exemptions.[2] The purpose of this study is not to examine critically the structure and language of the act itself (except to the extent that particular provisions have been the source of major problems in implementation), nor to detail the rather complex legislative history that produced it. However, a delineation of basic positions expressed in the debate preceding near unanimous endorsement by both the House and Senate is useful as a backdrop for considering the implementation of the law and its effects.[3]

In the decade between 1966 and 1976, sensitivity to public access to government information and decision-making activities was clearly evident in the country and in Congress. Thus the notion of a sunshine law at the Federal level drew strength not only from a general concern about government secrecy, but also from a number of concrete, precedential steps dealing with access to government information. The idea of open meeting laws was pioneered at state and local levels, and when Congress began serious consideration of the matter, sunshine acts were in place in most of the states. At the Federal level, there had been the Freedom of Information Act of 1966 and the amendments that strengthened it in 1974,[4] the Advisory Committee Act of 1972,[5] and the movement beginning in the early 1970s toward open congressional committee meetings, all of which attested to growing concern about public access to government information.

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[2] The basic source is Richard K. Berg and Stephen H. Klitzman, An Interpretative Guide to the Government in the Sunshine Act (Washington, D.C.: Administrative Conference of the United States, 1978).

[3] The remainder of this section relies heavily on Terry Wayne Hartle, The Implementation of the Government in the Sunshine Act of 1976 (Unpublished Ph.D. dissertation, The School of Government and Business Administration of The George Washington University, 1981).

[4] 5 U.S.C. 552(a).

[5] 5 U.S.C., Appendix I.

The first sunshine bill in Congrss was introducedin 1972 by Senator Lawton Chiles of Florida. Other members of the Senate and House played leadership roles in the drive to enactment between 1972 and 1976, but Chiles remained in the forefront. Although the position of supporters of the legislation differ on particular points, they share a basic objective that was simple, obvious, yet profound: to open the processes of affected agencies to greater public scrutiny. Practical considerations resulted in allowance of some closed meetings, but closure was not mandated. Even when consideration of certain information could be closed under the act, openness in decision making to the maximum feasible extent clearly was viewed as desirable.

The ideals of open deliberation and collective decision making in public view rested on a rather straightforward hypothesis that was at the heart of the pro-sunshine argument: the greater the openness in government, the greater the public trust and confidence in government. Proponents did not present specific examples of situations in which "secrecy" in administrative deliberations had yielded poor or undesirable results. They did not argue that officials in the agencies to be affected were not trustworthy, although some may have thought it. Rather, they asserted as a general principle, with no empirical foundation, that conventional ways of doing business in the context of that particular time were themselves the cause of enervating suspicion. If the public could see more clearly how government actually worked, that suspicion would dissipate. And if sunshine revealed that in some instances distrust was justified, corrective steps would be facilitated.

Advocates of sunshine suggested a number of associated benefits to be realized in addition to increased public trust and confidence. Among the more important of these were

-Stimulation of broader participation in agency processes and more extensive public debate of agency policies.
-Agency responsiveness to a broader array of interests.
-Stronger lines of accountability.
-Reduced public misunderstanding resulting from partial information.
-Improved rates of compliance with agency rules and regulations.
-Higher quality of work resulting from greater public scrutiny.

Although generally stopping far short of rejecting the principle of open government, officials who would be responsible for implementation and adaptation of agency operations to an open meeting law expressed strong reservations. The most important were that

-Implementation would be costly and burdensome.
-The flexibility essential to administrative processes and the capacity for expeditious action would be limited.
-Information would be prematurely disclosed and information appropriately kept confidential would be inadvertently revealed in an open meeting, or in the release of records of a closed meeting.
-Communications among members and staff would be discouraged with negative consequences for the character and quality of agency judgments and decisions.

Clearly the debate attending passage of the Government in the Sunshine Act turned around a fundamental tension in democratic government, the public's right to know versus conditions conducive to sound and effective governmental performance.[6] Advocates of an open meeting law, dissatisfied with the existing balance, were of the view that its negative effects, at the most, would be minimal. Those expressing reservations from an agency perspective saw the likely costs in effectiveness and sound decision making to be much higher. In the clash of these perspectives, alterations were made in statutory language that addressed some agency concerns, but not to the point of eliminating their foundations. When the process of implementation began, the act's consequences and effects could not confidently be foretold. The act has now been in place for seven years, providing a record of experience from which to develop at least some tentative conclusions as to the nature of the changes it has wrought.

Research Procedures

Analyzing--indeed, even simply describing--the particulars of agency experience with the Sunshine Act and its effects is a challenging task for at least three reasons. First, the law applies to more than 50 agencies that share certain structural features but differ significantly in other respects. Second, some of the more important possible effects, such as altered relationships among agencies and their various publics, are extremely subtle. Third, the sunshine concept has a powerful symbolic dimension and is capable of evoking highly subjective reactions based upon basic value orientations. In light of these difficulties, this section sets the stage for the study by describing the data employed and suggesting several points to keep in mind when reading the analysis.

Data Sources

The study is based upon data drawn from four basic sources: judicial decisions interpreting the act; annual sunshine reports required of agencies for the years 1977 through 1981; mail survey questionnaires; and personal interviews. The annual reports, complemented by an analysis of all agencies' sunshine rules, were especially useful in assessing agency practices in implementing the act. Selected interviews were employed to gain a closer view of implementation practices and to pursue questions suggested by survey results.

The survey concentrated on 27 of the agencies covered by the act. Selection was weighted toward agencies with regulatory functions, and 18 of this type are included. The others are agencies with program and enterprise management, credit, and conflict adjudication functions. Included in the sample are agencies of various sizes, and agencies with both full and part-time membership. No strictly advisory bodies are included. The particular agencies examined are identified in Appendix A.

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[6] See Norman Dorsen and Stephen Gillers (eds.) None of Your Business: Government Secrecy in America (New York: The Viking Press, 1973); Itzhak Galnoor, Government Secrecy in Democracies (New York: Harper Colophon Books, 1977); Morton Halperin and Daniel Hoffman, Top Secret: National Security and the Right to Know (Washington, D.C.: New Republic Books, 1977); and Francies E. Rourke, Secrecy and Publicity: Dilemmas of Democracy (Baltimore: The Johns Hopkins Press, 1961).

Two respondent populations were constructed for each agency. The first consisted of agency members and upper echelon staff whose names appeared in the Government Organization Manual for the years 1977 through 1981. The second population was made up of journalists, attorneys, and trade, labor and public interest group officials thought to be representative of the attentive publics especially interested in and informed about agency operations.

The questionnaires sent to the two groups were identical in most but not all respects to allow comparison of responses. For example, members of attentive publics were not asked about the conduct of closed meetings, but they were asked questions regarding the act's special utility to them.

Details regarding the populations and response rates can be found in appendices A and B. 667 questionnaires were sent to agency officials and 396 were returned in usable form for a response rate of 59.4%. The number sent to the second population was 840, and 314 were returned for a response rate of 37.4%. The combined response rate was 47.1%. The actual rate, especially for the attentive publics, is probably somewhat higher, because erroneous addresses may have precluded the receipt of questionnaires in some instances. Of those responding, a substantial proportion of the agency population (76.0%) served both before and after implementation of the Sunshine Act. Almost as many of the attentive public population (67.3%) indicated they had very closely observed agencies subject to the act, and most of the remainder (30.6%) reported close observation. Those who responded, then, seem clearly qualified to assess the workings of the law.

Several comments about the attentive public population are in order. The task of construction was frustrated by the fact that even attentive publics are diffuse and constantly shifting and changing, thus difficult to pinpoint. The major sources used for identification purposes were the sunshine mailing lists maintained by a number of agencies, directories of associations and Washington representatives, and in some especially difficult cases such as the journalists who cover particular agencies, agency officials themselves.

As Appendix B shows, more success was attained in certain areas than in others. For example, the populations in some instances are small. A larger number and better distribution of public interest group officials would have been desirable, although a strenuous effort was made to identify all relevant organizations. This, plus the level of response, may raise questions about the validity of findings. Still, the deficiencies in the responses are not as great as they might seem. A high level of consistency in responses across the attentive public populations for different agencies and across types of respondents in those populations lends credibility to the findings to be reported. An increase of substantial magnitude in the numbers of respondents probably would have caused no significant change in the overall results.

Guides to Interpretation

The survey data might be employed and presented in several ways. In most of the sections to follow, the emphasis (except where good reason indicates otherwise) is upon tracking central tendencies. At a later stage in the analysis, some important variations are explored.

The major reason for employing this option is that the effects of the act as they are perceived by both agency officials and attentive publics do not greatly vary from agency to agency. To be sure the perceptions of respondents differ, but for the most part the pattern in the case of Agency X is not much different from the pattern in Agency Y.

Another preliminary observation bearing on the presentation of data is that the responses of the two basic populations are amazingly congruent in some respects and divergent in others. When questions pertain to what both groups can directly observe or experience, such as the conduct of open meetings, response patterns are very similar. Such congruence adds to the persuasiveness of the findings. When this kind of closeness is revealed by the data, differences are not always reported. But in other areas systematic, consistent differences do appear. Members of attentive publics are much more inclined than are agency officials to see positive benefits flowing from the act. They also are likely to suspect behind-the-scenes behavior that seriously compromises sunshine principles, such as unofficial meetings, to a greater extent than is reported by agency officials.

A major limitation of the study is that it does not directly weigh the effects of the act upon its major intended beneficiary, the public-at-large. To do so would be tremendously costly, even if it were methodologically sensible to try. Whether the views of attentive publics with their own special interests in the act may be extended to the broader population is subject to question.

Finally, the study should not be taken as attempting a precise cost-benefit analysis of the Sunshine Act's effects. No appraisal based essentially upon perceptions rather than upon verifiable, "objective" measures can perform such a task. What has been sought here is to draw upon questionnaire responses and interview data in order to assess broadly and with reasonable accuracy the act's consequences for an important set of governmental institutions and their publics.

The manner in which the act has been implemented is considerably easier to grasp than is its impact on ambiguous administrative relationships and internal processes of decision. Implementation is the topic of the next two sections. After examining the litigation the statute has generated, attention turns to questions of agency practice and performance.

The Courts and Implementation

Public policies emanating from Congress are usually the product of bargaining and compromise among competing interests. The process of mutual accommodation and adjustment leading to enactment often leads to vague and ambiguous provisions. Although the language of the Government in the Sunshine Act is comparatively precise, agencies have been required to read meaning into a number of its mandates. Their interpretations have been challenged in several instances. Though the volume of litigation has not been great, Federal courts have addressed a number of important questions about the act's definitions, exemptions, procedures, and enforcement.

Definitions

The Sunshine Act's provisions delimiting the scope of the meeting requirements have been described as among the more troublesome parts of the statute.[7] Two key definitions, of "agency" and of "meeting," have precipitated controversies requiring judicial attention.

Specifying precisely which governmental bodies are to be affected by a statute such as the Sunshine Act poses a difficult problem in drafting legislation. Congress deliberately chose not to list agencies and instead defined generally those to be covered. They are all agencies headed by a collegial body of two or more members appointed by the President with the advice and consent of the Senate. Included within the scope of this definition are any "subdivisions" which are authorized to act on an agency's behalf.

The two leading cases dealing with the definition of agency are Symons v. Chrysler Corporation Loan Guarantee Board[8] and Hunt v. Nuclear Regulatory Commission.[9]

Symons dealt with the Chrysler Corporation Loan Guarantee Board, created by Congress in January, 1980 to administer a loan program to help the company avoid bankruptcy. The board was authorized to make commitments for and to issue loan guarantees under specified conditions. The board's members were the incumbents of specified official posts. The Secretary of the Treasury, the Chairman of the Federal Reserve Board, and the Comptroller General of the United States were designated as full members. The Secretary of Labor and the Secretary of Transportation were to serve as non-voting members. Though all members had been appointed to a government position by the President with the advice and consent of the Senate, they had not been appointed to the Loan Guarantee Board by him, but rather received this assignment from Congress.

Symons, a staff attorney and lobbyist for the public interest organization Congress Watch, sent a letter to the board in April, 1980 demanding that it open its meetings to public observation. The board refused on the grounds that it was not an "agency" as defined by the Sunshine Act, since none of its members had been appointed "to such position" by the President. Symons subsequently filed suit against the board in the District Court for the District of Columbia. The court held that the Board was subject to the Sunshine Act. It viewed the government's argument that the board was not covered by the Act since its members served ex officio as based on a "crimped, unduly restrictive view of the statute."[10] The legislative history, according to the trial court, revealed a "deliberate congressional choice in favor of a broad, all encompassing definition of agency."[11]

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[7] Berg and Klitzman, An Interpretative Guide to the Government in the Sunshine Act, pp. 3-4.

[8] 670 F. 2nd 238 (D.C. Cir. 1981).

[9] 468 F. Supp. 817 (N.D. Okla. 1979), affirmed, 611 F. 2d 332 (10th Cir. 1979).

[10] 488 F. Supp., 874, 876 (D.C.C. 1980).

[11] Id.

On appeal, the D.C. Circuit reversed the lower court's ruling, holding that Congress intended a much narrower definition of "agency." Members who serve on multi-headed agencies ex officio do not count toward the majority required by the definition, since their appointment was not "to such position" by the President. Furthermore, "If Congress had wanted to subject the Board to the provisions of the Act, it could have so provided when the Board was established."[12] This reasoning was based on the fact that Congress had followed that route when it established the Depository Institutions Deregulation Committee in 1980. "When Congress wishes to extend Sunshine coverage to ex officio agencies, it will do so."[13]

Hunt involved a suit against the NRC alleging that the Sunshine Act precluded the commission's atomic safety and licensing boards from holding closed meetings. More specifically, Hunt challenged a licensing board's in camera hearing dealing with the so-called "Reed Report" on the safety of the nuclear steam supply system to be installed in the Black Fox nuclear power station scheduled to be built near Tulsa, Oklahoma.

The NRC argued in response that the Sunshine Act's mandate for open meetings did not apply to the adjudicatory hearings of a licensing board. The phrase "any subdivision thereof authorized to act on behalf of the agency" referred only to subdivisions composed of members of the collegial body, and no NRC commissioner served on the three member licensing board. It's position was upheld by the District Court for the Northern District of Oklahoma and by the Court of Appeals for the Tenth Circuit.

A more sensitive definitional problem is the types of agency gatherings that constitute a meeting. The act defines a meeting as: "The deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business."[14] Several basic elements must be present for a gathering to be a meeting. First, the phrase "at least the number of agency members required to take action on behalf of the agency" requires that a quorum of agency members (or a quorum of subdivision members) must be present. A quorum may be less than a majority of members, and as few as two. Second, the number of members required for a quorum must be in a position to exchange views. The phrase "joint conduct or deliberations" is intended to exclude such situations as when a member gives a speech concerning agency business, and other agency members are present. Third, the discussions among officials must be substantive in nature. Social gatherings or casual encounters are not encompassed if there is only passing reference to agency matters. Finally, the deliberations must involve "official agency business." It is the discussion involved, not where or how it is conducted that determines when a gathering becomes a meeting subject to the Sunshine Act.[15] Recognition of these elements, however, still leaves interpretative problems.

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[12] 670 F. 2d at 244.

[13] Id. at 245.

[14] 5 U.S.C. Sec. 552b (a) (2).

[15] Susan T. Stephenson, "Government in the Sunshine Act: Open Federal Agency Meetings," The American University Law Review 26 (1976/77), pp. 170-172.

Three major cases have dealt with the act's definition of meeting. One grew out of the distinctive functions of the Council on Environmental Quality. Located within the Executive Office of the President, it performs two major tasks. It advises the President on environmental matters, and it examines the programs of the government to ensure that they are administered in accordance with the National Environmental Policy Act of 1969. A restricted application of the Sunshine Act was necessary, the council determined, if it were to exercise its responsibilities properly.

The Pacific Legal Foundation, a non-profit, public interest organization, filed suit in January, 1979 against the council alleging that it had acted in proceedings that constituted meetings under the Sunshine Act since June, 1977, but had neither opened nor closed those meetings in accordance with the statute. The District Court for the District of Columbia dismissed the suit, concluding on the basis of sparse legislative history that, "the formulation and presentation of advice to the President on environmental matters, which is the CEQ's primary responsibility, is [not] 'official agency business' subject to the requirements of the Act."[16]

Prior to this ruling, CEQ decided to amend its sunshine regulations in two areas. First, the council changed the definition of meeting to limit the applicability of the Sunshine Act to those situations in which an affirmative vote was required by statute, regulation, executive order, or internal procedures. In addition, the amended regulations exempted from the open meeting requirement gatherings involving advice to the President.

The Pacific Legal Foundation petitioned the D.C. Circuit Court of Appeals for review of the portions of the CEQ's regulations which limited the applicability of the open meeting requirement and the district court's decision. The court found that the legislative history did not support the council's contention that the Sunshine Act permits an exception for advising the President. According to the court, the language of the act is "sweeping, unqualified, and mandatory."[17] It does not permit an agency to exempt from the open meeting requirement an entire category of its business.

The court also held that limiting the open meeting requirement to gatherings where a formal vote was required was inconsistent with the Sunshine Act's definition of meeting. It saw nothing in the act which allowed the CEQ to restrict the openness requirement to those meetings on business which required an affirmative vote of two members.

> The statutory test is whether the deliberations 'determine or result in the joint conduct or disposition of official agency business.' If they have that effect, the deliberations constitute a meeting, whether or not a formal vote is taken, and if it is taken, whether or not the vote is 'required' for there to be agency action. By adding the required-vote standard to the statutory definition of 'meeting,' the Council improperly has limited

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[16] Pacific Legal Foundation v. CEQ, 13 E.R.C. 1273, 1276 (D.D.C. 1979).

[17] Pacific Legal Foundation v. CEQ, 636 F. 2d 1259, 1265 (D.C. Cir. 1980).

> the reach of the broad open meeting mandate that Congress has specified.[18]

The second case is of somewhat broader significance as it concerned the rather common practice of decision making through the circulation of written communications, or by notation voting, rather than in meetings. The FCC's use of this device was attacked as a violation of the Sunshine Act.

Plantiffs contended that if the FCC were allowed to use notation voting to dispose of agency business, then the purposes of the Sunshine Act could be circumvented by agencies simply deciding not to hold meetings. Relying on the legislative history of the act, the D.C. Court of Appeals held that Congress intended to allow commissioners to act on agency business circulated to them "sequentially in writing." According to the court, notation voting permits agencies to accelerate consideration of "less controversial cases without formal meetings." Furthermore:

> If all agency actions required meetings, then the entire administrative process would be slowed - perhaps to a standstill. Certainly requiring an agency to meet and discuss every trivial item on its agenda would delay consideration of the more serious issues that require joint face-to-face deliberation. Clearly Congress did not intend such a result.[19]

Although holding that the Sunshine Act does not prohibit agencies from making final decisions on non-controversial and routine matters by notation voting, the D.C. Circuit left open the issue of whether lawful action by notation voting was limited to such situations. The question of whether the act allows a subsequent notation vote to result in a reversal of a substantive policy decision made in public by an agency is now awaiting judicial resolution.

The most important case dealing with the definition of meeting is Federal Communications Commission et al. v. ITT World Communications, Inc., et al., the first sunshine case to be decided by the Supreme Court.[20] At issue was whether the consultative process gatherings (CPGs) of the FCC's Telecommunications Committee and representatives of foreign telecommunications authorities were meetings within the meaning of the Sunshine Act.

Before 1979, the discussions in these periodic sessions were open to all interested parties. At a session in Dublin, Ireland that year, Telecommunications Committee members persuaded their foreign counterparts to discuss increased competition in international services following its certification of two new carriers not long before. European governments had not responded enthusiastically to this development, preferring instead to deal with the few large carriers with well-established services. Nevertheless, they agreed to talk about competition in international markets. Representatives of the carriers were excluded from these deliberations and from subsequent discussions in 1980. ITT and other carriers challenged their exclusion on the grounds that the discussions were subject to the Sunshine Act. They won on the point in the District Court for the District of Columbia, and the FCC appealed.

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[18] Id. at 1266.

[19] Communications Systems, Inc. v. Federal Communications Commission, 595 F. 2d 797, 801 (D.C. Cir. 1978).

[20] ____ U.S. ____ (1984).

When the matter came to the Court of Appeals for the District of Columbia, the commission put forth three major arguments in support of its position. The first was that consultative process gatherings did not constitute an "official agency meeting." Only three of the seven members serve on the Telecommunications Committee. Since they had not been formally delegated the authority to act on behalf of the agency at the gatherings, the threshold requirement of a quorum of the agency was not met. The D.C. Court of Appeals emphatically rejected this argument, holding that the applicability of the Sunshine Act did not depend upon whether the agency formally delegated authority to a subdivision. Committee members attended the sessions in their official capacity, they attempted to reach a consensus with their foreign counterparts on the course of action to pursue, and they conveyed the information obtained at the gatherings to the full commission for its consideration. The court concluded, "Whatever the actual scope of the Committee's endeavor, there can be . . . no question that they (the meetings) are undertaken on behalf of the Commission."[21]

A second arguemnt advanced by the FCC was that for several reasons, the informal talks were not deliberations that resulted in the "joint conduct or disposition of official agency business." No official agency business was transacted at the consulative process gatherings; members simply exchanged information and views and did not "vote, 'negotiate,' or otherwise engage in a 'rump' FCC meeting.[22] The CPG exchanges furthermore, were not meetings of the Telecommunications Committee, but simply gatherings attended by committee members, so the discussions did not involve the "joint conduct" of business among members at the subdivision level. Finally, the commission contended that CPG gatherings were the kind of discussions that Congress intended to exclude from the meeting requirements, basing its position on the Senate report which stated that "[i]t is not the intent of the [Sunshine Act] to prevent any two agency members, regardless of agency size, from engaging in informal background discussions which clarify issues and expose varying views.[23]

The court rejected the FCC's argument that CPG exchanges were not deliberations involving the joint conduct of official agency business. It ruled that the commission had failed to rebut the presumption that the consultative process gatherings were an important mechanism for gathering information from foreign administrations, and that such materials were useful in the commission's policy deliberations. According to the court, the Sunshine Act does not support "a distinction between an agency's predecisional activities and its postdecisional efforts to implement, interpret, and promote its policies."[24] The sessions "focus on concrete issues and are conducted to build a 'consensus' that will have far-reaching effects on the structure of the communications industry. They are, in short, an integral part of the Commission's policy-making processes, and as such they constitute the 'conduct. . . of official agency business.'[25]

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[21] ITT World Communications, Inc. et al. v. Federal Communications Commission, 699 F. 2d 1219, 1241 (D.C. Cir. 1983).

[22] Id.

[23] Id. at 1243.

[24] Id. at 1242.

The third major argument put forth by the commission in defense of its stance was that it would be extremely difficult to get representatives of foreign governments to engage in informal discussion if they were open to public observation. Given that the act did not deal with this issue explicitly, the FCC argued that the open meeting requirement should not be extended to cover meetings between agency members and their foreign counterparts. The Court of Appeals, however, found nothing in the history or structure of the Sunshine Act to substantiate the commission's claim. It noted that Congress had recognized that certain meetings should be closed to public scrutiny. The decision to close a meeting, however, had to be on an individual basis. Instead of closing the CPG exchanges by use of the exemptions in the act, the commission had attempted to exempt an entire category of agency business from meeting requirements. The court ruled that such an action was in violation of the Sunshine Act's presumption in favor of openness.[26]

The circuit court's decision was a victory for ITT and its allies in litigation and for those who support a broad interpretation of the act. Yet in its reading of the law to incorporate consultative process gatherings, the court left important points in a state of uncertainty. First, it appeared to interpret the "conduct or disposition of official agency business" to include any interaction involving the necessary quorum of members with one another or outsiders that plays "an integral role in the...policymaking process," whether before or after an agency decision.[27] Yet no principles were established that went beyond the particulars of this case to give clear meaning to the key concept, "integral role."

Second the court read the authorization requirement to include more than formal delegation of authority to act for an agency. What, then, would constitute authorization? Three criteria were proffered, drawn from the situation at hand: (1) members must be acting in their "official roles;" (2) in pursuit of an agency "goal;" and (3) later conveying information derived from the meeting to the full body.[28] Applying the criteria literally, it can be argued that a substantial portion of the interactions in which agency members engage could be defined as sunshine meetings. When members work they are in their "official roles," typically are involved in the pursuit of "goals" related to agency responsibilities, and the products of their interactions are commonly fed into agency considerations. Surely the court did not intend so broad an interpretation. The problem is, what did it intend? One can think of many examples of interaction previously considered to be outside Sunshine Act requirements the status of which was clouded by this decision.

The Supreme Court unanimously overruled the court of appeals in a rather spare decision, one based upon a narrow reading of the act's language, buttressed by references to the legislative history. The consultative process gathering discussions, it concluded, functioned to provide general background information to the FCC and to permit the members attending "to engage with their foreign counterparts in an exchange of views by which decisions already reached by the Commission could be implemented." Such discussions, according to the court, are not "deliberations (that) determine or result in the joint conduct or disposition of official agency business. Although they may play, in some sense, "an integral role in the . . . policymaking process," they do not bear a sufficiently close relation to determination of official action so as to fall within the statute's definition of meeting.[29]

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[25] Id. at 1244.

[26] Id. at 1244-45.

[27] Id. at 1244.

[28] Id. at 1242.

On the related issue of authorization, the Supreme Court rejected the lower court's inferrence of "an undisclosed authority, not formally delegated, to engage in discussions on behalf of the Commission." The act instead, "applies where a subdivision of the agency deliberates upon matters that are within that subdivisions formally delegated authority to take official action for the agency." The Telecommunications Committee's only delegated authority was to approve applications for common carrier certification, and the committee did not consider or decide upon such applications at the international gathering. A broader reading than this, the court concluded, "would require public attendance at a host of informal conversations of the type Congress understood to be necessary for the effective conduct of agency business."[30]

Exemptions

The Sunshine Act recognizes that agencies often deal with sensitive matters that may justify an exception to the open meeting requirement. As noted before, the act sets forth ten exemptions which agencies may use to close all or portions of meetings. Common Cause v. Nuclear Regulatory Commission is a leading case in which an agency's interpretation of exemptions was challenged.[31] The issue was whether any of the statutory exemptions of the Sunshine Act were applicable to the NRC's budget meetings. In July, 1981, the U.S. District Court for the District of Columbia held that the commission acted contrary to the requirements of the act when it closed its budget deliberations under exemption 9(b), which permits closure if open deliberations would be "likely to significantly frustrate implementation of a proposed agency action." The court ordered the release of the transcript of the meeting and subsequently enjoined the commission from closing its budget deliberations.

Approximately a month after the district court's ruling, the NRC scheduled a series of meetings to discuss budget requests for fiscal year 1983. On the advice of its general counsel, the NRC divided these meetings into two categories: preliminary staff briefings and markup/reclaim sessions. The preliminary staff briefings were designed to provide commissioners with background information and staff advice, while in the markup/reclaim sessions the commissioners would decide on the specific funding levels to be submitted to the Office of Management and Budget (OMB). The commission voted to open the preliminary staff briefings, but decided to close the markup/reclaim sessions.

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[29] _____ U.S. _____, (1984).

[30] Id. at

[31] 674 F. 2d 921 (D.C. Cir. 1982).

The basis for closing the markup/reclaim meetings were exemptions 2, 6 and 9 (b). Upon learning of the NRC intention to close the markup/reclaim sessions, Common Cause filed suit asking the district court to enforce its injunction requiring the NRC's budget meetings to be open to public observation. The district court did not act immediately on Common Cause's motion, and on July 27, 1981, the NRC held its markup/reclaim meeting in closed session. Subsequently, the district court construed its injunction of July 2 as prohibiting the closure of any budget meeting under any exemption and ordered a transcript of the meeting of July 27 to be released to the public. Two weeks later, the district court issued an order holding the NRC in contempt of court for closing the meeting.

A stay was issued by the Court of Appeals for the District of Columbia. The commission also obtained a second stay from the Court of Appeals to permit a closed meeting for formulating an appeal of proposed budget reductions to the Director of OMB.

On appeal, the D.C. Circuit struck down the district court's injunction which permanently enjoined the NRC from closing "future meetings of a similar nature" on the grounds that it violated the specificity requirements of the Federal Rules of Civil Procedure.[32] But with regard to the substantive issues, it concluded that no blanket exemption existed for budget deliberations; none of the Sunshine Act exemptions relied on by the NRC to close its budget meetings--2, 6, or 9(b)--could be interpreted so broadly.

The court held that exemption 9(b) allows closure of agency discussion of proposals or negotiating strategies which could affect the decisions of third parties acting in a nongovernmental capacity--exporters, potential corporate merger partners, or owners of real property, for example. The court's reasoning was that the premature disclosure of information which could influence the actions of third parties might have an "adverse effect upon the government's financial or regulatory interests."[33] The NRC contended that opening budgeting meetings would mean that the commission would have to reveal its "time honored strategies of item-shifting, exaggeration, and fall back positions" in its dealing with OMB and the President. Such concerns did not fit with the courts reading of the exemption.

> If Congress had wished to exempt these deliberations from the Sunshine Act--to preserve the prior practice of budget confidentiality, to reduce the opportunities for lobbying before the President submits his budget to Congress, or for other reasons--it would have expressly so indicated.[34]

It also concluded that exemption 2, which concerns matters that "relate solely to the internal personnel rules and practices of an agency," could not be used to justify the NRC's approach to closing portions of a budget meeting. Although acknowledging that budgetary discussions inevitably bear on personnel matters, the court ruled that they do not "relate solely" to internal personnel questions.[35] In addition, the court rejected the NRC's use of exemption 6, which protects information of a personal nature the disclosure of which would result in an "unwarranted invasion of personal privacy" could be used to close budget deliberations. The commission argued the need to protect discussions of an "individual managers particular qualifications, characteristics, and professional competence in connection with a budget request for that particular manager's program.[36] The court concluded, however, that the exemption was not intended to be used "to shelter substandard performance by government executives."[37] Such "policy considerations apply a fortiori in the budget process, in which the performance of individual executives may affect the Commission's willingness to allocate budgetary resources to particular regulatory programs."[38] No merit was found either in the NRC's contention that secrecy in the budgetary process was mandated by the Budget and Accounting Act of 1921 and implied in the separation of powers doctrine. The court went on to note that even though there was no blanket exemption of budget meetings, the NRC could justify closing portions of a meeting on an individualized and particularized basis.

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[32] Id. at 927.

[33] Id. at 933.

[34] Id. at 934.

The tenth exemption in the Sunshine Act became an issue in the 1981 case of Time, Inc., v. U.S. Postal Service.[39] The Board of Governors of the Postal Service had scheduled meetings to discuss the Postal Rate Commission's recommendation on changes in postal rates and announced that portions of them would be closed to the public pursuant to exemption 10. That exemption applies to meetings likely to concern an agency's issuance of a subpoena; participation in litigation or arbitration; or "the initiation, conduct, or disposition" of a case of formal adjudication or "otherwise involving a determination on the record after opportunity for a hearing."[40] The reason given for closure by the Postal Service was the possibility that litigation might arise over postal rate increases, and thus involve the board directly in a civil action.

Shortly thereafter, Time, Inc., along with Newsweek and the National Association of Greeting Card Publishers, requested the Court of Appeals for the Second Circuit to determine whether the closures violated the Sunshine Act. The court found that the board's decision was a proper one. The court based its reasoning on the final clause of exemption 10 which deals with an agency's participation in a proceeding "otherwise involving a determination on the record after an opportunity for a hearing." According to the court, the clause applied not just to adjudicatory matters, but also to rulemaking proceedings "involving a determination on the record after an opportunity for a hearing" (formal rulemaking).[41] (Under its statutory mandate, the Postal Rate Commission cannot make recommendations until a hearing on the record has been held.) The court explained that if the board had known that the last clause of exemption 10 applied to both formal adjudication and formal rulemaking, it would have relied on "a surer ground than the litigation" clause to justify closing its meetings.[42]

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[35] Id. at 937-38.

[36] Id. at 938.

[37] Id.

[38] Id.

[39] 667 F. 2d 329 (2nd Cir. 1981).

[40] 5U.S.C. Sec. 552(b) (c) (10).

Procedures

The Sunshine Act requires agencies to announce meetings publicly at least seven days in advance, except in limited circumstances certain conditions if a majority of the collegial body so determines by a recorded vote. When closing meetings under this expedited procedure, agencies must notify the public "at the earliest practicable time." Also, agencies can add or delete items from the agenda after public notice if they announce such changes promptly and take a recorded vote. Agencies are required not only to issue public notice of all meetings in the Federal Register, but also to use "other reasonable means" to inform the public of upcoming meetings. In closing meetings agencies must take a separate recorded vote on the action, provide a written explanation of the decision, and supply a list of all persons expected to attend. In addition, the general counsel or the chief legal officer of the agency must certify that the meeting was properly closed. Finally, the act requires agencies to maintain "a complete transcript or electronic recording" of each meeting or portions of a meeting closed to the public. But in the case of meetings closed pursuant to exemption 8, 9(a), and 10, the agency need only keep full and accurate minutes. All records of closed meetings, excluding exempted materials, must be made "promptly available to the public." Agencies are required to maintain these records for a period of two years.

An important case in which an agency's procedures were challenged was A.G. Becker v. Board of Governors of the Federal Reserve System.[43] The plaintiff, a broker and dealer in securities, maintained that the board violated the Sunshine Act in two meetings held in 1980 to consider an alleged illegal sale of commercial paper. Both meetings were closed to the public pursuant to exemption 4 which protects commercial and financial information, exemption 8 which protects reports prepared for the use of an agency responsible for regulating financial institutions, and exemption 10 which covers adjudicatory matters. The Board of Governors did not provide notice of the meetings until approximately three hours after they were completed.

Becker's suit alleged that the board disregarded the letter and spirit of the Sunshine Act by not providing notice "at the earliest practicable time." In addition, it was contended that the board did not cite an exemption to the act which dealt with the particular matter scheduled for discussion and had included material not relevant to it in order to justify closure. Finally, the plantiff argued that since the meetings had not been properly closed, the deletions made in the released minutes and transcripts of the meetings were illegal.

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[41] 667 F. 2d at 334.

[42] Id at 335.

[43] 502 F. Supp. 378 (D.D.C. 1980).

The District Court for the District of Columbia held that the board had properly closed the meetings. However, relying on the legislative history of the act, the court found that providing notice of a meeting after it was held did not satisfy the requirement that meetings closed under expedited procedure be announced "at the earliest practicable time." The court specifically rejected the board's argument that advance notice of the meeting to consider cease-and-desist action against the bank in question would have caused damage in financial markets. The court stated that such a closure without notice would have to be supported by "specific affidavits describing with sufficient justification the basis for such a claim, and not rest on conclusory hypotheses."[44] The court went on to hold that absent extraordinary circumstances, notice that that board will hold a meeting must be given prior to the beginning of the meeting.

To comply with the district court's holding in Becker, the board changed its procedures for notice of meetings. Except in instances where information is exempted from disclosure under the Sunshine Act, the board now provides prior notice of meetings proposed to be closed under expedited procedure. Such notice is ordinarily issued at the time the staff prepares the preliminary agenda, usually two working days before the meeting.

Another case involving procedures in Northwest Airlines, Inc. v. Equal Employment Opportunity Commission.[45] The plaintiff brought an action against the EEOC requesting that it make public the records of a portion of a closed meeting. At that meeting, members of the EEOC discussed a request by the Solicitor General of the United States to formulate a position on a case pending before the Supreme Court. That case, which involved Northwest Airlines, dealt with whether an employer was entitled to a contribution from the union for back pay accrued against the employer under various civil rights statutes administered by the EEOC. The commission denied Northwest Airlines access to the records of that portion of the meeting.

Northwest contended that the meeting had not been closed in accordance with statutory procedures. The law requires that an agency make publicly available within one day of any decision to close a meeting the votes of each member and a full written explanation of the action. The EEOC acknowledged that these requirements had not been met since the explanation given for closing the meeting was not available until eight days after the vote was taken.

The District Court for the District of Columbia upheld Northwest's contention and ordered the EEOC to make available the tape recordings, minutes, and any transcripts of the meeting. The court also criticized the commission for its failure to comply with the appropriate closing procedures. According to the court, it was "apparent that the EEOC and its staff seem to have what can be construed as a dim awareness of the statutory requirements."[46]

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[44] Id. at 385.

[45] 24 FEP Cases 255 (1980).

[46] Id. at 256.

Judicial Enforcement

Federal district courts are empowered to enforce the various provisions of the Sunshine Act. Any citizen may challenge an agency action. However, suits must be field within at least sixty days of the meeting at which the alleged violation occurred. The burden of proof is on the agency to justify its conduct.

In considering challenges brought under the Sunshine Act, a district court may examine in camera portions of a transcript or the minutes of a meeting to determine if there has been a violation of the open meeting requirement. District courts may order that a closed meeting be opened, require the release of transcripts of a closed meeting, or issue an injunction against future violations of the act. They do not have the statutory authority to invalidate, set aside, or enjoin substantive agency actions related to sunshine violation. This prohibition does not apply to courts otherwise authorized to review agency actions, and these may grant whatever remedy they deem appropriate under the act.[47] However, the Senate Report indicated that authority to set aside an agency action should not be used when the violation of the act was unintentional and non-prejudicial to the parties involved, or when the violation was of an inconsequential nature.

The scope of the enforcement power of courts is illustrated in Pan American World Airways v. Civil Aeronautics Board.[48] When Braniff Airlines sought reorganization in bankruptcy on May 13, 1982, the CAB had to quickly consider airline applications for temporary exemptions to operate the international routes left unserved. CAB announced late in the afternoon of May 13 that it would hold a closed meeting the next day to consider the applications received. The meeting was closed on the grounds that foreign policy concerns and other exempted materials could possibly be discussed in awarding the routes.

After the meeting, the CAB announced that the Dallas/Fort Worth (DFW) to London route had been awarded to American Airliens and the Central Zone (DFW, Houston, and New Orleans) to Venezuela route had been awarded to Continental Airlines. The CAB's order, however, did not contain an explanation of why it was in the "public interest" to grant the routes to these particular airlines, or why the exemption authority would continue until April, 1983, or until final board action, whichever came first. It was not until May 27 that the CAB issued an order which set out the basis of its May 14 decision.

Three airlines, Pan Am, Delta, and TWA, filed suit in the Court of Appeals for the District of Columbia challenging the CAB's order as a post hoc and arbitrary rationalization of its decision. With regard to the sunshine issue, the D.C. Circuit found that the CAB's closure of its May 14 meeting was "in patent violation of the law."[49] According to the court, the recent decision in Common Cause v. NRC should have put all agencies covered by the act on notice that all meetings were subject to the openness requirement, except those specific portions which were closed under the terms of one of the exemptions.

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[47] 5 U.S.C. Sec. 552b(i).

[48] 684 F. 2d 31 (D.C. Cir. 1982).

[49] Id. at 35.

The court concluded that no basis existed for the CAB to close the entire May 14 meeting because of a belief that some exempt material might be discussed.

> At a bare, absolute minimum, the CAB should have opened the entire discussion of the DFW-London route, for the transcript reveals that no foreign policy concerns, arguably exempt, were discussed in connection with this route. We also have serious doubts, based on our examination of the full transcript (which the Board filed under seal after oral argument), that exempt foreign policy discussions so pervaded the debate on the Venezuelan route that the agency could not have segregated exempt and nonexempt portions, closing only the former.[50]

The D.C. Circuit also rejected the CAB's contention that the meeting had been closed because no member of the public had requested the board to open it. The Sunshine Act, the court declared, speaks to the agencies, not to the public. The act establishes a broad presumption that meetings should be held in the open, "not a mere requirement that the Board accede to requests that it open its meeting."[51]

After condemning the CAB's failure to comply with the requirements of the act, the court then turned to remedies available for such violations. By unlawfully closing the meeting and offering no explanation for its actions, the court stated that the CAB had come "periously close" to forcing the court to set aside the agency's decision. The court declared, however, that the CAB's failure to comply with the Sunshine Act did not provide a basis for invalidating the agency's action. The court noted that such a decision would be to the detriment of American Airlines, Continental Airlines, and the traveling public, none of whom was directly involved in the board's "illegal closure." The court concluded that the release of transcripts would be the proper remedy for the Sunshine Act violations.[52]

In another decision involving the Civil Aeronautics Board, Braniff Master Executive Council, Inc. v. CAB,[53] the D.C. Circuit held that the agency's closing of a meeting in violation of the Sunshine Act did not warrant invalidation of the Board's substantive action. In that case, Braniff Master Executive Council, an organization representing former Braniff pilots, requested the D.C. Circuit to set aside a CAB order granting interim approval for the transfer of most of Braniff's South American routes to Eastern Airlines. The airline pilots wanted the order invalidated on the grounds that the CAB, in an illegally closed meeting, had failed to include labor protection provisions in granting the transfers. The court noted that it already had criticized the CAB's closure of meetings such as this in the Pan Am case. Moreover, as in the Pan Am decision, it held that release of transcripts, not invalidation of the agency's substantive action, was the appropriate remedy.[54]

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[50] Id.

[51] Id.

[52] Id. at 36.

[53] 693 F. 2d 220 (D.C. Cir. 1982).

[54] Id. at 226.

Agency Implementation

Although litigation has clarified several aspects of the law, agency continue to be troubled by some of its provisions. One is the definition of meeting and its application to special circumstances in which members are together, but are not engaged in formal deliberations. Examples of borderline situations mentioned by interviewees include staff briefings field trips, and the sessions of member-staff committees to "refine" measures following previous consideration by the full membership. Considerable variation in agency practices in such situations attests to uncertainty, some of which may be resolved by the Supreme Court's decision in the ITT case. Determing the appropriate scope of several of the exemptions is an additional problem, especially 2 pertaining to personnel rules and practices, 9 (b) pertaining to frustration of proposed agency action, and 10 pertaining to issuance of subpena, participation in civil action or proceeding, and formal agency adjudication. Finally, it is not clear how long the transcripts, recordings and minutes of closed meetings may be kept in confidence.

Agency officials also cite four procedural requirements as contributing to administrative inefficiency and delay without providing, in their view, any substantial benefit to the public. One is the requirement of a majority vote to delete or postpone an agenda item. The others relate to closed meetings and are the requirements for a "full written explanation" of the reasons for closure, for a list of persons expected to attend a meeting, and for a presiding officer's statement setting forth time and place of the meeting and the persons present.

An earlier study of implementation of the Sunshine Act concluded that, for the most part, agencies encountered few serious administrative difficulties in putting it into effect. The major reasons cited were the relative clarity of the law, the lead time it allowed, the ability of agencies to absorb the dollar costs entailed, and the positive response of agency leadership.[55] Despite the concerns just mentioned, from an administrative standpoint today, seven years after the initial period of adjustment, the act still appears to pose no fundamental administrative problems for affected agencies. It is now a part of agency life, and in the narrow administrative sense it functions smoothly. Rules are in place, routines for compliance are established, personnel are knowledgeable about its requirements, and the resources necessary to administer the act are modest. Consequently, the emphasis in this section is on larger questions of implementation, particularly basic questions of compliance, meeting patterns, and the conduct of meetings.

Calibrations of Compliance

When the act went into effect, some felt that it would be difficult to secure real, as contrasted with illusory compliance, because of the basic alterations it mandated in agency processes. Respondents were asked for their overall assessment of agency compliance. As shown in Table 1, agencies generally are perceived to be in essential compliance with the law and not attempting to circumvent its provisions, except in the eyes of a very, very few. The degree of enthusiasm brought to the task is seen somewhat differently by those associated with agencies and attentive publics. A much greater proportion of the former perceive a serious attempt to comply with the letter and spirit of the law than do the latter.

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[55] Hartle, The Implementation of Government in the Sunshine Act of 1976, 1981, p. 334.

The two basic ideas in the Sunshine Act are that notices should precede meetings and that members should meet only in official meetings. Generally speaking, compliance with notice requirements is the norm. The act requires a notice to be forwarded to the Federal Register at least seven days in advance of a meeting, except under narrowly defined circumstances. In their annual sunshine reports for the 1977-81 period, most agencies indicated that the seven day requirement typically is met. The appearance of notices less than seven days before a meeting is often due to a time lag between submission and publicaton, agencies say, despite the adoption in 1977 of special Federal Register procedures for expediting the processing of sunshine items. However, the reports also reveal that a few agencies, most notably the Federal Labor Relations Board, the Federal Deposit Insurance Corporation and the Nuclear Regulatory Commission, failed to meet the seven day standard approximately half the time during the 1977-81 period.

Table 1

Assessment of Agency Implementation Efforts

	Agency Officials	Attentive Publics	Total
Serious attempt to live up to letter and spirit of law	82.2%	53.0%	69.4%
Attempt to meet requirements in minimal fashion	15.7	39.6	26.2
Attempt to conduct business as usual	2.1	7.3	4.4

A number of agencies involved in the regulation of financial activity, especially the Federal Reserve Board, the Farm Credit Administration, and the Federal Home Loan Bank Board, frequently hold meetings under expedited procedures where there is some discretion in giving notice. Such meetings, as has been noted are to be announced "at the earliest practicable time." For most agencies, this has meant the day of the meeting and for others a day or so after a meeting. It was pointed out in the previous section that post-meeting notification has met with judicial disapproval. Still, observers feel that agencies still are inclined to take advantage of expedited procedures.

The act allows changes in agendas after notice if such changes are announced, again, "at the earliest practicable time." Records of individual agencies show that most announcements of changes do not appear in the Federal Register until after a meeting is held. This is perhaps an unavoidable weakness in notice procedures. Furthermore, the notices of changes are such that it is often difficult to interpret them without going back to the original notice.

Agencies are encouraged by the act to go beyond formal notice in ensuring that the public is informed of upcoming meetings. Annual reports show that most make it a practice to post notices on agency bulletin boards, send notices to individuals on the agency's mailing list, and issue releases to newspapers and the wire services. Several agencies, in particular those engaged in health and safety regulation such as the Nuclear Regulatory Commission and the National Transportation Safety Board, publish notices in trade association periodicals and magazines. Several provide notices by means of recorded telephone messages. Most of the agencies involved in economic and health and safety regulatory matters, including the Commodity Futures Trading Commission, the Federal Trade Commission, the Nuclear Regulatory Commission, and the International Trade Commission, to name but a few, utilize this technique. A number, such as the Federal Communications Commission, the Interstate Commerce Commission, the Securities and Exchange Commission, and the Consumer Product Safety Commission, publish a weekly or biweekly public calendar which contains notices of meetings. Of all of the agencies, those engaged in regulatory activities have developed the most extensive mechanisms for publicizing meetings.

Members of attentive publics generally give the agencies high marks on questions of notification. Almost all (89.3%) evaluate agency performance as at least adequate. Indeed, almost as many (75.3%) say that they are usually aware of upcoming meetings before the appearance of notice in the Federal Register.

Respondents were asked to estimate the frequency of substantive discussions among a majority of members outside the act's notice and meeting requirements as preludes to both open and closed meetings. A very large number from the attentive public group indicated they did not know, although those who did respond were inclined to suspect a higher rate of questionable interaction than the agency respondents, whose views are reported in Table 2.

Table 2

Frequency of Non-Sunshine Meetings

	Often	Sometimes	Seldom	Never
Planned prior to open meetings	9.9%	15.3%	25.4%	49.4%
Spontaneous prior to open meetings	5.5	19.8	45.1	29.6
Planned prior to closed meetings	8.0	16.6	27.7	47.7
Spontaneous prior to closed meetings	4.4	24.8	41.4	29.5

The evidence suggests that while compliance is not total, it is substantial. Three quarters of those reporting say that questinable gatherings occur infrequently at the most. Others see them as more common, although only a small number perceive non-compliance to be the norm. The difference in the apparent incidence of spontaneous versus planned interactions also suggests the difficulties of absolute compliance, given the proximity of members to one another and the nature of the settings in which they work. Furthermore, it appears that a good bit of substantive interaction that might be viewed as prohibited by the act is accidental, not calculated circumvention.

Varieties of "shade" meetings may be held, however, that are not prohibited by the act but which are complementary to or substitutes for meetings of agency members. One type which has been employed in some five member agencies involves the chairman, one member participating on a rotating basis, and assistants to the three absent members. Another and more common type is a meeting of staff assistants to members. Meetings of assistants were not unknown before the Sunshine Act, but more than half the agency respondents (57.8%) feel that their incidence has increased since it became law. They also report, as shown in Table 3, that such meetings take place with substantial regularity particularly before open meetings.

Table 3

Staff Assistant Meetings

	Often	Sometimes	Seldom	Never
Prior to open meetings	56.4%	29.4%	8.7%	5.5%
Prior to closed meetings	39.9	39.2	12.2	8.8

Meeting Patterns

Two other aspects of implementation that relate to compliance concern the number of meetings held and the incidence of closed meetings. Meeting data for the 1977-81 period are presented in Appendix C. Judging from the large number of meetings, it does not appear that, overall, the act has discouraged holding them to any great degree, the question of the nature of their substantive content aside. Furthermore, in almost all cases agencies have not varied a great deal from year to year in the number of meetings held. A rather dramatic exception to this generalization is the Interstate Commerce Commission, where in recent years there have been practically no meetings of any sort.

The incidence of open, closed, and partially closed meetings from 1977 through 1981 is shown in Table 4. During this period, 39.6 percent of all agency meetings were open to the public, 41.3 percent were fully closed, and 19.1 percent were partially closed. The percentage of closed meetings held during this period remained relatively constant. In 1977, 40.3 percent of the total number of meetings were closed to the public. This increased to a high of 42.2 percent in 1980 and dropped slightly to 41.7 percent in 1981.

The data in Table 4 also indicate that the percentage of open meetings held during the five year period fluctuated somewhat. In 1977, 36.5 percent of all meetings were open to the public. This rose to a high of 43.3 percent in 1980 and dropped slightly to 38.4 percent in 1981. Offsetting the increase in open meetings between 1977 and 1980 was the decline in the percentage of partially closed meetings from 23.3 percent in 1977 to 19.5, in 1980, although the figure crept upward to 19.9 percent in 1981.

Table 4

Meetings of Sunshine Agencies: 1977-1981

Status of Meeting	Year 1977	1978	1979	1980	1981	Totals
Open	36.5%	40.3%	38.7%	43.3%	38.4%	39.6%
Closed	40.3	39.6	42.1	42.2	41.7	41.3
P/C	23.3	20.0	19.1	19.5	19.9	19.1
Totals	100% (N=1763)	100% (N=1602)	100% (N=-2191)	100% (N=-2096)	100% (N=1353)	100% (N=9005)

Individual agencies show considerable consistency in meeting patterns, but there is variation among agencies. Those engaged in advisory and planning activities are more likely to hold open meetings than agencies which perform other functions. Seventy-nine percent of the meetings of advisory and planning agencies were open to public observation during the period examined. One agency, the Mississippi River Commission, held no closed or partially closed meetings. Two other agencies, the Council on Environmental Quality (95.7%) and the National Commission on Libraries and Information Sciences (88.5%), also held a high percentage of their meetings in open session.

In contrast, agencies with financing and credit functions and those regulating financial institutions have opened very few meetings to public observation. Only 2.2 percent of the meetings of credit agencies and 21.7 percent of the meetings of financial regulatory agencies were open in the 1977-81 period. One credit agency, the Export-Import Bank of the United States, held 511 meetings, but only three (0.6 percent) were open. Moreover, only 11 percent, 20.6 percent, and 22.7 percent of the meetings of the Federal Deposit Insurance Corporation, the Federal Home Loan Board and the Federal Reserve Board, respectively, were open to public observation.

Although most agencies report a relatively constant rate of open meetings during the five year period, certain changes are evident. Two agencies, the Federal Reserve Board and the Federal Election Commission, show a significant increase in the proportion of open meetings. In the first year of the act, 11.4 percent of the FRB's meetings were open, as were only 4.3 percent of the FEC's. By 1981, the percentage of open meetings held by the FRB and FEC increased to 46.3 percent and 40.2 percent respectively. In contrast, a number of agencies, most notably the U.S. Postal Service Board of Governors, the Civil Aeronautics Board, and the Federal Home Loan Mortgage Corporation, reported a substantial decrease in the percent age of open meetings. In 1977, for example, the USPS governors opened 91 percent of their meetings, but in 1981 the figure was dropped to 6.2 percent. For the CAB and the FHLMC, the decline was from 1977 highs of 85.9 percent and 40.9 percent, respectively, to lows of 28.6 percent and 2.7 percent in 1981.

There probably are greater threats to sunshine principles in the inappropriate closure of meetings than in overt non-compliance, such as meeting without regard to the act at all. One reason is that many of the exemptions leave much room for interpretation, especially 9(b) which allows closure if discussion in an open meeting would be likely to significantly frustrate implementation of a proposed agency action.

It is difficult to draw conclusions about the degree to which agencies misuse the various exemptions. Fragments of evidence suggest, however, that if there is misuse, it is not of epidemic proportions. Hartle studied the exemptions employed by agencies in 1977, 1978, and 1979. He found that 9(b), perhaps the one most open to abuse, was cited in only about 10 percent of closures each year, ranking behind 10, which concerns subpoenas and adjudication, among other matters, and 4, protection of trade secrets, commercial and financial information.[56] Furthermore, there has been little litigation alleging improper closure, indicating an absence of complaints about agency practices on the part of those with stakes in proceedings. Finally, interviews suggest that general counsels typically take seriously their responsibilities to see that exemptions are not misapplied.

In most agencies the recommendation for closed consideration of a matter comes at the initiative of the staff bringing it forth. Although members must vote to close, the key step is the certification of the general counsel that an item involves exempt information. Interviews indicate that general counsels tend to be vigorous in their application of the law at this stage, more so at times than members and staff appreciate. In one agency the role played by the general counsel's staff in relation to line staff was described as "adversarial" on closure decisions. General counsels also have been known to cut off discussion among members in closed meetings when it veers toward subjects that are not closable. Instances are also reported in which the general counsel's office advises against the use of notation voting on important items and encourages open consideration of matters that could probably be closed. Nevertheless, there seems to be a general tendency, often stronger now than in the immediate period after the act was passed, to close discussions when an exemption applies.

Clearly a substantial amount of agency business is conducted in closed meetings. This does not necessarily mean, however, that open meetings are not important settings for decisions. Agency officials were asked to estimate the proportion of important agency decisions made in open meetings. Just more than half (50.9%) judge the number to exceed 50 percent. A bit more than half of that group think the figure is 75 percent or more. At the other extreme, a smaller group (35.4%) gave an estimate of from 0 to 24 percent. This question related to the formal adoption of an agency position through the votes of members. Decision making involves much more than this. The nature of the processes and meeting dynamics leading to that vote are also of particular importance.

To the extent that meetings, especially open meetings, are not authentic and comprehensible, the purposes of the act are frustrated. And if member behavior is distorted in substantial fashion by reason of being on public view, questions arise as to possible perverse effects on agency decision making.

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[56] Id. at p. 225.

The Conduct of Meetings

Agencies have responded to the problem of comprehension in varying degrees and in a variety of ways. Experience in planning and conducting open meetings has been an important common factor, however. Practically all the respondents (91.5%) think that meetings now are always or usually well planned. There are indications also that staff presentations,so often a key element in meetings, over time have become sharper and clearer.

In addition to simply becoming more practiced in the business of open meetings, agencies also facilitate public understanding through specific rule requirements. Of course, agencies can and do employ the various techniques although there is no specific provision for them in their rules. Numerous agencies, particularly those involved in regulatory, advisory and planning, and program and enterprise activities, provide in their ruler for a clear, non-technical summary of agenda items to be discussed at open meetings. Most of them also distribute staff papers and other background information dealing with agenda items prior to or at the beginning of meetings. In addition, several regulatory agencies--the Federal Energy Regulatory Commission, the Federal Maritime Commission, and the International Trade Commission to name just a few--expressly have adopted a policy of discussing agenda items in a manner that makes them understandable to the general public.

At least two regulatory agencies, the Federal Communications Commission and the Nuclear Regulatory Commission, have published pamphlets describing for public attendees the seating arrangements of participants at the conference table, the functional responsibilities of those individuals, the procedures for voting on agenda items, and the rules for public conduct at open meetings. The FCC's brochure additionally includes a glossary of technicaal terms.

Another mechanism utilized to aid understanding, one not required by the Sunshine Act, is actual public participation, in which members of the public, usually with prior approval, may speak during meetings. Most agencies allowing participation are involved in advisory and planning functions. They include the Council on Environmental Quality, the Mississippi River Commission, the National Commission on Libraries and Information Science, and the U.S. Metric Board. Among the more visible agencies, only the Consumer Product Safety Commission and the Commodity Futures Trading Commission provide for public participation in open meetings. Others may do so in practice, as is the case with the Tennessee Valley Authority.

Communicating the results of meetings with clarity is also a matter of some importance. The rules of several agencies--the Federal Deposit Insurance Corporation, the Tennessee Valley Authority, the Federal Reserve Board, the National Credit Union Administration, the National Transportation Safety Board, the Parole Commission, the U.S. Railway Association, and the Foreign Claims Settlement Commission--provide for questioning of staff about the proceedings after a meeting is completed. A few agencies, most notably the Tennessee Valley Authority, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Energy Regulatory Commission, and the National Transportation Safety Board, require the issuance of news releases summarizing the major actions taken in open meetings.

The rules of agencies which tend to do a major part of their business in closed meetings, such as those primarily involved in credit and conflict adjudication functions, are omparatively limited in regard to aids to public understanding. Means to help the public better comprehend what is discussed at open meetings are not addressed at all in the rules of two of the credit agencies, the Federal Home Loan Mortgage Corporation and the Export-Import Bank. A third agency involved in credit matters, the Overseas Private Investment Corporation, does provide for oral presentations on agenda items disposed of in open meetings. However, none of the credit agencies release staff papers or allow public participation. The Federal Home Loan Mortgage Corporation is the only one of the three which, in its rules, provides for a detailed explanation of matters acted upon by the board during the open meeting portion of a meeting. Among the conflict adjudication agencies, only the National Labor Relations Board makes allowance for public attendees at open meetings to receive background information on agenda items. In fact, the Merit Systems Protection Board has a stated policy of withholding pre-deliberative materials, such as staff papers and reports, from the public. Nor do any agencies within this group provide for public participation in open meetings, and only one, the Foreign Claims Settlement Commission, by rule makes staff available after a meeting to discuss the actions taken.

Two of the most important aids to comprehension are agendas and explanatory material dealing with matters under consideration. Journalists and others attending meetings were asked about their availability and utility. Agendas are provided all or most of the time according to a substantial number (73.0%) and some of the time in the experience of a considerably smaller group (21.9%). When made available, almost all the respondents (88.6%) consider them to be helpful. Explanatory materials are provided less frequently, some of the time according to just about half (46.8%), most of the time according to a third (32.9%), and never according to the remainder. When they are made available, again almost all (88.7%) consider such materials to be helpful.

Given the complexity of much that is discussed in open meetings and the mixed pattern evident in agency approaches to aiding comprehension, some limitations on the ability of those attending meetings to understand the proceedings might be expected. To a degree this is the case. Respondents were asked to evaluate the frequency with which discussions in open meetings were such that reasonably knowledgeable persons could understand them. The perceptions of agency officials and observers were almost identical. More than half (52.3%) felt that discussions were understandable most of the time, and most of the remainder (38.6%) judged them to be understandable sometimes. Comments indicate that the most serious impediments to comprehension are the disposition of agenda items with little or no discussion at all, the use of verbal shorthand by agency officials, and the frequent unavailability of documents discussed, referred to or relied upon.

Comprehension is of limited value to the extent that what is said in discussions does not accurately reflect the thinking of members and staff and reveal the information that shapes their views. The manner in which members and staff behave in open meetings is important for this reason. It is also important for the results obtained, for presumably there is a relationship between the scope, depth, candor and vigor of exchanges among members and staff and the quality of decisions, or so advocates of collegial processes argue.

Those who were unconvinced of the desirability of sunshine feared that forced public discussion and decision making would produce dysfunctional behavior with negative consequences for the conduct of agency affairs. Table 5 shows that those fears have been borne out to some degree. It reports the perceptions of all respondents of behavior in open meetings, of agency respondents of behavior in closed meetings, and of agency respondents who served both before and after the act of behavior in pre-sunshine meetings. The key findings are that members tend to behave somewhat differently in open and closed meetings, and that behavior in closed meetings does not differ much from behavior in pre-sunshine meetings.

Several specific points should be underscored. As expected by sunshine advocates, members are inclined to prepare thoroughly for open meetings, more so than for closed meetings. There is a certain amount of posturing, or casting comments to appeal to particular audiences in open meetings. And in various

Table 5

Member Behavior in Open, Closed and Pre-Sunshine Meetings

	Open	Closed	Pre-Sunshine
Prepare more thoroughly than before the act	61.2%	24.4%	NA
Often or sometimes cast comments to appeal to special interests	75.3	31.6	39.1%
Often or sometimes extensively expresses views	81.7	93.4	92.8
Often or sometimes state views with candor	77.1	96.5	96.4
Often or sometimes avoid conflict with other members	86.3	64.7	73.8
Often or sometimes refrain from asking important questions	67.6	24.1	20.5
Often or sometimes sharply define and debate differences	62.7	89.3	89.3
Often or sometimes attempt to reconcile conflicting views	77.3	89.7	93.3
Often or sometimes call upon the expertise of staff	92.0	97.4	96.5

ways members are restrained and inhibited in what they say in a public forum, compared to their behavior in closed meetings. There are indications that in some instances being in public may affect basic positions as well as rhetoric the reasons are political, as when a member feels a certain identification with a particular group or interest, perhaps because of support received in appointment. A member of an agency going through a process of regulatory reform described one such case, a colleague who felt obliged "to talk old regulation" in public sessions and then to vote that way, whereas there is reason to believe that if the public were not present, he might have cast reform votes from time to time.

Inhibited behavior is probably a more significant substantive consequence in most agencies than posturing and the influence of an audience on views. One form of inhibition is stylistic in nature. Open meetings were often described by respondents in terms suggesting the absence of meaningful exchanges, such as "stiff", "formal," "set pieces," and "staged presentations." Also dimished is the "kidding around," one general counsel noted, that can contribute to a productive work climate. There also may be restraint in the content of what members say, according to interviews. Some of the reasons are substantive uncertainty and a desire not to appear uninformed, apprehension or uncertainty about market and political repercussions, a reluctance to embarrass staff, and fear of tipping the agency's hand or revealing weak points in a proposed action. Staff members, interviews indicated, at times are inhibited in their contributions in much the same way and for the same reasons. Another form of inhibition concerns the adjustment of positions or a change in views in the process of deliberation. In some agencies it is reported that members can and do alter positions in open meetings as a result of what is said there and may adjust stances to facilitate accommodation of contrasting views. But there are counter pressures in support of the maintenance of a position after it is announced, even if there is an inclination to alter it. They include an unwillingness to appear weak, indecisive, or unprincipled.

The inhibitions commonly associated with open meetings appear to have several effects. Among the more important of them reported by participants are to "take the sting out of debate," as one member put it; to contribute to divisiveness among the membership by making the attainment of a consensus more difficult; and to limit the exchange of views, the flow of relevant information, the depth of critical collective scrutiny given to matters before the agency, and strategic speculation and planning.

There are slight and probably insignificant indications of inhibition in closed meetings as compared to pre-sunshine meetings. When the act was passed, there was a modicum of fear that the necessity of a record would have a dampening effect. Most agency respondents (73.4%) noted some inhibition. Interviewees generally felt, however, that the effects are on style, not substance. Transcripts and tapes result in the exercise of care in the statement of views and in the avoidance of "colorful" language, as one agency member put it. The fact that over the years most agencies have received very few requests for transcripts of closed meetings no doubt has lessened whatever restraint may have been felt initially.

The survey data and interviews indicate that in various ways the quality of interaction among decision makers more often than not is higher in closed than in open meetings. Discussion or debate of the issues is likely to be more thorough and substantive when the public is not present. This conclusion about behavior in meetings suggests that the Sunshine Act carries with it some costs in the conduct of governmental affairs. The following section examines more directly the question of its positive and negative effects.

Effects

The agencies subject to the Sunshine Act, though all are headed by a group appointed by the president, differ in their functions, history, customs, and in other respects. It is reasonable, then, to expect that they are affected differently in their operations by the requirements of the law. In this section, however, an effort is made to assess its broad impact in regard to agency publics, agency capacity, and decision-making processes.

Agency Publics

Agencies are linked to the mass public through attentive publics that have more than a passing interest in their activities. Attentive publics include those individual and group interests with immediate and in many cases large particularistic stakes in what agencies do or do not do, groups which present themselves as representatives of a broader public interest in governmental affairs, the media, and other parts of government.

Few, if any, advocates of sunshine probably expected the general citizenry to appear in significant numbers at meetings of the Harry S Truman Scholarship Foundation or even the Federal Reserve Board of Governors. It was expected, however, that the law would enlarge the access of attentive publics to information of interest to them which then would be disseminated through various means, resulting ultimately in diffuse benefits to the public-at-large and, as said before, increased accountability and public trust and confidence in government. Attentive publics do use notices and open meetings to follow agency activity. Although the typical open meeting apparently attracts only a small number of observers, at times meeting rooms are filled to overflowing. The extent to which the greater access enjoyed by attentive publics serves larger public interests is much less evident than their presence at meetings.

Although the central concern addressed in sunshine legislation is information availability, there are two aspects of the relationship between agencies and their publics associated with, but distinguishable from, information per se: participation and influence in agency processes. At the time the act was passed, there was some explicit sense that sunshine might stimulate greater and more varied public participation in proceedings. Less clearly expressed was the sense in some quarters that the influence of narrow, particularistic interests might be reduced by closer public scrutiny of decision-making activity. The extent to which these two objectives have been realized is extremely difficult to determine. For now, the best that can be done is to examine the relevant perceptions of agency officials and members of attentive publics.

It is clear that the Sunshine Act has enlarged the "window" through which to view agency activities. Since the law was passed, the overall openness with which agencies conduct their affairs has increased or greatly increased according to a substantial number (69.9%) of respondents. As a result, the amount of available information has increased significantly, according to a slightly higher proportion of observers.

The effects of the act become less certain as one moves from attentive publics to the public-at-large, although according to the respondents it seems that they decline. There are fairly sharp differences between the views of agency officials and the other group about the extent of the decline. Members of attentive publics are much more inclined to perceive diffuse public benefits than are agency officials. The following figures should be read with this in mind. More than half the respondents (54.2%) conclude that the amount of information available to the general public has increased or greatly increased, while just under half (45.0%) see no impact. By a narrow margin, more respondents (53.0%) see no change in the level of general public understanding of the work of the agencies than feel there to be some degree of increase (45.1%).

To recapitulate briefly, although the two populations differ in their views to an extent, together their responses suggest that the act has brought a measure of additional sunlight into the agencies and enlarged the amount of information available to attentive publics and through them, possibly, to the public-at-large. To what extent does this make agencies more accountable and increase public trust in them? Again keep in mind that agency officials are prone to be less positive in their perceptions of effects. Almost half the total group (46.1%) judge there to be an increase or great increase in accountability because of the act. Just over half (50.3%) see no impact at all. An even larger number (64.2%) see no impact on the level of public trust in government, as opposed to a much smaller group (24.5%) who see a positive effect. These responses indicate that whereas sunshine has increased the availability of information, commensurate gains may not have been realized in general public understanding of agency affairs, agency accountability, or public trust and confidence in government.

If the major beneficiaries of the increased access to information are the attentive publics, as seems to be the case, what do they gain? One benefit clearly is more timely knowledge about agency activities. Several journalists noted that it is now easier for them to plan their work. Whereas prior to sunshine, only a relatively small number of observers (30.7%) indicated they usually were aware of the consideration of important issues before action was taken, more than three-quarters (76.8%) say that they now know beforehand. Most representatives of attentive publics (78.4%) say that the act makes their reporting tasks easier to perform. Another benefit is sharper awareness of the basic forces at work in an agency. A large number indicated that their ability to understand the influences shaping decisions increased or greatly increased as a consequence of the Sunshine Act. Many reinforced the point in comments. For a journalist, a prime benefit was "greater insight and understanding of agency members' views, abilities, and personalities." An attorney noted, "One learns a little more about how little agency members know about their cases. But one *might* gain a glimmer of how a member thinks." Another pointed to "greater understanding of the real basis for decisions." For a trade association official, open meetings were important as a means "to identify the power brokers on the staff."

Several qualifications raised in interviews must be entered in regard to benefits gained. Increased openness may yield confusing and misleading information. Open meetings, as one agency member generally in favor of sunshine noted, at times can be marked by "disarray, confusion and misunderstanding that can cause the public to pick up the wrong signals." To the extent that discussion and debate are guarded or colored by political purposes, the actual basis for decision may remain unarticulated. Puzzlement about the future course of policy may be created to the extent that split votes are caused by inflexibility rooted in public exposure or, as another member suggested, by the barriers raised by the act to negotiating unanimity. Also, inappropriate information may escape that unfairly harms parties, although most respondents (69.0%) do not see this as a serious problem. Finally, the greater access enjoyed by journalists does not necessarily lead to more extensive or better reporting, it was suggested several times. Stories are enlivened by the opportunity to observe meetings directly and by the color this may yield, but substantive content is not always better than in the pre-sunshine period. Knowledgeable reporters, in this view, provided good and accurate coverage before the act. Now their job is made somewhat easier, but qualitative improvements in their products are difficult to discern.

The relationship between the informational benefits enjoyed by attentive publics and effects on the direction of agency affairs are not clear cut. A majority of respondents perceive no change in patterns of participation or influence in agency processes. Among the minority who see alterted levels of participation as a result of the Sunshine Act, gains by representatives of particularistic interests and by public interest groups are viewed as basically of the same magnitude. In regard to influence, the largest number of respondents see gains by the media (42.7%), followed by public interest groups (42.5%), and particularistic interests (36.4%). The general public is considered to have derived increased influence by about one quarter (25.6%) of the respondents. In sum, to the extent that there are winners, they appear to be those with the resources to closely follow agency affairs. What they learn as a result of increased openness, respondent comments suggest, is of real assistance in the advancement of their interests.

Agency Capacity

An agency's capacity to function effectively in carrying out its assigned responsibilities, of course, is not determined by any single factor. It is shaped by a complex of political, organizational and other conditions. Yet limited prescriptions such as those found in the Sunshine Act may have a bearing, because of the way in which they regulate decision-making procedures and enlarge the information resources of others with whom agencies must deal, including interests inclined to frustrate them in the pursuit of legitimate governmental objectives. Several particular ways in which the act might impair agency effectiveness have been mentioned in discussions of it.

One is that notice requirements may limit the ability to act expeditiously in emergencies. It is not clear whether this is actually the case to any great degree, although there may be selected instances in which difficulties arise, such as when the CAB was faced with Braniff's bankruptcy. The respondents are mixed in their views. Under half the total number (44.8%), and in this a bare majority (53.9%) of agency officials serving both before and after the act, think there is a problem. That apprehensions have not been realized fully may be because the act's expedited meeting process works better than was expected, and because agencies with a frequent need for quick response, such as regulators of financial institutions, have developed techniques for moving quickly within the context of the act.

Another possible problem is that information appropriately confidential may be forced or fall into the open prematurely, thus tipping an agency's hand in enforcement or some other sensitive endeavor. As in the case of impediments to expeditious action, there is no clear indication that premature disclosure is a serious generic problem. Well more than half the respondents (59.6%) do not think so. While more than half the officials with agencies before and after implementation of the act (52.9%) feel that premature disclosure occurs at times, only a few (14.3%) judge it to be often.

Yet another impairment suspected is that agencies may be hampered in negotiations or other aspects of necessary relationships with other institutions. Respondents were asked whether sunshine was an impediment to effective working relationships with other agencies. The overall response was in the negative, with more than half (60.2%) seeing no impact and a small number (9.4%) reporting positive benefits. On the whole, agency respondents were somewhat more inclined to see difficulties. But aggregate figures may present a deceptive picture and mask discrete problems because of differences in missions and operating requirements among agencies, or so interviews suggest. In some settings potentially useful discussions have not been held, it is reported, because agencies not subject to the act were reluctant to meet in open sessions. Furthermore, when classified or sensitive material is involved, there may be a reluctance to engage in even a legitimately closed meeting. Interviews also pointed to similar problems with non-governmental groups and representatives of foreign governments.

Ties to Congress are important for all agencies. A substantial portion of respondents (70.3%) are of the view that sunshine either has no effect upon or aids in the conduct of effective congressional relations. Agency officials are a bit more likely to see a negative impact. Again, this is an area in which some agencies may be seriously affected and others hardly at all, interviews and respondent comments indicate, depending upon the amount of legislative business at hand and the level of controversy associated with it.

That there are some differential effects is further suggested by the data presented in Table 6. It focuses on major regulatory agencies and rank orders the perceptions of agency officials and attentive publics on two of the variables associated with capacity. They are the ability to work effectively with Congress and with other agencies. (An index employing these and several other variables shows basically the same pattern. The simpler of the two is used here in the interest of measurement comparability.) A score of 4 indicates that the act has had no impact on capacity, a score of more than 4 means a postive impact, and a score of less than 4 indicates a negative impact.

Agency respondents report that 15 of 18 agencies have been affected negatively. The most severely affected are the Commodity Futures Trading Commission, the Federal Reserve Board of Governors, the Nuclear Regulatory Commission, and the Securities and Exchange Commission. Agency publics see negative effects, generally in less severe terms, in eight of the 18 cases. On the whole, the perceptions of the two groups for particular agencies are not far apart, but there are some discrepancies. The most striking concerns the Nuclear Regulatory Commission. Its officials see a distinct impairment, whereas its public reports that effectiveness is enhanced by the act.

It does not appear that there are serious generic impediments in the act to agency effectiveness in regard to moving expeditiously, disclosure of information and to managing relationships with other agencies and Congress.

Table 6

Two Variable Capacity Index

Agency Officials			Attentive Publics		
Agency	Mean	N	Agency	Mean	N
All Respondents	3.41	298	All Respondents	3.95	205
1 EEOC	4.86	7	1 USPRC	6.5	2
2 USPRC	4.25	8	2 NRC	4.74	19
3 NTSB	4.14	14	3 FMC	4.43	7
4 FEC	3.83	12	4 FCC	4.43	21
5 CAB	3.68	25	5 FTC	4.36	11
6 FHLBB	3.67	9	6 USITC	4.20	5
7 FMC	3.58	19	7 FERC	4.05	17
8 FTC	3.56	16	8 EEOC	4.00	2
9 CPSC	3.56	25	9 FDIC	4.00	1
10 FDIC	3.55	11	10 NTSB	4.00	1
11 USITC	3.53	17	. . . .		
12 ICC	3.50	20			
. . . .			11 CAB	3.92	24
			12 CPSC	3.89	9
13 FCC	3.38	24	13 CFTC	3.81	16
14 FERC	3.33	18	14 FEC	3.80	5
15 CFTC	2.87	15	15 FRB	3.64	22
16 FRB	2.77	13	16 FHLBB	3.33	9
17 NRC	2.67	21	17 SEC	3.29	14
18 SEC	2.50	24	18 ICC	3.15	20

Because of special circumstances, some agencies, it should be emphasized, may be affected differently and experience trauma of a sort in these areas. A larger concern related to effective performance is the character and quality of agency decision making processes. It is in this area that the Sunshine Act may have its most profound impact.

Decision Making

Agencies subject to the Sunshine Act perform a variety of functions and have two types of membership structures. Some are headed by a group of full-time members ranging in number from three to seven who share basic responsibility for the direction of agency operations. Others are governed by part-time boards with a more restricted, though critical, role. Presumably both types of agencies were constructed as they were by Congress because collective leadership and collegial decision making in their areas of responsibility were deemed to be appropriate, desirable, and preferred to the concentration of authority in a single administrator. The comparative advantages and disadvantages of these competing approaches to government organization have been debated for decades. Congress historically has indicated a persistent preference in certain circumstances for the collegial option, as the number of such agencies shows. It has usually rejected the advice of those who, from time to time, have urged the conversion of collegial agencies to the alternative form. Furthermore, it continues to create collegial agencies, as in the recent cases of the Consumer Product Safety Commission and the Commodity Futures Trading Commission.

There are a number of particular justifications for employing collegial arrangements. They allow the direct representation of varied interests, views, backgrounds, political orientations, and geographical areas in governemntal affairs. Continuity in policy without rigidity is served by staggered terms for agency leadership. But perhaps the most important justification has to do with decision making in difficult and sensitive areas.

One of the strongest defenses of collegial decision making was provided by the First Hoover Commission's Committee on Independent Regulatory Commissions. It emphasized two key points. First, it argued, decisions are improved when there is a melding of the diverse and general perspectives of an agency leadership group and the specialized expertise of the staff. Second, decisions are improved as a consequence of interaction among a group of members. The committee elaborated on the point as follows.

> A distinctive attribute of commission action is that it requires concurrence by a majority of members of equal standing after full discussion and deliberation. At its best, each decision reflects the combined judgment of the group after critical analysis of the relevant facts and divergent views. This provides both a barrier to arbitrary or capricious action and a course of decisions based on different points of views and experience.
>
> This process has definite advantages where the problems are complex, where the relative weight of various factors affecting policy is not clear, and where the range of choice is wide. A single official can consult his staff but does not have to convince others to make his views or conclusions previal. The member of the commission must expose his reasons and judgments to the critical scrutiny of his fellow members and must persuade them to his point of view. He must analyze and understand the views of his colleagues if only to refute them.[57]

During debate prior to passage of the Sunshine Act, some attention was given to the possible effects of its strictures on collegial decision making. Congressional proponents of the bill appeared to acknowledge the possibility of some impairment. Their view was that some adjustment in exemption provisions would lessen negative efects, that there were no objective reasons for non-exempt information not to be dealt with in public, and that to the extent bureaucratic proclivities for secrecy did interrupt collegial interactions, this was a tolerable exchange for more openness in government. There is, of course, no way to know how much in the way of diminished collegiality would fall within the Congress' tolerable range. It may be that the law's provisions have caused alterations in the complex network of interactions among agency leadership and staff that sacrifice many of the advantages of collegial decision making beyond that which Congress anticipated, especially in agencies with full-time membership. Before pursuing the point, however, a word is necessary about those with part-time membership.

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[57] Commission on Organization of the Executive Branch of Government, Task Force Report on Regulatory Commissions, Appendix N. (Washington, D.C.: Government Printing Office, 1949), p. 21.

The role of part-time boards is basically to provide general guidance to agency staffs and to focus on major policy questions. Lacking day-to-day decisional responsibilities, meeting relatively infrequenly, with members spread across the country, and with considerable authority located in the staff, such organizations, one suspects, are less affected by the Sunshine Act than those with full-time membership. Survey results show this generally to be the case. However, a majority of respondents (58.3%) from agencies in this category see impediments to the collective development of policies and strategies located in the act, and almost as many (46.3%) report that the act hinders board direction of staff.

A discussion of effects in agencies with full-time membership requires some understanding of the degree to which the collegial ideal was realized prior to 1977. The brief answer is, only partially. Important matters might be decided without the authentic exchanges so central to the concept of collegiality. There is reason to suspect the decisions frequently reflected more the influence of staff or of chairmen in association with staff than a true amalgamation of member views informed by staff expertise. Yet the impressionistic evidence is that to varying degrees, at many times, and on central issues, the kind of collegial process described by the Committee on Independent Regulatory Commissions was a reality.

Respondents serving in these agencies before and after implementation of the act provide some empirical underpinning for the impression. They suggest that prior to 1977 there was extensive and consequential interaction among members acting as a collective. Almost all (80.1%) say that the important matters were often discussed in formal meetings of agency members. Informal sessions on such matters involving at least a majority of members also occurred with some frequency, according to almost half (43.0%). Furthermore, a very high proportion (85.8%) characterized members as making up their minds on issues, most or some of the time, after discussion in meetings.

There are reasons to believe that there has been a shift in patterns of decision-making behavior, at least in a number of agencies, away from collegial processes toward segmented, individualized processes in which, in the words of one commissioner, "members are isolated from one another." One reason is a decline of the importance of meetings as decisional vehicles, a dynamic which is suggested in two major ways.

First, an increase in notation voting is perceived by more than half (54.0%) the agency respondents. It is probably true that some of the increase is to dispose of minor items previously handled in meetings in order to avoid the red tape involved in including them on a meeting agenda. But a part of it appears to result from an aversion to public discussion of certain topics. Second, although open meetings in which collegial interactions are quite evident do take place, meetings often have no bearing on results. The inhibitions which mark the behavior of many members and staff, previously discussed, obviously imply diminished collegiality of the type described by the Committee on Independent Regulatory Commissions. A more direct indication is the perception of a large number (83.1%) of respondents from agencies with full-time membership that members now typically make up their minds on matters dealt with in open meetings prior to collective discussions. The expectation that members would prepare better for meetings held in the open appears to have been realized, but at some cost to collegial processes. Many respondents (44.3%) see the same phenomena prior to closed meetings. The substantial difference in the two figures suggests that closed meetings are much more meaningful vehicles for decision making than are open ones. This finding squares with reports entered from time to time by those who attend open meetings that some matters decided are not discussed, and when there is discussion it often appears to be for the record rather than for deliberative purposes.

Another reason for suggesting diminished collegiality is an indication of a sense that collegial bodies are impaired in the performance of the agency leadership responsibilities placed in them by statute. Most agency respondents serving both before and after the act (68.3%) judge that members are hindered or greatly hindered by it in the joint development of policies and strategies. A lesser but substantial number of officials who arrived afterward (58.2%) and external observers (39.5%) are of the same view. Although the effects of the act are not judged to be quite so severe, a similar pattern is evident concerning the collective direction of work at the staff level.

A more detailed examination of 18 regulatory agencies in Table 7 provides further evidence of diminished collegiality. The data here combine and rank order responses by agency regarding the effect of the act on the collective development of policies and strategies and the collective direction of staff work. (Again, an index incorporating more variables gave essentially the same results). As in the case of the previous table, a mean response of 4 means no impact, more than 4 means a positive impact, and less than four means a negative impact. Only officials associated with the Federal Election Commission think that the act has strengthened the collegium. Members of attentive publics perceive increased collegiality in one instance and no impact in three others, and a decline is shown for the remainder. All in all, they see the negative effects to be less severe in degree than do agency officials. There are some widespread differences in the perceptions of the two groups in regard to particular agencies, with the Nuclear Regulatory Commission again serving as a case in point, but the general direction of the results is of greatest interest. The table clearly reinforces the assertion that the collegial character of agency processes has been modified.

The essential underlying problem appears to be that policy and strategic planning and the provision of meaningful direction to the staff commonly require the speculative exploration of sensitive matters at an early stage if there are to be productive results. This is difficult to do in public when there are uncertainties about the dimensions of problems, the options, and staff and member views, and when public reactions to speculative discussions and tentative strategic thinking might cause undesirable and unwarranted reactions. Consequently, collective discussions of important matters often do not take place, or they come so late in the process that the positive effects of free collegial interaction are substantially forfited.

As the incidence of meaningful collective debate and negotiation among members has declined, the focus of decision-making activity has shifted toward the offices of individual members and to the staff level and involves three key sets of interactions. The first is between staff at the operating level who are handling a particular matter and the offices of the chairman and other members. The second is between members one-on-one, except presumably in three member agencies. The third is among staff assistants to members acting as surrogates

Table 7

Two Variable Collegiality Index

Agency Officials			Attentive Publics		
Agency	Mean	N	Agency	Mean	N
All Respondents	2.62	306	All Respondents	3.52	217
1 FEC	4.09	12	1 CFTC	4.19	16
2 USPRC	3.75	8	2 FDIC	4.00	1
3 EEOC	3.43	7	3 NTSB	4.00	1
4 NTSB	3.07	15	4 NRC	3.90	20
5 CPSC	2.96	26	5 FHLBB	3.90	10
6 FDIC	2.91	11	6 FMC	3.89	9
7 FHLBB	2.89	9	7 FTC	3.85	13
8 FTC	2.88	17	8 CPSC	3.67	9
9 CAB	2.88	25	9 FEC	3.67	6
10 FRB	2.85	13	10 FERC	3.59	17
11 FMC	2.76	21	11 FCC	3.58	24
. . . .			. . . .		
12 USITC	2.61	18	12 EEOC	3.50	2
13 CFTC	2.53	15	13 CAB	3.44	27
14 ICC	2.48	21	14 ICC	3.05	21
15 FERC	2.06	18	15 FRB	3.05	21
16 FCC	2.00	25	16 USPRC	3.00	1
17 SEC	1.79	24	17 USITC	3.00	5
18 NRC	1.67	21	18 SEC	2.71	14

for their principals, and exercising, as one member put it, "proxies of a sort."

All have distinct limitations as substitutes for collegial discussions. Processes of essentially individual interactions as a means for reaching accord in particular decision situations are cumbersome and time consuming. The chain of communications is elongated, risking the filtration and distortion of views. Members may not be exposed to the full range of staff advice and expertise, and staff may experience difficulty in ascertaining clearly the thinking of members and relating the views of one to those of others. Members may also find themselves in this situation. It is difficult for a member in the position of being a swing vote to forge accommodations under such circumstances, as one who at times has been in that position observed. Also addressing the point is the comment of a former activist member of the Interstate Commerce Commission about the utility of the members' dining room when less than a quorum was present and discussion of agency affairs could be free: "I could not have functioned without it." Reaching understandings would appear to be even more difficult when responsibility falls upon staff intermediaries, as it often does.

An enlarged role for the personal staff of members in processes of decision is one of the more important effects of the Sunshine Act. Staff efforts are useful in many respects, but despite close relationships with their members, there are certain liabilities which may attend their efforts, according to interview data. One is the exacerbation of conflict through the imposition of conflictual relationships among the staff members themselves on the process. Another, probably of greater importance, stems from the staff role as the representative of the perceived views of a superior. Assistants rightly feel obligated to reflect their principal's position as they understand it. It is not their place to independently compromise that position as they work with other assistants, whereas in private discussions involving members themselves, more flexibility might be manifest. Still another problem is the possible loss of spontaneity and momentum in the processes of decision. At critical monents, it is reported, when it seems that agreement is in sight if certain adjustments in position are made, discussions must be broken off for consultation with principals. This, according to interviews, not only slows the process but breaks concentration and a sense of movement which are difficult to regain.

If it is true that the Sunshine Act tends to encourage staff reticence in meetings, discourages the interaction among members collectively and with staff in policy and strategic planning, and enlarges the importance of individualized member-staff relationships which limit the access of members to staff expertise and the diversity of staff veiws, another attribute of collegial processes is diminished. Together these developments increase the difficulty of effectively conjoining the diverse generalist views of members and their collegial judgments with the specialized expertise of the staff in decision making.

To the extent that a collegial body is impaired in its ability to function, it might be expected that there would be spillover effects on the influence of chairmen and staff. Comments proffered by respondents suggest that this may be the case to some degree. According to a staff member, "The chairman meets with staff and hammers out staff positions." A member of a different agency noted that because of the act, consideration of important matters often did not start with discussion among members but with the chairman's paper on the subject, giving the chariman's position a strong advantage. The chairman of another agency listed "near abdication of decision making to staff absent the 'heavy hand of the chairman' (in the words of another commissioner)." A member of still another agency, after noting his view that the act had strengthened the chairman in management but not in substantive decision making, complained that members were not able to assert their prerogatives collectively, because they were reluctant to do so in a formal, open meeting. His chairman, incidentially, listed as one of the virtues of sunshine that it prevented members from "ganging up" on him. A member of another agency complained that sunshine is used as an excuse to keep information held by the staff and chairman from members, thus diminishing their role and influence. These limitations on the collegium are associated with strictures on the flow of information. In addition, some chairmen have been able to employ the open environment of public meetings as a means for moving their colleagues toward a preferred position.

No clear cut picture emerges from the survey data, however. Approximately half the respondents say that the act has no impact on the influence of chairmen in agency management (53.5%) or in substantive decision making (50.1%). Among those who see some effect, considerably more perceive an increase than a decrease. Interestingly, officials coming after implementation of the act and external observers are more inclined to see increases in both areas than are officials who were in an agency before 1977 and who presumably were aware of the considerable potency of agency chairmanships prior to sunshine.[58] A similar pattern emerges concerning the influence of staff. Just under half of all respondents (49.8) perceive no impact at all. But a notable number see an increase, more among observers (47.4%) than among officials of post-sunshine vintage (40.9%) or the pre-sunshine group (33.0%). Again, it may be that those in the last category understand better the traditional strength of staff in agency processes.

That the Sunshine Act has caused major changes in the internal decision-making processes of many agencies appears to be fairly certain. Its consequences for the substance, character and quality of agency decisions is less clear. One cannot know, obviously, the nature of the decisions that would have been made sans the act. Nevertheless, respondents were asked to assess the effects of the law on the quality of agency decisions. Quality is a subjective phenomenon. For some it may mean the craftsmanship evident in the decisions themselves, and for others the wisdom of their substance, and for still others a different construct. Thus it is difficult to evaluate the responses with precision. But whatever their sense of quality, a substantial number of respondents see no impact on quality at all, according to the data in Table 8. This is particularly the case for agency officials serving before and after implementation of the act. This group also is less likely to see improvement in quality than the others. Agency officials in general judge there to be a decrease in quality to a slightly greater degree than do members of attentive publics.

An examination of the findings reported in Table 9 shows that there is considerable variation from regulatory agency to agency. In this table, a mean

Table 8

Sunshine Effects on
Quality of Decisions

	Greatly Decreased	Decreased	No Impact	Increased	Greatly Increased
Attentive publics	3.6%	14.9%	43.0%	37.1%	1.4%
Officials after	4.5	18.2	44.3	23.9	9.1
Officials before and after	.5	22.9	58.4	16.4	1.9
Total	2.5%	18.7%	49.5%	26.4%	2.9%

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[58] David M. Welborn, Governance of Federal Regulatory Agencies (Knoxville, TN: University of Tennessee Press, 1977).

score of 2 indicates no impact on the quality of decisions, above 2 a positive impact, and below 2 a negative impact. Agency respondents see a positive relationship between sunshine and the quality of decisions in seven instances and no impact in two. In the remaining nine cases, a negative effect is reported. As might be expected, members of attentive publics are much more inclined to associate the Sunshine Act with an improvement in the quality of decisions and do so in 12 instances. The law is seen as having no effect in two cases, and a negative effect in only four. Setting aside the National Transportation Safety Board whose ranking is determined by only one response, it is interesting to note that the attentive publics of the Federal Maritime Commission, the Interstate Commerce Commisssion, and the Federal Communications Commission see more negative effects of sunshine on the quality of decisions than do agency officials.

At least in the view of agency officials there appears to be a relationship between diminished collegiality and a lowered quality of decisions in some instances, based upon a comparison of tables 7 and 9. Five of the six agencies reporting the most severe decline in colegiality are among the six reporting the

Table 9

Sunshine Effects on Quality of Decisions in Major Regulatory Agencies

Agency Officials			Attentive Publics		
Agency	Mean	N	Agency	Mean	N
All Respondents	2.03	289	All Respondents	2.17	217
1 EEOC	2.71	7	1 USPRC	3.00	2
2 NTSB	2.53	15	2 USITC	2.67	6
3 CAB	2.46	24	3 CPSC	2.56	9
4 FHLBB	2.40	10	4 EEOC	2.50	2
5 CPSC	2.33	24	5 FTC	2.39	13
6 FEC	2.17	12	6 FHLBB	2.33	8
7 FDIC	2.09	11	7 CFTC	2.20	18
. . . .			8 NRC	2.29	21
			9 FEC	2.20	5
8 FTC	2.00	13	. . . .		
9 ICC	2.00	20			
10 FMC	1.95	21	10 FERC	2.12	16
11 FCC	1.90	20	11 SEC	2.07	14
12 USPRC	1.87	8	12 CAB	2.04	26
13 FERC	1.88	16	13 FRB	2.00	21
14 CFTC	1.87	15	14 FDIC	2.00	1
15 NRC	1.80	20	15 FMC	1.89	9
16 USITC	1.78	18	16 ICC	1.77	22
17 FRB	1.75	12	17 FCC	1.06	23
18 SEC	1.48	23	18 NTSB	1.00	1

most negative effects on the quality of decisions. On the other hand, officials of eight agencies whose combined responses indicated some degree of impaired collegiality perceive an improvement in the quality of decisions.

General Assessment and Comparison

Respondents also were asked to assess the comparative overall costs and benefits of the act from the standpoint of effective agency performance. The results appear in Table 10. When compared with Table 8, they show a greater perception of general negative impact than that reported on the quality of decisions. As might be expected, observers (51.1%) are most inclined to feel that benefits are greater than costs, although officials serving only after the act was passed are almost as positive (45.7%). In contrast, more than half the officials who were in agencies before the act (51.6%) think that costs exceed benefits.[59]

Table 10

Costs and Benefits of the Sunshine Act

	C>B	C=B	B>C
Attentive publics	24.0%	24.0%	51.1%
Officials after	32.9	21.4	45.7
Officials before and after	51.6	23.8	24.6
Total	38.0%	23.6%	38.4%

When the scores are examined agency-by-agency, they again show major differences in the perceptions of agency officials and members of attentive

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[59] Two agency members recently have expressed critical views of the act as a result of their experience in the Consumer Product Saftety Commission and the Securities and Exchange Commission. See Stuart M. Statler, "Let the Sunshine In?," Ameican Bar Association Journal, May, 1981, pp. 573-5; and Bevis Longstreth, "A Little Shade, Please," The Washington Post, July 25, 1983, p. A 13. Longstreth drew a rejoinder from Senator Lawton Chiles, "The Sunshine Act Does to Work," The Washington Post, August 4, 1983, p. A 21.

Table 11

Costs and Benefits of the Sunshine
Act in Major Regulatory Agencies

Agency Officials

Agency	Mean	N
All Respondents	0.85	308
1 EEOC	1.50	8
2 CAB	1.50	24
3 FTC	1.31	16
4 NTSB	1.20	15
5 CPSC	1.15	27
6. FHLBB	1.00	10
7. USPRC	0.88	8
. . . .		
8 ICC	0.85	20
9 FCC	0.84	25
10 FEC	0.83	12
11 FERC	0.78	18
12 NRC	0.73	22
13 FMC	0.71	21
14 CFTC	0.67	15
15 USITC	0.56	18
16 FRB	0.46	13
17 FDIC	0.27	11
18 SEC	0.16	25

Attentive Publics

Agency	Mean	N
All Respondents	1.26	223
1 USPRC	2.0	2
2 USITC	1.50	6
3 CAB	1.48	25
4 FTC	1.46	13
5 FMC	1.44	9
6 FCC	1.39	23
7 NRC	1.38	21
8 CPSC	1.38	8
9 FEC	1.33	6
10 FHLB	1.27	11
. . . .		
11 FRB	1.18	22
12 CFTC	1.15	20
13 FERC	1.12	17
14 SECC	1.07	15
15 EEOC	1.00	1
16 NTSB	1.00	1
17 ICCC	0.82	22
18 FDIC	0	1

publics. Table 11 displays the results for the major regulatory agencies. Mean scores of less than 1 are reported only in the cases of the Federal Deposit Insurance Corporation where there is but one response and the Interstate Commerce Commission, indicating that observers on balance see the cost of the act as greater than its benefits in those agencies. In most other instances the aggregate view is that benefits exceed costs. Agency officials are less positive in their assessments. In five agencies benefits are perceived to exceed costs, in one they are seen as about equal, and in twelve agencies the costs are reported to outweigh benefits.

Given the sizeable number of agencies with distinctive features affected by the Sunshine Act, it would be reasonable to expect substantial differences in the character and ease of adaptation to its requirements. However, a comparative agency assessment of the average scores for each questionnaire item shows considerable consistency among them. This means, simply, that with certain exceptions, perceptions of sunshine experience and effects do not vary much in significant and systematic ways from agency to agency. In both the general sense and on specific points, experience under the act is seen in much the same way from agency to agency.

The major exceptions are several agencies which stand out in regard to the severity of the impediments agency respondents associate with the law. Several regulate either financial markets or institutions. They include the Securities and Exchange Commission, the Commodity Futures Trading Commission, the Federal Deposit Insurance Corporation, the Federal Home Loan Bank Board, and the Federal Reserve Board. Others are the Federal Communications Commission, the Federal Energy Regulatory Commission, the Federal Maritime Commission, the Interstate Commerce Commission, the Nuclear Regulatory Commission, and the United States International Trade Commission.

There are some differences among them in the particulars of perceived effects and their responses to the act which seem to be related to distinctive circumstances and to the personal predilections of agency members. For example, the agencies regulating financial institutions may close most of their more sensitive disucssions. On the other hand, two of them, the FDIC and the FHLBB, are further affected because they are among several three-member agencies where the act bans substantive discussion of one member with another outside of formal meetings.

When one cuts through the particulars in search of fundamental sources of discomfort, certain commonalities among those agencies most distressed by sunshine begin to emerge. First, the agencies operate under especially close scrutiny of attentive publics--the media, interest groups, and Congress. Second, their actions, even their anticipated actions, may set off profound economic and political repurcussions of national and even international scope. Third, awareness of this breeds caution about public disclosures prior to official action and guardedness in order to limit the possibility of market speculation, generation of particularistic political pressures on the agency, public apprehension, impediments to enforcement, and other undesirable effects. Fourth, most if not all of them have been engaged in policy transitions which intensify sensitivity to their actions. Fifth, because of an awareness of possible repurcussions to anticipated action, to the extent that it must be done in the open, policy and strategic planning through collegial processes are foregone or imperfectly realized. The impairment most keenly felt, then, is not in regard to the day-to-day decisions, but in those of broad and long-term policy significance or better yet, those leading up to focused policy deliberations. Frank, full and public explorations of issues and options, in which uncertainties, speculative thinking, and testing of ideas are inherent, are seen as risky endeavors likely to produce unacceptable costs.

Whether this rationale is correct is a matter of judgment, although there is no reason to think that the responses on which it is based are not authentic. There are agencies somewhat similar to those under discussion, it should be said, in which impairment is not so keenly felt. The Civil Aeronautics Board and the Consumer Product Safety Commission, two agencies in which the sunshine experience is viewed rather positively by many, may be contrasted with the ICC and the NRC. What accounts for the differences? In part it appears to be the dispositions of agency leadership. It may also have to do with age and tradition. When the act went into effect the CAB was well along in a process of re-creation that would lead to termination, and thus it was subject to much less uncertainty about its future than the ICC, just starting to reexamine its policies and programs. In 1977 the CPSC was a very young agency that had manifested a certain commitment to openness from the start, although members did not regularly hold their meetings in public. The NRC is a much older agency whose functions and organizational history going back to the Atomic Energy Commission create a special concern for the confidentiality of information. Although CAB and CPSC reactions to sunshine, overall, are on the positive side, there is considerable feeling in them that it is difficult to give appropriate attention to certain matters. This suggests that the impediments to considering the larger questions exist to some degree beyond those agencies where they are felt most acutely.

Weighing the Sunshine Experience

From the standpoint of the study of public policy and administration, the Government in the Sunshine Act is especially interesting in two major respects. One is the character of agency response to mandated change of substantial proportion in the conduct of their affairs. The other is the consideration the act dictates of competing approaches to the administration of public policies and programs in a democratic society, including the place of collegial processes in government. These points provide a focus for a summary discussion of experience under the act.

Bureaucratic organizations are often depicted as being rigid, wedded to standard operating procedures, inherently resistant to change, and strongly inclined to seek the comfort and advantage of secrecy and control over information central to their activities. Based upon such a characterization, it might be expected that the response of agencies to the strictures of the Sunshine act, imposing as they do rather basic changes in customary ways of doing business, would be tortuous, reluctant adaptation, and perhaps even evasision of its dictates.

That does not appear to be quite the case. Overall, it seems that agency compliance with the act's notice, meeting and other requirements has been high and generally at least in accord with the letter of the law. Certainly there are no indications that outright evasion, such as holding "secret" meetings of agency members in unquestionable violation of the law, is a major problem. Notices are generally put out before meetings, and although there are many closed meetings, substantial numbers of open meetings are held.

There is a difference, of course, between compliance with the letter of the Sunshine Act and with its spirit, which calls for maximum public access to meaningful information about agency processes. In this respect, those who wish to take advantage of the access provided them by the law see some deficiencies in its implementation. Three of the most common criticisms are that meetings are often closed on technical legal grounds when there is no substantive reason to do so, that at times there is not enough discussion in open meetings to allow those in attendance to understand the proceedings, and that some agencies do not give sufficient access to explanatory materials and documents underlying discussions and decisions. Whatever reticence these criticisms imply, it should be emphasized, stops far short of bureaucratic intansigence in the face of the law's requirements.

In the narrow administration sense, implementation of the act is now a routine matter and is not especially costly or burdensome. Regular procedures and processes were rather quickly put in place to govern notices, meetings and records in conformity with its provisions. Administrative adaptation has not been wholly free of problems, however. One source is certain procedural requirements which some officials view as administratively cumbersome and lacking offsetting benefits to the public. These include member votes on agenda changes, a "full written explanation" of the reasons for closure, a list of persons expected to attend a closed meeting, and a presiding officer's statement after a closed meeting. Of greater importance, agency officials even now may find themselves from time to time on uncertain ground in applying the statutory definition of meetings, in interpreting several of the exemptions, and in divining the proper course in face of statutory silence, as, for example, the length of time the records of closed meetings may be kept in confidence. A number of judicial decisions have addressed several interpretative problems. Furthermore, the relatively few court challenges to agency sunshine practices are further indications of a generally positive response to its requirements.

To report an absence of perverse bureaucratic intransigence in the face of mandated change is not to suggest an absence of considerable, continuing tensions about the Sunshine Act's purposes, values and suppositions. They are clearly indicated by the differences in perceptions and assessments reported by many agency officials, on the one hand, and by members of attentive publics, on the other. And they are a continuance of contrasting views about the costs and benefits of increased public access to information that marked legislative consideration of the sunshine proposal. At that time, legislative sponsors, Common Cause and other supporters of an open meeting bill clearly were of the view that government secrecy was a problem of substantial proportions. That view, the legislative history shows, was not based upon specific, concrete examples or circumstances associated with the agencies to be covered by the law. Rather, it was based upon the general proposition that open government is a good in and of itself, and that the more open government is, the more democratic percepts are served without a necessary loss in administrative effectiveness, and perhaps with gains to be realized in the quality of performance. State and congressional experience provided the empirical foundations for this position.[60] While not challenging the value of openness in government, numbers of agency officials saw a conflict between the public's right to know carried beyond a certain point and the public's right to fair, effective and reasoned administration of law. In their view the sunshine proposal went beyond that point, even with the provision for closed meetings, liberalized to an extent in the course of legislative consideration. Their major concern, although there were others, was that the open meeting requirement would have a chilling effect on deliberations.

This study, although executed from an objective perspective as to the merits of sunshine, cannot "objectively" determine which of the positions has proved to be the correct one. This is because the views and perceptions of several hundred respondents which are at the core of the analysis are themselves subjective, shaped by factors such as the roles in which people find themselves, their individual and institutional interests, and their personal scales of values. There is a sufficient basis to draw some conclusions, however, and to point out aspects of the sunshine experience that remain ambiguous.

One result of the act about which there is fairly general agreement is that public access to information has been enlarged. More information than before about what agencies are doing, how they go about their business, and in some respects the basic forces and rationales that underpin their actions, is there for the taking. There also is substantial agreement that it is the attentive publics, the journalists and those who do business with agencies and seek to influence their actions, who take advantage of the new opportunities. The major justification for the act was not the advancement of particularistic interests, however; it was a set of diffuse, systemic benefits, the most prominent of which were broadened general public knowledge and understanding of government, increased public trust and confidence in government (which polls show to have continued to decline), and improved agency responsibility and accountability. Whether any such benefits have been realized remains problematic. Respondents are quite divided in their views, and there is no independent evidence one way or the other.

There are reasons to believe that whatever the benefits resulting from the act, they have not come without certain costs, albeit distributed somewhat unevenly across agencies. For example, some agencies seem not to be affected in any significant way in their ability to act expeditiously, prevent the premature disclosure of information, and manage relationships with Congress and other organizations with which they must interact. Others, however, experience real difficulties in one or more of these areas. The sources of variation are not readily evident, but probably lie in factors such as the nature and political and economic sensitivity of responsibilities.

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[60] The fact that many state laws and congressional requirements are much less constraining than the Sunshine Act did not receive much attention. In regard to Congress, House committees and subcommittees may close all or part of any meeting by majority vote regardless of subject matter. Perhaps the more important difference is that in both the House and Senate, any number of members may caucus freely in private sessions on any and all business.

The cost that is clearest and most generally felt is impairment of collegial decision-making processes, a consequence noted even by many respondents generally favorable to the sunshine law, in addition to those less positive in their attitudes. Indications are found in the increased use of notation voting, observed differences in member behavior in open and closed meetings and in open and pre-sunshine meetings, the tendency of members to come to open meetings with their minds made up to a greater degree than in the case of closed or pre-sunshine meetings, the incidence of staff assistant and other types of meetings not covered by the law, and the limits members experience in asserting their collective prerogatives and meeting their collective responsibility for agency leadership.

A movement toward individualized, segmented processes as the setting for evaluating information, testing views and other aspects of decision making does not mean that other features of collegial systems are lost, such as the representation of diverse views and interests and a measure of continuity at the agency leadership level. But the most important advantages of collegial structures are diminished, to the extent that the diverse veiws of members are not tested in authentic deliberations, and the specialized expertise of the staff cannot be easily conjoined with the generalist perspectives of the members as a group.

There are variations among agencies in their willingness to treat what might be considered sensitive matters in open meetings when they do not fall under one or another of the exemptions. Yet in many settings, the evidence indicates, there is an absence of meaningful meetings on fundamental questions of policy and strategy if those meetings must be in public. The major difficulty is not when the question is, "What shall we decide in regard to this particular matter before us?" but, when it is, "Is there a problem, and, if so, what general approaches to dealing with it might it be well to consider?"

Unfortunately, human nature dictates that the public spotlight may often inhibit the kind of behavior called for in authentic collegial deliberations on complex problems where the uncertainties may be considerable and the views diverse and in an early stage of formulation. Deliberations in this type of situation are strengthened by such behavior as the expression of views, even if they are tentative and not fully informed; the testing of views through critical queries, even if put forth only for the purpose of debate; and raising alternatives for discussion, even though one does not necessarily favor them. People, especially public officials in positions of responsibility, generally do not wish to appear unknowledgeable, uncertain, or unprincipled, which such behavior might suggest. Furthermore, there are public and policy consequences officials might appropriately wish to avoid. These include inciting public alarm about conditions that after examination are found not to pose problems; stimulating public reactions in markets and elsewhere to an anticiapted action that ultimately may not be taken; generating political pressures at an early stage of attention to a problem that may preclude or distort further consideration; and providing interests subject to the authority of or otherwise affected by an agency with information which weakens it in the exercise of its responsibilities, to the general public's detriment.

It is easier to assert that the character of agency decision-making has changed as a result of the Sunshine Act than to pinpoint in convincing fashion the substantive consequences of that change. Certainly the evidence on the act's effect on the quality of decisions is mixed, although there are indications of a relationship in some agencies. On the other hand, the apparent loss of an element of administration that has been so valued for such a long period of time should give pause. Perhaps from the congressional perspective, diminished collegiality is a tolerable exchange for increased public access to information, but it is also possible that diminishment has gone beyond the acceptable. At the least, realization of what has occured should prompt further consideration of the state of collegial decision-making arrangements and their continued value under present conditions.

In summary, clearly the Sunshine act has proved to be no panacea for the ills besetting the relationship between the American administrative state and the American people. No one expected it to be, although its advocates clearly saw great promise in it. There have been certain benefits realized in seven years of experience, but there have been costs.[61] More time will be required to determine whether the balance it strikes between the public's right to know and, particularly, the confidentiality of administrative deliberations up to a certain point is a felicitous one, or whether over the long term, it contributes to further deterioration in the relationship between citizens and their government by impeding the sound and effective administration of governmental affairs.

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[61] This appears also to be true of the congressional experience. See, for example, William J. Keefe, Congress and the American People (Englewood Cliffs, N.J.: 1984), pp. 203 and 212; Catherine E. Rudder, "Committee Reform and The Revenue Process," in Lawrence C. Dodd and Bruce I. Oppenheimer (eds.), Congress Revisited (New York, Praeger Publishers, 1977), pp. 117-39, p. 126; Congressional Quarterly Weekly Report, Oct. 15, 1983, p. 2115; U.S. News and World Report, Feb. 20, 1984, p. 69.

Appendix A
Survey Response: Agency Officials

Sample

Agency	Staff		Member		Chairman		Total	
	Sent	Ret-	Sent	Ret-	Sent	Ret-	Sent	Ret-
Program/Enterprise Management								
Board for International Broadcasting	2	2(100.0)	7	2(28.6)	2	1(50.0)	11	5(45.5)
National Railroad Passenger Corp.	15	7(46.7)	13	4(30.8)	3	3(100.0)	31	14(45.2)
U.S. Parole Commission	11	6(54.5)	8	3(37.5)	4	1(25.0)	23	10(43.5)
U.S. Postal Service	14	9(64.3)	12	8(66.7)	3	2(66.7)	29	19(65.5)
Credit								
Export-Import Bank	10	3(30.0)	8	3(37.5)	3	1(33.3)	21	7(33.3)
Conflict Adjudication								
Foreign Claims Settlement Comm.	5	1(20.0)	4	3(75.0)	3	1(50.0)	11	5(45.5)
National Labor Relations Bd.	3	0(0.0)	5	1(20.0)	2	2(100.0)	10	3(30.0)
National Mediation Board	3	1(33.3)	4	2(50.0)	0	0(0.0)	7	3(42.9)
Occupational Safety and Health Review Comm.	11	9(81.8)	2	1(50.0)	2	1(50.0)	15	11(73.3)
Regulatory								
Civil Aeronautics Board	28	16(57.1)	7	2(28.6)	4	3(75.0)	39	25(64.1)
Commodity Futures Trading Comm.	22	12(54.6)	4	4(100.0)	2	0(0.0)	28	16(57.1)
Consumer Product Safety Comm.	28	22(78.6)	5	5(100.0)	2	1(50.0)	35	28(80.0)
Equal Employment Opportunity Comm.	14	6(42.9)	5	2(40.0)	3	0(0.0)	22	8(36.4)

Agency	Staff		Member		Chairman		Total	
	Sent	Ret-	Sent	Ret-	Sent	Ret-	Sent	Ret-
Federal Communications Comm.	21	14(66.7)	10	7(70.0)	5	3(60.0)	36	24(66.7)
Federal Deposit Insurance Corp.	18	8(44.4)	1	0(0.0)	4	3(75.0)		11(47.8)
Federal Election Comm.	6	5(83.3)	10	8(80.0)	1	0(0.0)	17	13(76.5)
Federal Energy Regulatory Comm.	20	13(68.4)	7	5(71.4)	2	1(50.0)	28	19(67.9)
Federal Home Loan Bank Bd.	27	10(37.0)	4	1(25.0)	1	0(.0.)	32	11(34.4)
Federal Reserve Board	14	7(50.0)	9	6(66.7)	2	1(50.0)	25	14(56.0)
Federal Trade Comm.	23	11(47.8)	5	3(60.0)	3	3(100.0)	31	17(54.8)
Federal Maritime Comm.	22	16(72.7)	6	3(50.0)	3	2(66.7)	31	21((67.7)
Interstate Commerce Comm.	19	11(57.9)	7	5(71.4)	5	4(80.0)	31	20(64.5)
Nuclear Regulatory Comm.	29	14(48.3)	4	2(50.0)	3	3(100.0)	36	19(52.8)
National Transportation Safety Bd.	14	11(78.6)	7	2(28.6)	2	1(50.0)	23	14(60.9)
Securities and Exchange Comm.	27	17(63.0)	7	7(100.0)	1	1(100.0)	35	25(71.4)
U.S. International Trade Comm.	15	11(73.3)	5	5(100.0)	2	2(100.0)	22	18(81.8)
U.S. Postal Rate Comm.	7	4(57.1)	4	2(50.0)	3	3(100.0)	14	9(64.3)
Total	428	246(57.6%)	170	96(56.6%)	69	43(66.3%)	667	389(57.8%)

Appendix B

Survey Response: Attentive Publics

Journalists		Attorneys, Firm, and Association Representatives		Public Interest Group Officials		Total	
Sent	Ret.	Sent	Ret.	Sent	Ret.	Sent	Ret.
174	61(35.1%)	621	241(38.8%)	45	11(24.4%)	840	313(37.4%)

Appendix C

```
 X
NO.OF MEETINGS BY TYPE & AGENCY:'77-'81
==========================================================================

(ADVISORY & PLANNING)
      1977           1978           1979           1980           1981           TOTALS
 CEQ
      N    %         N    %         N    %         N    %         N    %         N     %
OPN:    7(100.0)       0(  0.0)      15( 93.8) C  X (  N/A) C  X (  N/A)     22( 95.7)
CLD:    0(  0.0)       0(  0.0)       1(  6.2) C  X (  N/A) C  X (  N/A)      1(  4.3)
P/C:    0(  0.0)       0(  0.0)       0(  0.0) C  X (  N/A) C  X (  N/A)      0(  0.0)
      ------         ------         ------         ------         ------         ------
TOT:    7(100.0)       0(  0.0)      16(100.0) C  X (  N/A) C  X (  N/A)     23(100.0)

*MRC
      N    %         N    %         N    %         N    %         N    %         N     %
OPN:   10(100.0)      10(100.0)       8(100.0)       8(100.0)       8(100.0)     44(100.0)
CLD:    0(  0.0)       0(  0.0)       0(  0.0)       0(  0.0)       0(  0.0)      0(  0.0)
P/C:    0(  0.0)       0(  0.0)       0(  0.0)       0(  0.0)       0(  0.0)      0(  0.0)
      ------         ------         ------         ------         ------         ------
TOT:   10(100.0)      10(100.0)       8(100.0)       8(100.0)       8(100.0)     44(100.0)

*NCLIS
      N    %         N    %         N    %         N    %         N    %         N     %
OPN:   14(100.0)      15( 93.8)       4(100.0)       8( 61.5)      13( 92.9)     54( 88.5)
CLD:    0(  0.0)       0(  0.0)       0(  0.0)       5( 38.5)       1(  7.1)      6(  9.8)
P/C:    0(  0.0)       1(  6.2)       0(  0.0)       0(  0.0)       0(  0.0)      1(  1.6)
      ------         ------         ------         ------         ------         ------
TOT:   14(100.0)      16(100.0)       4(100.0)      13(100.0)      14(100.0)     61(100.0)

*USCCR
      N    %         N    %         N    %         N    %         N    %         N     %
OPN:   17( 47.2)      18( 81.8)      14( 77.8)      10( 90.9)      10( 90.9)     69( 70.4)
CLD:   19( 52.8)       0(  0.0)       0(  0.0)       0(  0.0)       0(  0.0)     19( 19.4)
P/C:    0(  0.0)       4( 18.2)       4( 22.2)       1(  9.1)       1(  9.1)     10( 10.2)
      ------         ------         ------         ------         ------         ------
TOT:   36(100.0)      22(100.0)      18(100.0)      11(100.0)      11(100.0)     98(100.0)

*USMB
      N    %         N    %         N    %         N    %         N    %         N     %
OPN:C  X ( N/A ) C  X (  N/A) C  X (  N/A)      18( 72.0)      26( 59.1)     44( 63.8
CLD:C  X ( N/A ) C  X (  N/A) C  X (  N/A)       2(  8.0)       8( 18.2)     10( 14.5)
P/C:C  X ( N/A ) C  X (  N/A) C  X (  N/A)       5( 20.0)      10( 22.7)     15( 21.7
      ------         ------         ------         ------         ------         ------
TOT:C  X ( N/A ) C  X (  N/A) C  X (  N/A)      25(100.0)      44(100.0)     69(100.0)

                                                                   TOT OPEN:  233( 79.0
                                                                 TOT CLOSED:   36( 12.2
                                                                 TOT PT/CLD:   26(  8.8
                                                                              ======
                                                          GROUF GRAND TOTAL:  295(100.0
(ADHOC ADJ. OF CONFLICT)
       1977          1978           1979           1980           1981          TOTALS
 CRT
      N     %      N     %       N     %       N     %       N     %       N     %
OPN:    0(  0.0)    14(100.0)     4(100.0) D  - (  N/A) D  - (  N/A)   18(100.0
CLD:    0(  0.0)     0(  0.0)     0(  0.0) D  - (  N/A) D  - (  N/A)    0(  0.0
P/C:    0(  0.0)     0(  0.0)     0(  0.0) D  - (  N/A) D  - (  N/A)    0(  0.0
     ------       ------        ------       ------       ------       ------
TOT:    0(  0.0)    14(100.0)     4(100.0) D  - (  N/A) D  - (  N/A)   18(100.0

 FLRA
      N     %      N     %       N     %       N     %       N     %       N     %
OPN:    0(  0.0)     0(  0.0)     2(  3.4) C  X (  N/A) C  X (  N/A)    2(  3.4
CLD:    0(  0.0)     0(  0.0)    57( 96.6) C  X (  N/A) C  X (  N/A)   57( 96.6)
P/C:    0(  0.0)     0(  0.0)     0(  0.0) C  X (  N/A) C  X (  N/A)    0(  0.0
     ------       ------        ------       ------       ------       ------
TOT:    0(  0.0)     0(  0.0)    59(100.0) C  X (  N/A) C  X (  N/A)   59(100.0

 FMSHRC
      N     %      N     %       N     %       N     %       N     %       N     %
OPN:    0(  0.0)     0(  0.0)    40( 76.9)    50(100.0)    36(100.0)  126( 91.3)
CLD:    0(  0.0)     0(  0.0)     6( 11.5)     0(  0.0)     0(  0.0)    6(  4.3)
P/C:    0(  0.0)     0(  0.0)     6( 11.5)     0(  0.0)     0(  0.0)    6(  4.3)
     ------       ------        ------       ------       ------       ------
TOT:    0(  0.0)     0(  0.0)    52(100.0)    50(100.0)    36(100.0)  138(100.0)

 MSPB
      N     %      N     %       N     %       N     %       N     %       N     %
OPN:    0(  0.0)     0(  0.0)     5( 55.6)     0(  0.0)     0(  0.0)    5( 22.7)
CLD:    0(  0.0)     0(  0.0)     4( 44.4)    12(100.0)     1(100.0)   17( 77.3)
P/C:    0(  0.0)     0(  0.0)     0(  0.0)     0(  0.0)     0(  0.0)    0(  0.0)
     ------       ------        ------       ------       ------       ------
TOT:    0(  0.0)     0(  0.0)     9(100.0)    12(100.0)     1(100.0)   22(100.0)

 NLRB
      N     %      N     %       N     %       N     %       N     %       N     %
OPN:    2(  6.5)     0(  0.0)     1(  2.7)     0(  0.0)     0(  0.0)    3(  2.0)
CLD:   29( 93.5)    30(100.0)    36( 97.3)    29(100.0)    25(100.0)  149( 98.0)
P/C:    0(  0.0)     0(  0.0)     0(  0.0)     0(  0.0)     0(  0.0)    0(  0.0)
     ------       ------        ------       ------       ------       ------
TOT:   31(100.0)    30(100.0)    37(100.0)    29(100.0)    25(100.0)  152(100.0)

 NMB
      N     %      N     %       N     %       N     %       N     %       N     %
OPN:    6(100.0)    12(100.0)    13(100.0)    12(100.0)    12(100.0)   55(100.0)
CLD:    0(  0.0)     0(  0.0)     0(  0.0)     0(  0.0)     0(  0.0)    0(  0.0)
P/C:    0(  0.0)     0(  0.0)     0(  0.0)     0(  0.0)     0(  0.0)    0(  0.0)
     ------       ------        ------       ------       ------       ------
TOT:    6(100.0)    12(100.0)    13(100.0)    12(100.0)    12(100.0)   55(100.0)

 OSHRC
      N     %      N     %       N     %       N     %       N     %       N     %
OPN:    4( 10.5)     3(  7.5)     8( 19.0)     1(  3.0)     1(  2.9)   17(  9.0)
CLD:   33( 86.8)    37( 92.5)    34( 81.0)    31( 93.9)    34( 97.1)  169( 89.9)
P/C:    1(  2.6)     0(  0.0)     0(  0.0)     1(  3.0)     0(  0.0)    2(  1.1)
     ------       ------        ------       ------       ------       ------
TOT:   38(100.0)    40(100.0)    42(100.0)    33(100.0)    35(100.0)  188(100.0)

 USFCSC
      N     %      N     %       N     %       N     %       N     %       N     %
OPN:   41(100.0)    27(100.0)    42(100.0)    29(100.0) C  X (  N/A)  139(100.0)
CLD:    0(  0.0)     0(  0.0)     0(  0.0)     0(  0.0) C  X (  N/A)    0(  0.0)
P/C: ___0(  0.0)  ___0(  0.0)  ___0(  0.0)  ___0(  0.0) C__X_(  N/A)  __0(  0.0)
TOT:   41(100.0)    27(100.0)    42(100.0)    29(100.0) C  X (  N/A)  139(100.0
 RB
         N    %       N    %       N    %       N    %       N    %       N    %
OPN:     9( 21.4)     0(  0.0)     0(  0.0)     0(  0.0)     0(  0.0)     9( 21.4)
CLD:    16( 38.1)     0(  0.0)     0(  0.0)     0(  0.0)     0(  0.0)    16( 38.1)
P/C:    17( 40.5)     0(  0.0)     0(  0.0)     0(  0.0)     0(  0.0)    17( 40.5)
        ------       ------       ------       ------       ------       ------
TOT:    42(100.0)     0(  0.0)     0(  0.0)     0(  0.0)     0(  0.0)    42(100.0)

                                                             TOT OPEN:  374( 46.0)
                                                           TOT CLOSED:  414( 50.9)
                                                           TOT PT/CLD:   25(  3.1)
                                                                        ======
                                                    GROUP GRAND TOTAL:  813(100.0)


    ------------------------------------------------------------------------
(CREDIT)
          1977         1978         1979         1980         1981         TOTALS
 EX-IM B
         N    %       N    %       N    %       N    %       N    %       N    %
OPN:     0(  0.0)     0(  0.0)     1(   .8)     2(  1.9)     0(  0.0)     3(   .6)
CLD:   111(100.0)   117(100.0)   118( 99.2)   106( 98.1)    56(100.0)   508( 99.4)
P/C:     0(  0.0)     0(  0.0)     0(  0.0)     0(  0.0)     0(  0.0)     0(  0.0)
        ------       ------       ------       ------       ------       ------
TOT:   111(100.0)   117(100.0)   119(100.0)   108(100.0)    56(100.0)   511(100.0)

*FFCB
         N    %       N    %       N    %       N    %       N    %       N    %
OPN:     6(100.0)     6(100.0)     7(100.0)     0(  0.0)     0(  0.0)    19( 59.4)
CLD:     0(  0.0)     0(  0.0)     0(  0.0)     0(  0.0)     0(  0.0)     0(  0.0)
P/C:     0(  0.0)     0(  0.0)     0(  0.0)     6(100.0)     7(100.0)    13( 40.6)
        ------       ------       ------       ------       ------       ------
TOT:     6(100.0)     6(100.0)     7(100.0)     6(100.0)     7(100.0)    32(100.0)

 FHLMC
         N    %       N    %       N    %       N    %       N    %       N    %
OPN:     9( 40.9)     0(  0.0)     0(  0.0)     0(  0.0)     1(  7.7)    10( 17.9)
CLD:     4( 18.2)     0(  0.0)     6( 60.0)     8( 72.7)    12( 92.3)    30( 53.6)
P/C:     9( 40.9)     0(  0.0)     4( 40.0)     3( 27.3)     0(  0.0)    16( 28.6)
        ------       ------       ------       ------       ------       ------
TOT:    22(100.0)     0(  0.0)    10(100.0)    11(100.0)    13(100.0)    56(100.0)

*OPIC
         N    %       N    %       N    %       N    %       N    %       N    %
OPN:A    0(  0.0)     0(  0.0)     0(  0.0) C  X (  N/A) C  X (  N/A)     0(  0.0)
CLD:A    1( 16.7)     0(  0.0)     0(  0.0) C  X (  N/A) C  X (  N/A)     1(  5.3)
P/C:A    5( 83.3)     7(100.0)     6(100.0) C  X (  N/A) C  X (  N/A)    18( 94.7)
        ------       ------       ------       ------       ------       ------
TOT:A    6(100.0)     7(100.0)     6(100.0) C  X (  N/A) C  X (  N/A)    19(100.0)

                                                             TOT OPEN:   32(  5.2)
                                                           TOT CLOSED:  539( 87.2)
                                                           TOT PT/CLD:   47(  7.6)
                                                                        ======
                                                    GROUP GRAND TOTAL:  618(100.0)
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(PROGRAM/ENTERPRISE)
          1977            1978            1979            1980            1981           TOTALS
*BIB
       N     %        N     %        N     %        N     %        N     %        N     %
OPN:      0(  0.0)       0(  0.0)       0(  0.0)       0(  0.0)       0(  0.0)      0(  0.0)
CLD:      2(100.0)       3(100.0)       4(100.0)       5(100.0)       3(100.0)     17(100.0)
P/C:      0(  0.0)       0(  0.0)       0(  0.0)       0(  0.0)       0(  0.0)      0(  0.0)
        ------         ------         ------         ------         ------        ------
TOT:      2(100.0)       3(100.0)       4(100.0)       5(100.0)       3(100.0)     17(100.0)

*CCC
       N     %        N     %        N     %        N     %        N     %        N     %
OPN:      3( 60.0)       4( 66.7)       3( 60.0)       1( 25.0)       0(  0.0)     11( 39.3)
CLD:      0(  0.0)       0(  0.0)       0(  0.0)       2( 50.0)       4( 50.0)      6( 21.4)
P/C:      2( 40.0)       2( 33.3)       2( 40.0)       1( 25.0)       4( 50.0)     11( 39.3)
        ------         ------         ------         ------         ------        ------
TOT:      5(100.0)       6(100.0)       5(100.0)       4(100.0)       8(100.0)     28(100.0)

*IMS
       N     %        N     %        N     %        N     %        N     %        N     %
OPN:      0(  0.0)       5(100.0)       4(100.0) D  - (  N/A) C  X (  N/A)      9(100.0)
CLD:      0(  0.0)       0(  0.0)       0(  0.0) D  - (  N/A) C  X (  N/A)      0(  0.0)
P/C:      0(  0.0)       0(  0.0)       0(  0.0) D  - (  N/A) C  X (  N/A)      0(  0.0)
        ------         ------         ------         ------         ------        ------
TOT:      0(  0.0)       5(100.0)       4(100.0) D  - (  N/A) C  X (  N/A)      9(100.0)

*IAF
       N     %        N     %        N     %        N     %        N     %        N     %
OPN:      2(100.0)       3(100.0)       4(100.0)       5(100.0)       4(100.0)     18(100.0)
CLD:      0(  0.0)       0(  0.0)       0(  0.0)       0(  0.0)       0(  0.0)      0(  0.0)
P/C:      0(  0.0)       0(  0.0)       0(  0.0)       0(  0.0)       0(  0.0)      0(  0.0)
        ------         ------         ------         ------         ------        ------
TOT:      2(100.0)       3(100.0)       4(100.0)       5(100.0)       4(100.0)     18(100.0)

*LSC
       N     %        N     %        N     %        N     %        N     %        N     %
OPN:      0(  0.0)      16( 94.1)      14( 66.7)      14( 66.7) C  X (  N/A)     44( 74.6)
CLD:      0(  0.0)       0(  0.0)       3( 14.3)       3( 14.3) C  X (  N/A)      6( 10.2)
P/C:      0(  0.0)       1(  5.9)       4( 19.0)       4( 19.0) C  X (  N/A)      9( 15.3)
        ------         ------         ------         ------         ------        ------
TOT:      0(  0.0)      17(100.0)      21(100.0)      21(100.0) C  X (  N/A)     59(100.0)

*NCER
       N     %        N     %        N     %        N     %        N     %        N     %
OPN:      3( 75.0)       3( 50.0)       5( 71.4)       0(  0.0)       0(  0.0)     11( 64.7)
CLD:      0(  0.0)       1( 16.7)       0(  0.0)       0(  0.0)       0(  0.0)      1(  5.9)
P/C:      1( 25.0)       2( 33.3)       2( 28.6)       0(  0.0)       0(  0.0)      5( 29.4)
        ------         ------         ------         ------         ------        ------
TOT:      4(100.0)       6(100.0)       7(100.0)       0(  0.0)       0(  0.0)     17(100.0)

*NNRC
       N     %        N     %        N     %        N     %        N     %        N     %
OPN:      0(  0.0)       0(  0.0)       5( 83.3)       0(  0.0)       0(  0.0)      5( 83.3)
CLD:      0(  0.0)       0(  0.0)       0(  0.0)       0(  0.0)       0(  0.0)      0(  0.0)
P/C:      0(  0.0)       0(  0.0)       1( 16.7)       0(  0.0)       0(  0.0)      1( 16.7)
        ------         ------         ------         ------         ------        ------
TOT:      0(  0.0)       0(  0.0)       6(100.0)       0(  0.0)       0(  0.0)      6(100.0)
```

```
*NRPC
         N    %         N    %         N    %         N    %         N    %         N    %
OPN:A    1( 10.0)       0(  0.0)       0(  0.0) C  X (  N/A) E  - (  N/A)      1(  2.9)
CLD:A    0(  0.0)       1(  8.3)       0(  0.0) C  X (  N/A) E  - (  N/A)      1(  2.9)
P/C:A    9( 90.0)      11( 91.7)      12(100.0) C  X (  N/A) E  - (  N/A)     32( 94.1)
       ------        ------        ------        ------        ------        ------
TOT:A   10(100.0)      12(100.0)      12(100.0) C  X (  N/A) E  - (  N/A)     34(100.0)

*NSB
         N    %         N    %         N    %         N.   %         N    %         N    %
OPN:A    5( 31.2)       0(  0.0)       0(  0.0)       0(  0.0)       0(  0.0)      5(  9.4)
CLD:A    5( 31.2)       0(  0.0)       0(  0.0)       0(  0.0)       0(  0.0)      5(  9.4)
P/C:A    6( 37.5)       8(100.0)       9(100.0)      10(100.0)      10(100.0)     43( 81.1)
       ------        ------        ------        ------        ------        ------
TOT:A   16(100.0)       8(100.0)       9(100.0)      10(100.0)      10(100.0)     53(100.0)

 RRB
         N    %         N    %         N    %         N    %         N    %         N    %
OPN:     2( 16.7)       0(  0.0)       0(  0.0) C  X (  N/A) C  X (  N/A)      2(  6.5)
CLD:     1(  8.3)       1( 10.0)       4( 44.4) C  X (  N/A) C  X (  N/A)      6( 19.4)
P/C:     9( 75.0)       9( 90.0)       5( 55.6) C  X (  N/A) C  X (  N/A)     23( 74.2)
       ------        ------        ------        ------        ------        ------
TOT:    12(100.0)      10(100.0)       9(100.0) C  X (  N/A) C  X (  N/A)     31(100.0)

 TVA
         N    %         N    %         N    %         N    %         N    %         N    %
OPN:    21(100.0)      19(100.0)      29(100.0)      25(100.0)      22(100.0)    116(100.0)
CLD:     0(  0.0)       0(  0.0)       0(  0.0)       0(  0.0)       0(  0.0)      0(  0.0)
P/C:     0(  0.0)       0(  0.0)       0(  0.0)       0(  0.0)       0(  0.0)      0(  0.0)
       ------        ------        ------        ------        ------        ------
TOT:    21(100.0)      19(100.0)      29(100.0)      25(100.0)      22(100.0)    116(100.0)

*USUHS
         N    %         N    %         N    %         N    %         N    %         N    %
OPN:A    5(100.0)       3(100.0)       4(100.0) D  - (  N/A) C  X (  N/A)     12(100.0)
CLD:A    0(  0.0)       0(  0.0)       0(  0.0) D  - (  N/A) C  X (  N/A)      0(  0.0)
P/C:A    0(  0.0)       0(  0.0)       0(  0.0) D  - (  N/A) C  X (  N/A)      0(  0.0)
       ------        ------        ------        ------        ------        ------
TOT:A    5(100.0)       3(100.0)       4(100.0) D  - (  N/A) C  X (  N/A)     12(100.0)

 USPC
         N    %         N    %         N    %         N    %         N    %         N    %
OPN:A    5( 17.2)       7( 18.4)       5( 15.6) C  X (  N/A) C  X (  N/A)     17( 17.2)
CLD:A   23( 79.3)      30( 78.9)      27( 84.4) C  X (  N/A) C  X (  N/A)     80( 80.8)
P/C:A    1(  3.4)       1(  2.6)       0(  0.0) C  X (  N/A) C  X (  N/A)      2(  2.0)
       ------        ------        ------        ------        ------        ------
TOT:A   29(100.0)      38(100.0)      32(100.0) C  X (  N/A) C  X (  N/A)     99(100.0)

*USPS
         N    %         N    %         N    %         N    %         N    %         N    %
OPN:A   11( 91.7)       7( 53.8)       6( 54.5)       2( 13.3)       1(  6.2)     27( 40.3)
CLD:A    1(  8.3)       0(  0.0)       0(  0.0)       3( 20.0)       3( 18.8)      7( 10.4)
P/C:A    0(  0.0)       6( 46.2)       5( 45.5)      10( 66.7)      12( 75.0)     33( 49.3)
       ------        ------        ------        ------        ------        ------
TOT:A   12(100.0)      13(100.0)      11(100.0)      15(100.0)      16(100.0)     67(100.0)
```

```
*USRA
              N      %       N      %       N      %       N      %       N      %       N      %
OPN:          4( 28.6)       3( 18.8)       0(  0.0)       0(  0.0)   C  X (  N/A)       7( 12.7)
CLD:          5( 35.7)       1(  6.2)       0(  0.0)       0(  0.0)   C  X (  N/A)       6( 10.9)
P/C:          5( 35.7)      12( 75.0)      12(100.0)      13(100.0)   C  X (  N/A)      42( 76.4)
             ------         ------         ------         ------         ------         ------
TOT:         14(100.0)      16(100.0)      12(100.0)      13(100.0)   C  X (  N/A)      55(100.0)

                                                                            TOT OPEN:  285( 45.9)
                                                                          TOT CLOSED:  135( 21.7)
                                                                          TOT PT/CLD:  201( 32.4)
                                                                                       ======
                                                                   GROUP GRAND TOTAL:  621(100.0)


    --------------------------------------------------------------------------------
(REGULATORY)
  ECON
            1977           1978           1979           1980           1981          TOTALS
 CAB
              N      %       N      %       N      %       N      %       N      %       N      %
OPN:         73( 85.9)      72( 74.2)      42( 56.8)      17( 44.7)      10( 28.6)     214( 65.0)
CLD:          9( 10.6)      18( 18.6)      11( 14.9)       7( 18.4)       6( 17.1)      51( 15.5)
P/C:          3(  3.5)       7(  7.2)      21( 28.4)      14( 36.8)      19( 54.3)      64( 19.5)
             ------         ------         ------         ------         ------         ------
TOT:         85(100.0)      97(100.0)      74(100.0)      38(100.0)      35(100.0)     329(100.0)

 CFTC
              N      %       N      %       N      %       N      %       N      %       N      %
OPN:A        12( 12.8)      46( 28.7)      29( 18.1)      25( 17.9)      26( 25.7)     138( 21.1)
CLD:A        56( 59.6)     114( 71.2)     131( 81.9)     115( 82.1)      75( 74.3)     491( 75.0)
P/C:A        26( 27.7)       0(  0.0)       0(  0.0)       0(  0.0)       0(  0.0)      26(  4.0)
             ------         ------         ------         ------         ------         ------
TOT:A        94(100.0)     160(100.0)     160(100.0)     140(100.0)     101(100.0)     655(100.0)

 FCC
              N      %       N      %       N      %       N      %       N      %       N      %
OPN:A        17( 37.0)      45( 51.7)      46( 59.7)      45( 53.6)      27( 48.2)     180( 51.4)
CLD:A         7( 15.2)      12( 13.8)      31( 40.3)      39( 46.4)      29( 51.8)     118( 33.7)
P/C:A        22( 47.8)      30( 34.5)       0(  0.0)       0(  0.0)       0(  0.0)      52( 14.9)
             ------         ------         ------         ------         ------         ------
TOT:A        46(100.0)      87(100.0)      77(100.0)      84(100.0)      56(100.0)     350(100.0)

 FERC
              N      %       N      %       N      %       N      %       N      %       N      %
OPN:A        46( 85.2)      64( 78.0)      50( 66.7)      48( 69.6)      38( 70.4)     246( 73.7)
CLD:A         1(  1.9)      18( 22.0)      25( 33.3)      21( 30.4)      16( 29.6)      81( 24.3)
P/C:A         7( 13.0)       0(  0.0)       0(  0.0)       0(  0.0)       0(  0.0)       7(  2.1)
             ------         ------         ------         ------         ------         ------
TOT:A        54(100.0)      82(100.0)      75(100.0)      69(100.0)      54(100.0)     334(100.0)

 FMC
              N      %       N      %       N      %       N      %       N      %       N      %
OPN:A         7( 17.1)   B 412( 87.3)      18( 24.7)      44( 62.9)       8( 14.5)      77( 32.2)
CLD:A         2(  4.9)   B  60( 12.7)      17( 23.3)       3(  4.3)       7( 12.7)      29( 12.1)
P/C:A        32( 78.0)   B   0(  0.0)      38( 52.1)      23( 32.9)      40( 72.7)     133( 55.6)
             ------         ------         ------         ------         ------         ------
TOT:A        41(100.0)   B 472(100.0)      73(100.0)      70(100.0)      55(100.0)     239(100.0)
```

```
FTC
           N    %       N    %       N    %       N    %       N    %       N    %
OPN:      25( 30.1)    23( 29.1)    15( 20.3)    12( 17.4)     9( 14.8)    84( 23.0)
CLD:      41( 49.4)    46( 58.2)    51( 68.9)    43( 62.3)    45( 73.8)   226( 61.7)
P/C:      17( 20.5)    10( 12.7)     8( 10.8)    14( 20.3)     7( 11.5)    56( 15.3)
          ------       ------       ------       ------       ------       ------
TOT:      83(100.0)    79(100.0)    74(100.0)    69(100.0)    61(100.0)   366(100.0)

ICC
           N    %       N    %       N    %       N    %       N    %       N    %
OPN:A     32( 86.5)    46( 93.9)    19( 82.6)    12(100.0)     1(100.0)   110( 90.2)
CLD:A      0(  0.0)     2(  4.1)     3( 13.0)     0(  0.0)     0(  0.0)     5(  4.1)
P/C:A      5( 13.5)     1(  2.0)     1(  4.3)     0(  0.0)     0(  0.0)     7(  5.7)
          ------       ------       ------       ------       ------       ------
TOT:A     37(100.0)    49(100.0)    23(100.0)    12(100.0)     1(100.0)   122(100.0)

USPRC
           N    %       N    %       N    %       N    %       N    %       N    %
OPN:A      3( 11.1)     0(  0.0)     3( 13.0)     2(  8.0)     0(  0.0)     8(  6.0)
CLD:A     18( 66.7)     7( 70.0)    17( 73.9)    20( 80.0)    46( 95.8)   108( 81.2)
P/C:A      6( 22.2)     3( 30.0)     3( 13.0)     3( 12.0)     2(  4.2)    17( 12.8)
          ------       ------       ------       ------       ------       ------
TOT:A     27(100.0)    10(100.0)    23(100.0)    25(100.0)    48(100.0)   133(100.0)

SEC
           N    %       N    %       N    %       N    %       N    %       N    %
OPN:      68( 41.0) B  76( 39.6)    67( 37.6)    56( 35.4) C X (  N/A)   191( 38.0)
CLD:      98( 59.0) B 116( 60.4)    98( 55.1)    95( 60.1) C X (  N/A)   291( 58.0)
P/C:       0(  0.0) B   0(  0.0)    13(  7.3)     7(  4.4) C X (  N/A)    20(  4.0)
          ------       ------       ------       ------       ------       ------
TOT:     166(100.0) B 192(100.0)   178(100.0)   158(100.0) C X (  N/A)   502(100.0)

USITC
           N    %       N    %       N    %       N    %       N    %       N    %
OPN:      29( 46.8)    38( 61.3)    20( 44.4)    46( 65.7) C X (  N/A)   133( 55.6)
CLD:       0(  0.0)     1(  1.6)     0(  0.0)    11( 15.7) C X (  N/A)    12(  5.0)
P/C:      33( 53.2)    23( 37.1)    25( 55.6)    13( 18.6) C X (  N/A)    94( 39.3)
          ------       ------       ------       ------       ------       ------
TOT:      62(100.0)    62(100.0)    45(100.0)    70(100.0) C X (  N/A)   239(100.0)

                                                        TOT OPEN:  1381( 42.2)
                                                      TOT CLOSED:  1412( 43.2)
                                                      TOT PT/CLD:   476( 14.6)
                                                                   ======
                                              GROUP GRAND TOTAL:  3269(100.0)


  H/S
        1977         1978         1979         1980         1981         TOTALS
 CPSC
           N    %       N    %       N    %       N    %       N    %       N    %
OPN:A     43( 54.4)    36( 45.6)    54( 60.0)    32( 44.4)    30( 44.8)   195( 50.4)
CLD:A      9( 11.4)     8( 10.1)    12( 13.3)    10( 13.9)    16( 23.9)    55( 14.2)
P/C:A     27( 34.2)    35( 44.3)    24( 26.7)    30( 41.7)    21( 31.3)   137( 35.4)
          ------       ------       ------       ------       ------       ------
TOT:A     79(100.0)    79(100.0)    90(100.0)    72(100.0)    67(100.0)   387(100.0)
```

```
 NTSB
         N    %          N    %          N    %          N    %          N    %         N      %
OPN:    28( 59.6)       22( 55.0)       29( 65.9)       21( 50.0)       28( 66.7)     128( 59.5)
CLD:    19( 40.4)        4( 10.0)        3(  6.8)        5( 11.9)        4(  9.5)      35( 16.3)
P/C:     0(  0.0)       14( 35.0)       12( 27.3)       16( 38.1)       10( 23.8)      52( 24.2)
      ------          ------          ------          ------          ------         ------
TOT:    47(100.0)       40(100.0)       44(100.0)       42(100.0)       42(100.0)     215(100.0)

 NRC
         N    %          N    %          N    %          N    %          N    %         N      %
OPN:A   47( 36.4) B 203( 66.6)     119( 56.1)      213( 78.6)      110( 55.6)     489( 60.4)
CLD:A   52( 40.3) B 101( 33.1)      57( 26.9)       56( 20.7)       44( 22.2)     209( 25.8)
P/C:A   30( 23.3) B   1(   .3)      36( 17.0)        2(   .7)       44( 22.2)     112( 13.8)
      ------          ------          ------          ------          ------         ------
TOT:A  129(100.0) B 305(100.0)     212(100.0)      271(100.0)      198(100.0)     810(100.0)

                                                                   TOT OPEN:   812( 57.5)
                                                                 TOT CLOSED:   299( 21.2)
                                                                 TOT PT/CLD:   301( 21.3)
                                                                              ======
                                                          GROUP GRAND TOTAL:  1412(100.0)


  FIN
      1977            1978            1979            1980            1981           TOTALS
 FDIC
         N    %          N    %          N    %          N    %          N    %         N      %
OPN:A    2(  4.8)       30( 37.5)        4(  5.6)        1(  1.3)        2(  2.4)      39( 11.0)
CLD:A   22( 52.4)       49( 61.3)       22( 31.0)       26( 32.5)       30( 36.6)     149( 42.0)
P/C:A   18( 42.9)        1(  1.3)       45( 63.4)       53( 66.3)       50( 61.0)     167( 47.0)
      ------          ------          ------          ------          ------         ------
TOT:A   42(100.0)       80(100.0)       71(100.0)       80(100.0)       82(100.0)     355(100.0)

 FHLBB
         N    %          N    %          N    %          N    %          N    %         N      %
OPN:     0(  0.0)        5(  7.6)        8( 13.6)       12( 18.8)       34( 65.4)      59( 20.6)
CLD:    16( 34.8)       25( 37.9)       19( 32.2)       21( 32.8)       16( 30.8)      97( 33.8)
P/C:    30( 65.2)       36( 54.5)       32( 54.2)       31( 48.4)        2(  3.8)     131( 45.6)
      ------          ------          ------          ------          ------         ------
TOT:    46(100.0)       66(100.0)       59(100.0)       64(100.0)       52(100.0)     287(100.0)

 FRB
         N    %          N    %          N    %          N    %          N    %         N      %
OPN:    13( 11.4)       12( 10.4)       41( 30.1)       39( 25.3)       25( 46.3)     130( 22.7)
CLD:    83( 72.8)       70( 60.9)       86( 63.2)      115( 74.7)       29( 53.7)     383( 66.8)
P/C:    18( 15.8)       33( 28.7)        9(  6.6)        0(  0.0)        0(  0.0)      60( 10.5)
      ------          ------          ------          ------          ------         ------
TOT:   114(100.0)      115(100.0)      136(100.0)      154(100.0)       54(100.0)     573(100.0)

 NCUA
         N    %          N    %          N    %          N    %          N    %         N      %
OPN:     0(  0.0)        0(  0.0)       15( 55.6)       43( 57.3)        0(  0.0)      58( 56.9)
CLD:     0(  0.0)        0(  0.0)       12( 44.4)       32( 42.7)        0(  0.0)      44( 43.1)
P/C:     0(  0.0)        0(  0.0)        0(  0.0)        0(  0.0)        0(  0.0)       0(  0.0)
      ------          ------          ------          ------          ------         ------
TOT:     0(  0.0)        0(  0.0)       27(100.0)       75(100.0)        0(  0.0)     102(100.0)

                                                                   TOT OPEN:   286( 21.7)
                                                                 TOT CLOSED:   673( 51.1)
                                                                 TOT PT/CLD:   358( 27.2)
                                                                              ======
                                                          GROUP GRAND TOTAL:  1317(100.0)
 OTHER
      1977          1978          1979          1980          1981          TOTALS
 EEOC
     N    %        N    %        N    %        N    %        N    %        N    %
OPN:    4( 11.8)     8( 17.0)    10( 18.5)     4(  8.2)     0(  0.0)    26( 12.3)
CLD:    6( 17.6)     3(  6.4)     0(  0.0)     2(  4.1)     0(  0.0)    11(  5.2)
P/C:   24( 70.6)    36( 76.6)    44( 81.5)    43( 87.8)    28(100.0)   175( 82.5)
     ------       ------       ------       ------       ------       ------
TOT:   34(100.0)    47(100.0)    54(100.0)    49(100.0)    28(100.0)   212(100.0)

 FEC
     N    %        N    %        N    %        N    %        N    %        N    %
OPN:    3(  4.3)    22( 25.6)    16( 20.3)    49( 45.8)    37( 40.2)   127( 29.3)
CLD:   21( 30.0)    37( 43.0)    28( 35.4)    58( 54.2)    54( 58.7)   198( 45.6)
P/C:   46( 65.7)    27( 31.4)    35( 44.3)     0(  0.0)     1(  1.1)   109( 25.1)
     ------       ------       ------       ------       ------       ------
TOT:   70(100.0)    86(100.0)    79(100.0)   107(100.0)    92(100.0)   434(100.0)

*HSTSF
     N    %        N    %        N    %        N    %        N    %        N    %
OPN:    4( 80.0)     2( 66.7)     1( 50.0)     1( 50.0)     1( 50.0)     9( 64.3)
CLD:    0(  0.0)     0(  0.0)     0(  0.0)     0(  0.0)     0(  0.0)     0(  0.0)
P/C:    1( 20.0)     1( 33.3)     1( 50.0)     1( 50.0)     1( 50.0)     5( 35.7)
     ------       ------       ------       ------       ------       ------
TOT:    5(100.0)     3(100.0)     2(100.0)     2(100.0)     2(100.0)    14(100.0)

                                                      TOT OPEN:   162( 24.5)
                                                    TOT CLOSED:   209( 31.7)
                                                    TOT PT/CLD:   289( 43.8)
                                                                  ======
                                             GROUP GRAND TOTAL:   660(100.0)


                                   ----------------------------------
                                  (REGULATORY)
                                                      TOT OPEN:  2641( 39.7)
                                                    TOT CLOSED:  2593( 38.9)
                                                    TOT PT/CLD:  1424( 21.4)
                                                                 ======
                                             GROUP GRAND TOTAL:  6658(100.0)


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        GRAND    TOTALS
      1977          1978          1979          1980          1981          TOTALS
     N    %        N    %        N    %        N    %        N    %        N    %
OPN:  643( 36.5)   646( 40.3)   849( 38.7)   907( 43.3)   520( 38.4)  3565( 39.6)
CLD:  710( 40.3)   635( 39.6)   923( 42.1)   885( 42.2)   564( 41.7)  3717( 41.3)
P/C:  410( 23.3)   321( 20.0)   419( 19.1)   304( 14.5)   269( 19.9)  1723( 19.1)
     ======       ======       ======       ======       ======       ======
TOT: 1763(100.0)  1602(100.0)  2191(100.0)  2096(100.0)  1353(100.0)  9005(100.0)

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    *  PART TIME BOARD
    A  FIGURES TAKEN FROM COMMON CAUSE REPORT ON FIRST YEAR IMPLEMENTATION
    B  AGENDA ITEMS COUNTED SEPERATLY, NOT FIGURED IN AGENCY TOTALS
    C  REPORT NOT AVAILABLE
    D  REPORT FILED FOR FISCAL YEAR
    E  NO LONGER UNDER THE SUNSHINE ACT
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BACKGROUND REPORT FOR RECOMMENDATION 84-4

NEGOTIATION AND INFORMAL AGENCY ACTION: THE CASE OF SUPERFUND

for

The Administrative Conference of the United States

Frederick R. Anderson
Professor of Law
University of Utah

May 25, 1984

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I. Introduction

During the 1970s Congress enacted a potent array of social legislation for the protection of health, safety, and the environment.[1] At the end of this effort, Congress adopted a comprehensive regulatory scheme for the safe handling of newly generated hazardous wastes. Enacted as subpart C of the Resource Conservation and Recovery Act (RCRA),[2] the hazardous substances provisions were intended "to eliminate the last remaining loophole in environmental law."[3] Yet shortly thereafter Congress was forced to admit that still another loophole existed, and in 1980 it enacted another major statute to address the problem of spills of hazardous substances and the past improper disposal of hazardous wastes. The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), or Superfund,[4] creates a $1.6 billion hazardous waste spill and disposal site cleanup program. Funds are provided by a tax on crude oil and chemical feedstocks and by general revenues. CERCLA also includes provisions for voluntary negotiated cleanup by private parties, administratively and judicially ordered cleanup, state participation, and reimbursement of governments and private parties for cleanup expenses.

The circumstances that stimulated the enactment of CERCLA present profound challenges to statutory implementation. For decades dangerous residues have been accumulating on generators' premises or at dump sites: acids and bases, synthetic organic compounds, fuel byproducts, toxic metals, explosives, and infectious organic materials from hospitals and scientific laboratories. In time, storage containers and burial locations have been breached and the waste material has dispersed in ground and surface waters, soil, and the air. The original site operator or generator may have gone out of business or sold the site. Records may have been lost or destroyed, if they ever existed.

Waste chemicals may cause sudden injury by exploding or igniting, but they may also cause harm after prolonged exposure at low levels. These slower, incremental harms often are masked behind other plausible causes which may delay and confound reliable medical diagnoses. The diseases associated with chronic human exposure to wastes may affect respiratory, nervous, alimentary, and urological systems and include cancer, infant deformity, and genetic impairment. Considerable uncertainty surrounds estimates of which hazardous waste disposal sites currently threaten human health and the environment.[5] More certain is the permanent loss of valuable supplies of groundwater.[6]

Hazardous waste sites show an astonishing diversity. At some sites groundwater supplies may be threatened although no one knows for sure; at others, groundwater is already contaminated. At a few of the latter, contamination is not important because the groundwater is unsuitable for use; at others, groundwater provides large populations with culinary supplies. Sites at which groundwater contamination is threatened present radically different needs for remedial investigation and cleanup compared to sites requiring only surface cleanup. Waste migration in groundwater is one of the least understood hydrological phenomena, principally because underground soil, sand, and rock vary so greatly from region to region and site to site. Public involvement ranges from indifference to panic.[7] At some sites, a few large cooperative site users may exist and few of the wastes may be orphaned; at the other extreme, a handful of uncooperative users may exist and the bulk of the wastes may be orphaned. Between those extremes lie situations of near-unimaginable diversity, although it now seems clear that completely orphaned sites for which no responsible parties can be identified are relatively few in number.[8] Not surprisingly, a complex web of relationships has been spun at each site between the governmental and private interests affected.

Today, CERCLA leaves other loopholes unclosed. Its provisions work well for quick cleanup of spills, but its program for remedying the hazards that exist at several thousand inactive and abandoned sites founder while a major legal and policy debate takes place over the roles of the EPA, the courts, and voluntary cleanup by the private sector in achieving CERCLA's purposes. Over 2,000 sites may eventually require attention, at a cost of tens of billions of dollars.[9] Yet only a handful of sites has been cleaned up, and government estimates of how much can be achieved with the existing Fund are pessimistic.[10]

Congress is poised to enlarge the Fund several times over and to set deadlines for cleaning up sites.[11] Perhaps money, strict deadlines, and enforcement actions will be enough to overwhelm the site cleanup problem. Congress has had some success in legislating solutions to environmental disruption through a series of detailed regulatory statutes, even if rather inefficiently and at high cost. Yet other CERCLA implementation options might save considerable time and money. In CERCLA, authority exists to fashion a viable long-term remedial program,[12] although its key elements are somewhat at odds with current EPA strategy.

Currently, formal EPA policy emphasizes Fund cleanup coupled with reimbursement by site users, and the alternative of EPA-mandated cleanup through administrative orders and court actions. In fact, the agency has negotiated more cleanups with private parties than it has carried out itself or compelled by judicial action; nevertheless, the option to negotiate has been deemphasized and is restricted both substantively and procedurally under current agency negotiation policy. The central element of the revised strategy which this paper proposes would stress cleanups which are negotiated publicly and with the full accord of site users, EPA, states, local governments, and local citizens. While the emphasis in a new strategy would fall once again upon negotiation, the approach to negotiation developed here is radically different from that prevailing between 1981 and 1983, when the agency went through a severe managerial crisis that focused political attention on its attempt to negotiate cleanups without expenditure of any Fund revenues.

In a sense, CERCLA was passed simply to remedy one of the excesses of industrialization and to make RCRA administrable. Yet on another level CERCLA also provides a crucible in which to test the conflict-resolving power of traditional adversarial institutions such as the courts and regulatory agencies, not only against each other, but against emerging new alternative dispute resolution processes. This basic examination includes the reconciliation of negotiation techniques with the procedures and demands of informal agency adjudication, the role of the courts in promoting non-adversarial processes, the role of rapidly developing legal norms when bargaining is attempted in their lengthening shadow, and the orchestration of a quasi-regulatory governmental program with consensus-based negotiation. Additional issues, such as the assimilation of common law principles into a modern welfare statute, and the types of relief appropriate under the array of authorities provided, complete the scope of this analysis.

II. CERCLA Surveyed: The Statutory Plan, Regulatory Context, and Remedial Statutory Analogues

A. Major Provisions and Attributes

Widely perceived as a federal cleanup law, CERCLA actually goes further. It makes the federal government responsible for site cleanup initiation but places ultimate responsibility on the site users. If responsible parties cannot be identified or are unable or unwilling to undertake cleanup measures, the government is authorized to clean up the site and Superfund[13] will be used to pay cleanup costs. The Fund may then sue any responsible parties whom it can locate for reimbursement. Responsible parties can also be sued directly to compel them to clean up sites themselves.[14]

The National Contingency Plan (NCP) establishes procedures for response actions and a method for putting priorities on waste sites for cleanup. The NCP has been carried over from the 1972 Clean Water Act in an expanded form.[15] Under CERCLA, the enlarged NCP specifies methods to be used for inventorying facilities which contain hazardous substances, provides the criteria for cleanup priorities, suggests techniques for cleaning up sites and spills, and coordinates intergovernmental cleanup. The politically explosive core of the Plan is a list of approximately 400 sites (including at least one in each state) which have first call on the Fund and other governmental cleanup efforts.[16]

The act provides a role for states, but unlike regulatory pollution control laws, it does not provide for program delegation. CERCLA delegates authority to state officials to obligate money in the Fund and to settle claims so long as they have signed a contract or cooperative agreement with EPA.[17] Response authority is limited to six months or one million dollars if no state contract or cooperative agreement has been executed, unless an emergency situation exists.[18] Response authority may continue beyond these limits if the contract or cooperative agreement has been executed and the state is in compliance with requirements for payment of a state share, for away-from-site disposal, and for long-term site maintenance.[19]

CERCLA contemplates replenishment of the Superfund after a government sponsored cleanup action.[20] Hence, the federal government does not have to wait; it may respond immediately at a hazardous waste site and bring suit later to shift the cost to responsible parties. Liability extends to the cost of removal and remedial actions by the federal or state government or any other person who incurs costs consistent with the NCP, as well as for damages to natural resources.[21] Responsible parties may still be held liable even if they have already paid substantial sums into the Fund through the taxes which CERCLA imposes.

The act provides a seemingly comprehensive list of potential defendants who may have used a site: current owners and operators of vessels and facilities and persons who owned or operated a facility at the time of disposal; all waste generators or other persons who arranged for the treatment or disposal, or for the transport of wastes which they owned or merely "possessed" to any facility where wastes remain; and any transporter who selected a disposal or treatment facility which afterwards required a Fund response.[22]

The act lavishes attention upon direct governmental cleanup and imposes many conditions on Fund expenditure. Yet at the same time it quite plainly mandates, albeit more succinctly, a substantial direct role in cleanups for responsible parties, if they can be found. Federal authority to undertake response actions is contingent upon a determination that removal and remedial action[23] will not be done properly by the owner or operator of a facility, or any other responsible party.[24] Thus it seems that Congress intended for EPA to negotiate voluntary cleanup with private parties before expending Superfund revenues.[25]

Further, §106(a) of CERCLA authorizes the federal government to secure such relief as may be necessary to abate an imminent and substantial endangerment created by an actual or threatened release of a hazardous substance. Federal district courts may grant relief justified by the "public interest and the equities of the case." Section 106 potentially confers CERCLA's most potent relief, yet, at the same time, remains the most unsettled in scope. The section fails to spell out the relationship between abatement and government cleanup under §104 and the parties against whom injunctive relief can issue.[26] In addition to court-ordered relief, the government may issue administrative orders to protect health or the environment. Substantial penalties may be requested for refusal to comply, including treble "damages" equal to three times cleanup costs.[27]

Waste sites may present either an acute need for an emergency response (fire, fumes, breach of containment, sudden threat to a water supply), or circumstances may permit a more deliberate response to clean up chronic, less immediate risks. CERCLA carefully preserves this distinction throughout by providing for emergency "removals" for the former but more protracted "remedies" for the latter.[28] In the NCP the EPA further elaborates upon this distinction, and the agency has organized its Fund response efforts accordingly. Because they are emergencies, removals require minimal preclearances. They obviously cannot be led through the lengthy analytical and ranking procedures of the National Priority List. Emergencies have first call on Fund revenues; they can jump the queue of NPL sites awaiting a long-term response.[29] The agency's emergency response program has performed well, as an extension of an EPA and Coast Guard program for cleanup of oil and chemical spills from barge collisions, ruptured pipelines, and burst storage tanks. Expenses were covered through the revolving fund set up by §311 of the Clean Water Act. An experienced emergency response team under EPA coordination acts quickly with local police and fire fighters; EPA may provide specialized contractors and other resources.[30] The emergency response program receives almost universal praise. Unfortunately, it offers few precedents of use in carrying out the more troubled remedial program.

B. The Statutory Context of Federal Environmental Regulatory Legislation

The scheme of CERCLA -- a two-prong public works and cleanup liability approach -- distinguish the statute sharply from other federal environmental laws. Congress did not require EPA to set ambient or performance standards specifying the degree or type of cleanup required at the sites.[31] CERCLA appears to contemplate an individualized, case-by-case approach to selection of particular site remedies.[32] Nevertheless, CERCLA adds an important thread to the already intricate web of existing regulatory and remedial statutes and challenges the EPA to shape a coordinated whole.

The most important of the existing statutes, the Resource Conservation and Recovery Act,[33] was intended to establish a systematic federal approach to hazardous wastes management. As a regulatory program intended to govern comprehensively for the indefinite future, RCRA overarches and incorporates the more limited, transitional mission of CERCLA: to correct past errors and provide for the proper management of the hazardous wastes that have accumulated over the past several decades.

In enacting RCRA Congress relied upon the same strategy which it used many times in attacking other pollution problems: adoption of a comprehensive scheme of direct regulation to forestall future harms. Subpart C of RCRA[34] is in many ways the most evolved application of the regulatory paradigm for pollution control ever enacted by Congress. Touted as a comprehensive, closed "cradle to grave" system, RCRA provides for the formal identification of wastes as hazardous,[35] the development of manifests to leave a paper trail tracking all shipments,[36] and the certification through a permit system that performance standards for safe treatment, storage, and disposal are being met.[37] As in other environmental statutes, states may run their own hazardous waste programs so long as they satisfy or exceed minimum EPA requirements; otherwise, EPA will administer them.[38]

RCRA's most important provisions will almost certainly be those establishing the permit system for on or off-site treatment, storage, and disposal.[39] These have direct implications for cleanups under CERCLA, because old wastes from abandoned sites may have to be placed in a RCRA-permitted facility.[40] To obtain a permit, a facility operator must comply with detailed regulations which adopt a two-pronged, preventive approach: performance standards for groundwater protection implemented through monitoring and if necessary corrective action; design and operation standards aimed at preventing waste releases during facility life and 30 years thereafter.[41] A tie with CERCLA's National Contingency Plan exists, because a cleaned-up Superfund site and a

RCRA-permitted site present somewhat similar waste containment, monitoring, and post-closure needs. EPA has proposed applying RCRA standards and public participation requirements, but not its permit and procedural requirements, to CERCLA cleanups.[42]

Sites existing at the time RCRA was passed were not expected to shut down until such time as they could meet RCRA standards, because the wastes which would accumulate or be disposed of illegally would pose a greater danger than they would if they were placed even in substandard existing disposal facilities. Under interim disposal guidelines a facility can operate at the level and in the fashion that existed when interim status was granted.[43] The intent is that EPA or a state will call in the temporary permits as its workload allows to require compliance with strict final standards. Some estimate that this review will last into the 1990s. As EPA and the states pressure existing facilities with interim permits to meet the stricter standards, some may go bankrupt, forcing the cleanup burden back on their customers and transporters or on the Superfund. At this point the RCRA-permitted site may become the responsibility of CERCLA, subject to all the implementation problems and strategies presented by that statute.

The Clean Water Act[44] provides a limited program for oil and hazardous substances spills in navigable waters.[45] The relationship between CERCLA and §311 is close and confusing. This is the case because early drafts of CERCLA expanded the oil pollution cleanup and liability provisions of §311 of the Clean Water Act, but Congress could not agree in the end on how oil spills should be handled under Superfund.[46] Opponents of combining oil and hazardous substances cleanup in one bill argued that oil spills require different cleanup techniques and that since the risks posed are very different in the two cases, determining the proportion of the fund to be paid in by the two categories of producers would be difficult.[47]

CERCLA still imposes a tax on crude oil, because oil is a prime hazard in many sites, and payments that are due but unsatisfied under §311 may be paid out of Superfund. Yet, CERCLA leaves oil spill and pollution cleanup responsibility largely to the provisions of §311 of the Clean Water Act, although it transfers half the balance of the §311 oil cleanup fund to the CERCLA Hazardous Substance Response Trust Fund. Ultimately, the National Contingency Plan is intended to integrate EPA's disparate CERCLA and Clean Water Act authorities with respect to oil.[48]

A critical issue concerning the CWA's relationship with CERCLA is whether dumps can be regulated as point sources.[49] The Clean Water Act does not empower EPA to regulate point source pollutant discharges to groundwater, a power which would be necessary for the statute even to begin to play a role in control of water pollution at most NPL sites. This is true even though about 30 percent of the nation's stream flow in an average year is water that has returned to the surface from underground natural springs and other seepage.[50] However, surface water drainage patterns may have little or no apparent relationship to underlying groundwater reservoirs. EPA does have the power to require states to promulgate groundwater quality standards where a clear hydrologic nexus with surface water exists.[51] Yet EPA has not generally used this authority.[52]

Before hazardous substances are discarded as wastes, therefore passing into the jurisdictional embrace of CERCLA and RCRA, they are regulated by the Toxic Substances Control Act (TSCA).[53] TSCA requires testing when the disposal of a chemical substance may present an unreasonable risk of injury to health or the environment.[54] If the chemical substance poses an unreasonable risk of injury, EPA may limit or prohibit its use.[55] The limitation on use may include regulating the manner or method of disposal of the chemical.[56]

The Safe Drinking Water Act of 1974 (SDWA)[57] established a federal regulatory system to insure the safety of public drinking water systems.[58] Because surface and especially groundwater contamination from leaking waste dumps is the principal problem that CERCLA must address, SDWA and CERCLA are closely related, even if Congress has not linked them closely together.[59] Under SDWA, EPA sets maximum permissible levels for contaminants in drinking water.[60] The SDWA underground injection control program is intended to prevent the endangerment of underground drinking water sources.[61] Aquifiers designated as the sole principal source of drinking water for an area are afforded special protection under the Act.[62]

Hazardous materials and wastes present the greatest risks while being handled. Hazardous waste transport is now regulated under RCRA, but RCRA must dovetail with several other federal authorities. CERCLA is concerned with the transportation of wastes because the initial transport of materials to dumps created transporter CERCLA liability. In addition, wastes cleaned up under Superfund may have to be transported. The Hazardous Materials Transportation Act (HMTA)[63] is a "command-and-control" statute authorizing strict performance, design, and information standards. Under HMTA, the Secretary of the Department of Transportation may promulgate rules governing virtually any aspect of the transport of hazardous materials which meet the familiar standard of "unreasonable risk" to health, safety, or property when transported in commerce.[64] Although HMTA centralizes authority over hazardous materials transportation, the

Department's HMTA program overlaps with programs of four other agencies: EPA,[65] the Nuclear Regulatory Commission, [66] the Occupational Safety and Health Administration,[67] and the Interstate Commerce Commission.[68]

C. CERCLA's Roots: The Modern Federal Law of Hazard Mitigation

Congressional strategies for responding to the excesses of an industrial society have been varied. New Deal industrial recovery and fair labor statutes presaged modern regulatory statutes, but programs like the Civilian Conservation Corps and the Works Project Authority also distantly foreshadowed CERCLA. The Tennessee Valley Authority and other regional economic development programs continued congressional attempts to design effective "remedial" programs. Congress has also adopted a number of federal relief acts over the years to permit the federal government to assist state and local governments in responding to natural and manmade disasters.[69]

In the last fifteen years federal programs designed to attack hazardous conditions that cannot be ameliorated except by direct cleanup action have proliferated. These ad hoc programs are diverse but their common feature is an attempt to ameliorate the harmful conditions of past conduct. The acts do not set comprehensive standards for industry; rather, they are designed to address harmful conditions through cleanup or payment of compensation. Examples abound: the Lead-Based Paint Poisoning Act of 1971,[70] the Uranium Mill Tailings Radiation Control Act of 1978,[71] the Asbestos School Hazard Detection and Control Act of 1980,[72] the Black Lung Benefits Act,[73] and the Federal Abandoned Mine Reclamation Program.[74]

The federal abandoned mine reclamation program, which is quite analogous to CERCLA, was established to reclaim lands that had been affected by mining operations that were abandoned or inadequately reclaimed prior to the Surface Mining Coal Reclamation Act (SMCRA).[75] The federal government may reclaim the abandoned site or a state may undertake reclamation if its plan has been approved by the Interior Department.[76] State and federal Abandoned Mine Reclamation Funds are established with revenues collected from a reclamation fee charged on coal.[77]

The laws whose inner workings provide the closest analogies to CERCLA have to do with oil spill liability. The first of these was §311 of the Clean Water Act and its predecessors, in which Congress sought to provide for the cleanup of oil and hazardous substance spills, but without placing a drain on general federal revenues. All similar laws are financed by taxes or fees on the oil or hazardous substance, and the costs of cleanup are ultimately the responsibility of various liable parties. The oil and hazardous spills acts reveal that CERCLA was established against a background of extensive federal hazard cleanup legislation. Statutes in this legislative background bear important parallels to CERCLA in connection with a number of key CERCLA issues:

Standard of Liability: CERCLA adopts the standard of liability for responsible parties found in §311 of the Clean Water Act,[78] which creates, as noted, an oil and hazardous substance cleanup program for discharges to navigable waters. The liability creating provision of §311 is silent, however, on the standard of liability as applied to responsible parties.[79] The courts have interpreted §311 as establishing strict liability.[80] Similarly, neither CECLA nor the CWA, by express terms, establishes joint and several liability for responsible parties, although both have been interpreted as doing so.[81] Other oil and hazardous substance liability acts expressly provide strict, joint, and several liability. The Deepwater Port Act of 1974[82] expressly provides that responsible vessels and port authorities shall be "jointly and severally liable, without regard to fault," for cleanup costs and damages that result from a discharge of oil.[83] The trans-Alaskan Pipeline Authorization Act[84] imposes strict liability on parties who are responsible for releases of oil from a pipeline or vessel,[85] and parties responsible for oil spills above the outer continental shelf or submerged lands are jointly, severally, and strictly liable for all compensable losses.[86]

Funds and Fees. The Superfund was not the first statute in which Congress established a fund to finance federal cleanup activities. Section 311 of the CWA had established such a fund in 1972, and part of that money was transferred to Superfund. The 1974 Deepwater Port Act fund is financed by a fee on oil that is handled at deepwater ports.[87] The 1978 Offshore Oil Spill Pollution Fund is financed by fees on oil produced on the OCS.[88] A similar fund is established by the Trans-Alaskan Pipeline Authorization Act of 1973 with revenues from fees on Alaskan oil.[89]

In liability and funding provisions of the oil and hazardous substance liability acts, Congress has forced industry to internalize those costs and allocate them ultimately to consumers. What is different about CERCLA is that the harmful conditions existed at the time the legislation was adopted. The conduct giving rise to the hazard often took place years ago.[90] In this respect, CERCLA more resembles the black lung benefits or abandoned mine reclamation programs. The former makes present owners and operators of coal mines liable for compensating miners who contracted black lung disease, even though the owners and operators conduct predated the act, or was unrelated to the miner's diseases,[91] while the latter imposes a fee on presently-mined coal to reclaim abandoned mines.[92] The nexus between the harmful condition -- black lung, unreclaimed land, or hazardous dump sites -- and the conduct of the responsible parties may be attenuated with CERCLA, the Black Lung Benefits Act, and the abandoned mine reclamation program, but rational nexus judicial review is unlikely to thwart any of these cost allocation schemes.

Government-Initiated Cleanup. CERCLA's legislative precedents authorize government-initiated cleanup, but only as an alternative to private remedial action. Similarly, the oil spill liability acts authorize the federal government to clean up spills unless cleanup will be done by responsible parties.[93] When private parties incur cleanup costs yet have a defense against liability, they are often entitled to bring a claim against the appropriate fund to recoup their costs.[94] Subrogation and contribution are also preserved.[95] Unfortunately, CERCLA is not as clear whether responsible parties can recover from the Superfund.[96]

Congress clearly did not enact CERCLA without statutory precedent, and although experience under various remedial statutes might have been limited, there was an abundance of statutory language from which Congress could draw. Indeed, the language of §§104(a) and 106 of CERCLA are taken almost verbatim from earlier enactments.[97] There is little, if anything, in CERCLA's funding mechanism that is unique,[98] and even the statutory scheme repeats a pattern found in earlier oil spill liability and abandoned mine reclamation acts. The federal statutory paradigm for responding to hazardous conditions thus requires:

1. Designation of hazardous conditions resulting from past or present activities;

2. Federally authorized cleanup, or delegation to state authorities, unless responsible parties will properly respond to the hazard;

3. The isolation of persons who have a relationship with the hazard and upon whom the ultimate responsibility for remedial efforts can be placed. The nexus may be direct, as in the case of oil spills, or attenuated, as in the case of black lung benefits;

4. The imposition of the ultimate cost of ameliorative action on responsible parties by a requirement of direct action, or by imposing liability for costs or damages incurred by others and by imposing taxes or fees on the products of the responsible parties.

Current federal responses to hazardous conditions may represent the limit of "rational nexus" congressional authority under the Constitution. Further, unrestrained by notions of dual sovereignty, Congress has authorized federal action to deal with patent health and welfare problems. Although Congress has responded to such problems in the past by conditional federal grants, the current procedure is direct federal action without the pretense of improving national economic conditions.

III. The Implementation of CERCLA by EPA and the Courts

The administrative implementation of CERCLA had a dismal beginning. As this section develops, CERCLA was caught up in the myriad of political and managerial problems that afflicted EPA from 1981 until mid-1983. The CERCLA program suffered from frequent policy shifts and reorganizations, patent abuse by its leadership, and a demoralizing slowdown of Fund expenditures and other cleanup initiatives. During this period negotiation acquired a bad name as the result of the apparent willingness of key officials to negotiate overly generous cleanup terms with site users. In ending this era, and in reaction to House oversight subcommittees which had conducted lengthy and sometimes acerbic hearings on the faltering CERCLA program, a new agency leadership group began to build a well-run program which stressed Fund remedies and permitted cleanup negotiations only under tightly-controlled circumstances. Coupled with aggressive litigation under CERCLA's cost reimbursement and imminent hazard provisions to establish that the widest array of potentially responsible parties were jointly and severally liable without regard to fault for the complete costs of cleanup, the new program was expected to produce prompt voluntary cleanup on the agency's terms. However, as the following analysis shows, the Fund-based program bristles with quasi-regulatory requirements which take time to implement and retard the rate of cleanup over and beyond the slow pace imposed by the limited size of the Fund itself. Moreover, vagaries in doctrine, especially joint and several liability, cause doubt that the federal district courts will interpret CERCLA as generously as EPA wishes and consequently create uncertainty that responsible parties will promptly acquiesce in the agency's preferred course of action. The analysis concludes that the slow pace of the remedial program and the residual ambiguity in EPA's legal position suggest a re-examination of the agency's policy regarding negotiated cleanups. A change in the agency's approach to negotiation might produce a more rapid rate of cleanup in the actual circumstances under which the remedial program must operate. Section IV then discusses the elements of a principled negotiation strategy based on contemporary developments in the field of alternative dispute resolution.

A. Policy Evolution: A Background of Politics and Negotiated Case Settlements

1. The Early Federal Site Cleanup Program

Contemporary site cleanup has its roots in litigation launched by the Justice Department late in the Carter Administration, before CERCLA was enacted. By the end of 1980, the Department had filed over 50 suits to compel site cleanup under the imminent hazard authority of RCRA .[99] The EPA played a supporting role.[100] The program emphasized case filings; the expectation was that most of the suits would be settled, although the Department realized that litigating some cases would be necessary to clarify the law and establish credibility.[101] The view that imminent hazard actions would usually be settled without resort to trial comported well with established practices in most federal environmental enforcement.[102] As with most Justice Department conduct of enforcement cases under modern welfare statutes, the expectation was that a consent decree would eventually be negotiated with the defendants.[103]

The enactment of CERCLA completely changed the complexion of the government's program. By enacting CERCLA, Congress did for the RCRA cleanup program what it had done earlier for the Refuse Act water pollution control program when it enacted the 1972 Federal Water Pollution Control Act Amendments -- it replaced a simple pollution control plan based on a few words in a self-executing statute with a complex administrative scheme.[104] Still, like the Refuse Act the RCRA imminent hazard provision has not been repealed. The Justice Department has continued to settle or litigate these suits, and now it can rely on virtually identical CERCLA imminent hazard authority as well.

In early 1981, EPA dissolved the Hazardous Waste Task Force formed to assist the Justice Department. Its functions were assumed by staff assigned to implement the new CERCLA legislation. With the change of administration in early 1981, personnel shifts occurred at the Justice Department as well, but the Department continued to file suits and negotiate case settlements under the combined imminent hazard authorities of RCRA and CERCLA.

As EPA began to implement the new CERCLA legislation, an important shift in the center of gravity of the federal waste site remedy effort occurred, away from the Department and toward the agency. The Department remained responsible for RCRA and CERCLA suits and consent decrees, but case referral occurred in the context of the agency's more complex statutory program. EPA has many managerial choices to make about priority among site remedies, pre-litigation negotiations, and use of the Fund, as well as case referral and settlement negotiations. Current CERCLA implementation continues the trend, although the Department maintains a vigorous effort to secure favorable judicial interpretations of CERCLA's enforcement provisions. The first two years of CERCLA implementation, however, coincided with a grave managerial crisis which exposed the CERCLA program to national political attention.

2. Stormy political history

The EPA passed through two difficult years between mid-1981 and mid-1983, during which internal dissention, reduced staffing and funding, and several reorganizations impaired operations in all agency programs.[105] Superfund drew national attention and suffered particularly. The difficulties of the CERCLA program in establishing a record of accomplishment can be assigned in part to this period. Moreover, the current CERCLA implementation strategy has been forged as a reaction to the events of that period and as a rejection of the management approaches which then prevailed. What's past is prologue.

The CERCLA implementation strategy which contributed to the resignations or firings of over 15 EPA officials[106] used programmatic delays and private party cleanup agreements to keep Fund expenditures low so that Congress would not need to reauthorize the Fund in 1985.[107] The strategy was supposed to curb inflationary public spending and obviate the need for another federal public works program.

The National Contingency Plan was to have been revised within six months of CERCLA's enactment.[108] Ten months later, the draft NCP was foundering under severe scrutiny by the Office of Management and Budget and internal EPA disagreement. It took a court order to force the EPA to act.[109] The Fund meanwhile accumulated unspent revenues. The EPA defended its actions against a storm of criticism as necessary to make sure that limited funds would be spent at deserving sites and to give the agency time to try to negotiate cleanup by responsible parties.[110]

Allegations of agency mismanagement included relaxing cleanup requirements as an inducement to private parties to clean up sites themselves,[111] agreeing to cost reimbursement settlements short of what the Fund should recover, playing politics with the Fund,[112] and generally following sloppy management practices.[113] On instructions from the White House, Administrator Anne Gorsuch claimed executive privilege in refusing to share site cleanup enforcement documents with two House subcommittees. In an historic action the House of

Representatives voted for the first time to hold an agency head in contempt of Congress.[114] The head of the CERCLA program was later convicted of perjury in her testimony to a congressional committee and of obstructing congressional investigations.[115]

Under Administrator Gorsuch the agency experienced unprecedented managerial dissention.[116] In fairness, a chronic tension between "program" and "enforcement" functions,[117] never satisfactorily resolved in the agency's fourteen-year history,[118] caused some of the difficulty. Yet this long-standing tension alone was inadequate to explain a chaotic three reorganizations within one year.[119]

CERCLA program officials who have now testified many times are keenly aware that Congress has a practiced vigilance against Superfund abuse.[120] This political backdrop helps explain EPA's current wariness toward negotiation. It also provides a clear example of how not to use negotiation. But negotiation done the wrong way does not rule out negotiation done the right way. The discarded negotiation strategy seems almost Quixotic in retrospect: the site problem was enormous and private willingness to solve it was limited, however highly the agency then valued holding down inflationary spending and private sector cooperative problem-solving. In prospect, consensus-based negotiation with site users can still be tapped -- but to clean up sites to safe levels with reasonable promptness or expect either the Fund or the courts to see that the job is done.

3. Negotation in CERCLA: The Experience with Remedial Agreements

Without question, EPA's reputation, technical competence, organization, and pride were severely damaged during the Gorsuch era. The CERCLA remedial program remained controversial throughout. Certain agreements -- Seymour in Indiana,[121] General Disposal in California,[122] and Chem-Dyne in Ohio,[123] -- drew severe criticism. The agreements criticised involved large sites and major companies, portending worse to come unless the government adopted a more aggressive negotiating posture.

Yet while the government negotiated some questionable remedies, the rest of the approximately three dozen agreements concluded before mid-1983 have escaped criticism.[124] A footnote samples these agreements.[125] Perhaps Congress and the press needed only a few symbolic sites as vehicles for exploring EPA mismanagement and the potential for abuse inherent in the Fund-conserving strategy. Yet any missteps by EPA and the Justice Department during this politicized era were unlikely to escape vigilant congressional oversight committees and the press. More likely, the shortcomings of the CERCLA remedial program have been somewhat exaggerated. Perhaps the presence of the Justice Department, judicial oversight to ensure that consent decrees serve the public interest, and prompt congressional oversight prevented greater abuses. Even the most-criticized agreement, Seymour, was carefully reviewed and approved by the federal district court.[126] The Justice Department continues to defend the settlement.[127]

Whatever the merits of the substantive agreements, a practical and defensible process for negotiating site remedies evolved during CERCLA's first three years. Settlement procedures have varied, reflecting the different circumstances at the sites, but negotiations by and large have tended to follow a pattern.[128] While suggestions appear later that would significantly improve upon current EPA negotiation policy, the past experience lays a useful foundation. It continues to provide the site negotiation paradigm today.

After the EPA has notified potentially responsible parties, the government and the parties consult about a meeting. In most cases, the EPA convened the parties to discuss how to proceed.[129] Initially, party initiative was difficult, because EPA would not share names. As this practice relaxed, in some later settlements one or more responsible parties took the initiative, contacting EPA and each other.

The most important procedural step toward negotiation has proven to be the organization of a committee of a few persons to represent the diverse interests of the responsible parties in bargaining with the agency. Of course, at sites involving only a few relatively homogenous parties, organization presented few problems. At most sites, however, party organization taxed the ingenuity of the participants. At the Chem-Dyne site, the committee created for the large generators represented the small generators as well.[130] At the Stringfellow site several party tiers were established.[131]

The party committees typically have consisted of corporate technical staff and inside and outside counsel, who consult frequently with the companies for whom they speak. The government has been represented by EPA technical, program, and enforcement personnel, as well as attorneys from the Justice Department.

Committee financial support has been developed in a number of ways. A few parties may take the lead in sending letters to others explaining that a committee is forming and that if the addressee wants the committee's representation, an assessment must be paid. The letters are careful always to state that the negotiations are non-binding and that participants will be polled before commitments are made. Typically, the assessments are modest -- a few hundred dollars for copying, room rental, and transportation.[132] The significant costs -- the time of lawyers and technical staff -- are usually donated by parties with large volumes of wastes, with a small volume but a wider corporate presence at many sites, or an "institutional" interest in the process. Thus each committee is unique, and difficulties have arisen in keeping all of its members together throughout negotiations. Additional assessments may be made for specific, and sometimes costly, measures, e.g., a groundwater contamination study.[133]

Once organized, the parties can begin to negotiate. They exchange information, digest it, and begin to focus on a draft agreement. Obtaining adequate information developed as an early stumbling block to negotiations. EPA wanted to protect its litigation position; the parties could not decide whether to negotiate or litigate until they better understood their involvement at the sites. Offers and counter-offers on the terms of the agreement follow. Some early negotiations over cleanup terms began before the sites had been adequately studied. Disputes also occurred over the reliability of EPA studies and procedures.

The problems in reaching agreement which have arisen typically have been resolved in similar fashion. First, a dispute may arise about the formula to be used in apportioning shares. Almost all successful agreements adopt a volumetric approach; agreement on how the toxicity, mobility, or condition of the wastes should affect share allocation has usually been difficult to obtain. Second, parties have sought releases from further liability. On this sticking-point no adequate solution has yet been found. When agreement has been reached, some type of release, even if partial, ordinarily has been granted. The main problem involves requests for release from liability for later-emerging groundwater contamination.

Third, at some sites there have been hold-outs -- parties who refuse to negotiate or sign. Sometimes their refusal has prevented negotiations or, later, prevented agreement. In other situations, the agreeing parties have gone ahead, and the government has sued the hold-outs for the unallocated cleanup costs. While generally unwilling to grant cooperative parties immunity from further suit since the Seymour settlement, the Justice Department has occasionally been willing to assist parties in their defenses when they are impleaded for third-party contribution, or has agreed to pursue non-settling parties first for costs beyond the amount of the settlement.

The courts have encouraged negotiated solutions at CERCLA sites. The court in the Stringfellow case attempted unsuccessfully to involve an outside mediator.[134] The judge in the Petro Processors case stated early in the proceedings that, if necessary, he would subpoena the Administrator and the executive officers of the defendants to explain why the case had not been settled. Later, the judge summoned the parties to a final marathon settlement negotiation, during which the judge "assisted" the parties in reaching agreement.[135]

Most settlements to date have been approved as consent decrees. Even where negotiations did not begin in the context of a lawsuit, suit was subsequently filed to obtain the consent decree. While private parties would prefer a quasi-contractual negotiated agreement to avoid the adverse publicity of a lawsuit, the EPA now insists at least on an administrative consent order because of its greater enforceability. Given a choice between an administrative order and a consent decree, many responsible parties tend to prefer the consent decree to avoid the uncertainty of the treble damages remedy available to enforce administrative orders.[136]

B. Current EPA Policy

The new EPA leadership reversed the direction of CERCLA implementation policy. Where the Gorsuch administration emphasized the Fund-conserving strategy, the Ruckelshaus administration has emphasized expenditure from the Fund for direct federal cleanup.[137] To carry out the policy, the agency has developed both a set of substantive requirements and a systematic management framework. These program elements, discussed here, replace an erratic managerial style with a consistent approach which more clearly delineates authority. They strengthen headquarters control over CERCLA implementation and channel the choice of priorities among NCP sites. Yet, as the next section develops, current policy requirements and procedures thwart the prompt cleanup objective which they were designed to achieve, primarily because they adopt an overly cautious approach to negotiated cleanups in reaction to the excesses of the Fund-conserving era.

In the summer of 1983, EPA began to produce program documents detailing terms and conditions on which it would discuss voluntary cleanup with site users, its plans for informing the public of cleanup activities, appropriate federal and state lines of authority and coordination, and criteria for site study, cleanup design, and cleanup itself. The EPA documents ordinarily take the form of interim, draft, and final guidance memoranda to Regional Administrators and staff, although a number of plans and handbooks are also in preparation. The process of producing this guidance is still under way and challenges the mettle even of insiders to keep clear what has been planned, drafted, approved, or withdrawn.[138]

Placement of a site on the NPL triggers the remedial program.[139] After listing, regional program and enforcement personnel divide up lead responsibility for the NPL sites in their region.[140] These assignments reflect the agency's best guess about how cleanup eventually will be conducted if negotiations are unsuccessful: in the first instance by the Fund, in the second by site users who will be compelled to act through administrative orders and litigation conducted by the Department of Justice.[141] Despite the impression which the guidance leaves that EPA will take the lead responsibility for NPL sites, a large ill-defined category of state leads exists.[142]

The criteria which guide the classification are what might be expected. They include the existence of financially viable responsible parties, the strength of the enforcement case, the likelihood of constructive negotiations, the time available before the response must begin, and "the objectives of the Superfund program" (e.g., state difficulty in paying its share, or Fund difficulty in allocating resources).[143] After site studies are conducted, reclassification may occur.[144]

The EPA organizational structure[145] affects both the choice between CERCLA program or enforcement lead responsibility and the number and type of approvals which must be obtained before a final plan of action can be executed at an individual site. Regional enforcement is balkanized among several offices which are coordinated only in the Regional Administrator's office.[146] At headquarters, an Assistant Administrator for Solid Waste and Emergency Response manages the CERCLA program. Under the Assistant Administrator, an Office of Emergency and Remedial Response manages direct Superfund actions, i.e., expenditures involving emergency removals and longer-term federally funded remedies. An Office of Waste Programs Enforcement manages the remaining CERCLA cleanups, by providing enforcement policy guidance and technical support. Each office takes lead responsibility for negotiated cleanups depending upon the categories assigned initially by their regional counterparts. Moreover, an Assistant Administrator for Enforcement and Compliance Monitoring reviews CERCLA enforcement policy and monitors enforcement in the regions.[147] Leaving aside state and municipal commitments and clearances, this structure implies a varied "constituency" of federal officials with an organizational interest in site cleanup, and will therefore cause difficulty in the selection of an appropriate federal negotiating team where site users are willing to negotiate. Just as internal operations require clearly established lines of authority, so too negotiation requires concentrated and clearly defined authority.

After leads are assigned, site management proceeds on two parallel tracks.[148] Enforcement personnel search for responsible parties, send notice letters and information requests, and generally lay a groundwork for negotiations. Hundreds of notice letters have already been sent. Initially, the letters were quite brief, specifying the involvement with the site which EPA believed to exist and providing an opportunity for the user to clean up the site. The agency has since issued some guidance on the scope of the letters and has promised still more.[149]

Simultaneously, the appropriate lead office lets contracts for a "remedial investigation study" and a "feasibility study" (RI/FS). In brief, these studies are supposed to provide a detailed physical assessment of conditions at sites (RI) and a set of alternative actions for cleanup (FS).[150] The RI/FS are currently the centerpiece of the CERCLA remedial program. They will consume a large percentage of Fund revenues and occupy the largest share of agency staff time for several years.[151] Completion of the RI/FS has been made a virtual condition precedent to any remedial activity at sites, in order to put an end to what EPA perceived were lengthy and inconclusive negotiations caused by insufficient knowledge about site conditions.[152]

Current agency policy requires EPA contractors to perform the RI/FS at Fund expense, with reimbursement by responsible parties.[153] Subject to limited exceptions,[154] responsible parties may perform the RI/FS only if the agency has already committed funds to perform them itself (about 100 each year) and if responsible parties satisfy a list of requirements intended to save time, reduce disputes, assure technical quality, organize site users, and provide agency oversight.[155] Separate agency guidance ensures public release of the names of other potentially responsible parties, which should aid site users in organizing inter se to negotiate with EPA about RI/FS preparation.[156] The agency does not intend to engage in lengthy negotiations about private RI/FS.[157] It also expects to formalize any private RI/FS in a §106 administrative consent order or a judicial consent decree.[158]

The RI/FS are intended to produce a record of decision among alternative cleanup plans similar to the environmental impact statement prepared under the National Environmental Policy Act (NEPA).[159] NEPA requires an environmental impact statement on proposals for major federal actions which significantly affect the quality of the human environment.[160] The agency concedes that NEPA applies to CERCLA remedial actions, as Congress intended.[161] But EPA apparently thinks that the record of decision compiled in the course of preparing the RI/FS is the "functional equivalent"[162] of an impact statement which satisfies NEPA.[163] EPA has provided for public comment prior to the selection of a remedial alternative, including instances where the RI/FS have been privately performed.[164] Public comment is also provided for proposed consent decrees and administrative consent orders.[165]

The performance and design specifications which a site cleanup should meet are the heart of a feasibility study. Two views clash starkly over how they should be developed. The one maintains that CERCLA mandates an incremental, case-by-case approach which treats each site as unique, acknowledges that the agency has almost no relevant experience with waste site risk mitigation, and attempts to solve each problem pragmatically with a cost-effective best estimate of the specific measures most likely to control risks at the site.[166] The other proceeds from the premise that the wastes covered by CERCLA are often the identical chemical substances regulated under other federal statutes. The risk of injury may be the same no matter how recently the wastes have been discarded by the industrial system, or which governmental regulations ordinarily regulate them. Therefore, the ambient standards or design standards to limit human and environmental exposures to hazardous substances of the Clean Air and Clean Water Acts, the Toxic Substances Control Act, the Safe Drinking Water Act, and especially RCRA should apply.

The agency has struggled with this issue, tending first to the former view, but more recently to the latter.[167] Further, in settling a challenge to the NCP brought by a national environmental organization, the agency agreed to adopt the substantive standard approach formally by revising the NCP.[168] The EPA has decided that as a matter of law it is not bound to comply strictly with the procedural and permit requirements of other federal statutes, but as a matter of policy (similar to NEPA "functional equivalence") it will apply to CERCLA cleanups the substantive standards evolved under other federal statutes. It will make waivers available to introduce flexibility into the system at sites which are not amenable to application of existing standards. The agency will also provide a public participation comparable to those required under other federal statutes.[169]

After notice letters have been sent and the RI/FS completed, negotiations may begin. Pre-litigation negotiation has been put under a tight leash to enable the agency to control the rank order and timing of site cleanup and the commitment of staff resources to cleanup.[170] The thrust of the guidance is to prevent site users -- by their willingness to negotiate -- from causing delays and diverting agency effort from agency-determined priorities.[171] Paradoxically, the EPA apparently can generously allocate resources for direct but expensive cleanups, but its budget for staff to supervise the same cleanups "off-Fund" by private parties is severely restricted.[172]

The agency notifies responsible parties that they have 60 days (exceptionally 120)[173] to agree to carry out EPA's preferred cleanup alternative, or the government will either clean the site up itself or attempt to force them to clean it up through an administrative order or a lawsuit. The additional notice letters, known to responsible parties as "drop dead" letters, ordinarily do not take responsible parties by surprise; officials may have already encouraged them to organize a committee to negotiate with the agency and to develop their bargaining perspectives. In negotiations, the agency will seek 100 percent of the response costs or complete implementation of its preferred cleanup alternative, although the agency may settle for less, but it will not entertain a settlement proposal for less than 80 percent of response costs.[174] EPA will determine the timetable for negotiations and communicate it to the parties. The agency prefers that the parties allocate costs and responsibilities among themselves, but upon request the agency may help apportion costs, without prejudice to its legal claim that all parties are severally liable to perform or pay for 100 percent of the cleanup.[175] The current policy is to refuse credit to responsible parties who voluntarily undertook risk reduction measures at the site sometime in the past.[176]

Discussions and information sharing between EPA and the private parties are conducted to protect the government's litigation options. The agency drafts an "enforcement document" to serve as the single-text centerpiece for negotiations; the final document then can be enforced as an administrative consent order or consent decree. The agency will consider negotiating releases from liability for discrete tasks (e.g., surface cleanup), but "absent extraordinary circumstances" full releases will not be granted and the agency will hold settling parties contingently liable for additional site releases (e.g., groundwater contamination discovered years later).[177] The criteria which the agency has established to guide its decision on whether to settle strongly resemble those applied in deciding whether to settle a conventional lawsuit.[178]

Should negotiations fail and the enforcement option look unattractive, a Fund cleanup will be conducted. Current policy stresses this option -- clean up now, argue over who pays later.[179] CERCLA's conspicuous silence on the requirements for negotiations, administrative orders, lawsuits for mandatory relief, and recoupment actions is made up for by the detail with which the statute governs direct Fund expenditures.[180] Both private party and federal cleanups must comply with the

NCP, including the requirement of cost-effectiveness, but a Fund remedy must comply with the additional requirement of Fund balancing.[181] Federal cleanup contracts must satisfy complex federal procurement regulations.[182] The EPA is developing Fund cleanup guidance that goes well beyond the NCP.[183] Cost recovery actions likewise have been addressed in lengthy guidance.[184]

Section 106 of CERCLA authorizes administrative orders to protect public health and welfare and the environment.[185] The administrative order was once the forgotten remedy under CERCLA,[186] but EPA now intends to make it the primary enforcement vehicle in its CERCLA implementation strategy.[187] The administrative order has been used increasingly in CERCLA enforcement.[188] Settlement terms can be incorporated in and enforced through administrative orders.[189]

EPA's general guidance on administrative orders contemplates both "consent" orders and "unilateral" orders. The latter will be issued only if the agency thinks compliance is likely and practicable;[190] otherwise, it will proceed directly to a Fund remedy or to a §106 federal district court action. The agency believes it must make a finding of both a "release" and "imminent and substantial endangerment" for an order to issue.[191] A responsible party has an opportunity to request a conference with an EPA official to discuss the applicability and appropriateness of the order. The party has the right to bring an attorney or technical representative to the conference.[192] EPA takes the position that this conference is not an administrative hearing.[508] Anticipating pre-enforcement judicial challenges, the agency requires the administrative record to be ready for litigation at the time the order is issued.[194]

C. A Critique of EPA Policy: How the Remedial Program is Likely to Work

CERCLA was enacted with a sense of urgency[195] which did not carry over into the implementation of the remedial program during its first three years. The EPA and responsible parties negotiated a handful of private cleanups.[196] They also laid a rudimentary foundation for negotiating additional privately conducted cleanups.[197] Yet on balance the Fund-conserving strategy and mismanagement of the early 1980s damaged and delayed the remedial program. As of late 1983 the remedial program had produced only a handful of cleanups.[198] About half of the sites on the NPL had had no action taken at all.[199]

The new EPA administration intended to accomplish orderly, prompt cleanups with its reformed program. However, it soon issued exceedingly modest predictions of what it would be able to achieve.[200] The pace of cleanup is likely to be glacially slow for reasons developed in this section: a strict litigation-oriented negotiation strategy, a cumbersome and underfinanced primary Fund alternative, and a judicially-managed private-party cleanup alternative which suffers from the expense and inefficiency of litigation. By replacing the Fund-conserving strategy with a Fund-first quasi-regulatory strategy, the agency has poured cement into the veins of the site remedy program. Vigilant to rectify the abuses of the Gorsuch era, the agency's numerous guidance memoranda reflect the simple conclusion that inaction provokes fewer penalties than action and that it is safe to spend or sue but dangerous to negotiate.

Inaction by an agency charged with the protection of health and safety ordinarily provokes severe criticism. While it might first appear that EPA has more to lose by inaction than by action, closer reflection suggests precisely the opposite. In the present political dynamic of the CERCLA remedial program, failure to clean up a dumpsite at all has fewer consequences for the agency's reputation than cleaning up the dumpsite inadequately. If a dump that EPA has cleaned up (or has allowed to be cleaned up) leaks, the agency is much more likely to be viewed as responsible for any harm resulting to persons or resources.[201] The public or a congressional oversight committee cannot second-guess a site remedy until it has been finally selected. The same analysis explains an official's refusal to adopt innovations in program management designed to speed or tighten up performance. Innovation focuses responsibility on the bureaucratic entrepreneur who brought the change about, disturbs the balance of accommodations that have been worked out among peers at the agency, and provides the scapegoat who can be punished with traditional sanctions such as reorganization, loss of staff, or transfer if the innovation fails.[202] Speeding up the rate of site remedies will require a certain amount of risk-taking to overcome these bureaucratic tendencies.

In CERCLA Congress envisioned a program of a few years duration; under the present implementation strategy, the EPA may have to struggle for decades to complete the statutory mission. Change is needed, and no single solution is likely to put the remedial program back on track. The negotiation strategy developed here may be only part of the solution, just as Congress' enlarging the fund and providing mandatory deadlines cannot overwhelm the real difficulties inherent in the CERCLA mandate with a barrage of expenditures and forced agency marches.

1. EPA Policy: Prudent But Ineffective

a. The impact of negotiation policy on the selection of an implementation strategy

EPA policy calls for strict control of the agenda of site cleanup, which will ordinarily be accomplished by the Fund or administrative orders and lawsuits, with a brief, controlled "opportunity to meet with agency personnel to discuss private party implementation of the remedy,"[203] which the agency has already selected based on its RI/FS. The opportunity to negotiate must not delay Fund action or weaken the agency's litigation posture. All of the following significantly reduce the opportunity and the incentive to negotiate a solution: the EPA decision to perform the RI/FS itself except if its current annual action plan already has earmarked the necessary federal funds; to allow 60 or exceptionally 120 days for negotiations; to seek in all cases complete cost recovery or complete implementation of EPA's preferred remedy but not to bargain in any event unless 80 percent of response costs are committed in advance; to refuse to apportion costs; to maintain that each known party is severally liable for 100 percent of the costs of a complete cleanup; to insist on several liability regardless of the extent of the party's waste contributions; to refuse releases to all responsible parties absent extraordinary circumstances and to hold them contingently liable above and beyond the negotiated settlement for later-emerging problems; to refuse credit for earlier voluntary risk-reduction measures; and to take into account a number of factors having more to do with obtaining a favorable case settlement than with reducing hazard and obtaining cost-effective site cleanups.[204]

These requirements are intended to prevent delay and minimize the risk of an inadequate cleanup by owners and former site users. They are undermined, however, by the agency's resource constraints, its protracted schedule for site cleanup, and its limited capacity to participate in negotiations with as much alacrity as it expects of others.[205] The measures also seem to be framed to prevent negotiated cleanups that might be vulnerable to congressional second-guessing reminiscent of the Fund-conserving negotiation strategy. The agency apparently believes that the best way to placate critics is to impose the norms of its legal position on its negotiation posture. Thus, its measures seem designed to protect the agency's litigation option should mandatory cleanup be sought under §106 or cost recovery under §107.

First, the interim Hazardous Waste Case Settlement Policy is lawyers' work. It was written to be applied to "cases," it refers to "settlements" instead of cleanup agreements, and the agency's proffered text is called a "draft enforcement document." Yet this guidance is applied to pre-litigation negotiations which take place as a result of the 60-120 day negotiation notice letter sent immediately following the RI/FS.[206] No negotiation guidance drafted farther from the courthouse door has yet been provided. Second, the guidance suggests that the agency should be informed about the equities of individuals' involvement with the site, but it is also careful to maintain that such considerations are irrelevant under the statute.[207] Third, the guidance stresses the "precedential value" of cases favorable to the government's interpretation of CERCLA, and it implies that barring a particularly attractive offer from the responsible parties, the government should proceed to litigation -- even if an otherwise acceptable solution might be negotiated.[208]

In the past EPA has been reluctant to share the information it has obtained about conditions at the sites in order to protect its position in subsequent litigation. This practice probably will change with guidance that encourages information sharing; certainly the guidance authorizing release to the public and to other responsible parties of responsible party names will facilitate bargaining.[209] Still, the problem of protecting the agency's posture remains in any subsequent litigation where disclosure of data might strengthen the defendant's position. The policy falls afoul of a classic information use barrier imbedded in the adversarial system -- "parties have far more, and more accurate information than they are willing or allowed to communicate."[210]

Site users perceive the government's negotiation posture as unfair. Whether or not this perception is warranted, it still poses a major impediment to negotiation.[211] Users think that expecting them to agree to 100 percent responsibility for all phases of a present cleanup (and to agree to finance 80 percent of costs merely for the privilege of negotiating), with open-ended liability in the event groundwater problems emerge at some later time, will require them to assume responsibility grossly out of proportion to their actual contribution to the problem at many sites. Instead, they urge an approach in which users would pay their shares of the cleanup costs based on volume (but based also, as appropriate, on such other factors as toxicity, mobility, and the condition of waste containers at the site), with the Fund making up the balance. They point out that any other approach offends fundamental notions of fairness which they believe the courts eventually will apply as part of joint and several CERCLA liability, will cause small users to fight rather than settle for a liability that may potentially bankrupt them, and that 87 percent of the Fund is contributed by industry in any event.[212] They add that phased settlement (RI/FS; surface; groundwater) is desirable from a public policy standpoint, that users often possess the expertise necessary for effective cleanups, and that rapid cleanups should not be subordinated to a concern for establishing points of law in the courts.[213]

b. Cleanup by the Fund

Fund expenditures are the centerpiece of the current EPA policy.[214] In theory, given enough resources and time the Fund can overwhelm the hazardous waste site problem. But while relatively reliable over the long run, such a strategy is wasteful and slow, it must satisfy numerous statutory conditions placed on expenditures, and it will require a tremendous expansion of the Fund by Congress.[215]

While Fund expenditures could in theory be made cost-effective, EPA and other federal agencies apparently are not as successful as the private sector in keeping costs under control.[216] Early Fund commitments were notoriously wasteful.[217] Estimates are thin, but EPA cleanup and assessment costs may possibly average 30 to 40 percent more than equivalent private cleanups.[218] At even the most highly visible site, Love Canal, officials failed to detect apparent criminal fund skimming.[219] EPA's only other major public works program, the sewerage construction grants program under the Clean Water Act, was severely criticized for waste and local chicanery in grant fund allocation.[220] Moreover, CERCLA requires that Fund disbursements comply with federal procurement regulations.[221] While intended to ensure competition among contractors, procurement procedures apparently are not effectual at reducing waste and abuse, and they delay the implementation of the Fund alternative. Only a few firms nationwide reportedly are able to comply with EPA's procurement requirements.[222]

State participation is a statutory condition precedent to Fund action under CERCLA. Absent an emergency, federal removal and remedial efforts are limited by statute to $1 million or six months unless the government enters into a contract or cooperative agreement with the affected state under which the state assumes significant financial responsibility.[223] Yet the state financial participation requirements may cause CERCLA to founder. State site cleanup programs are underfunded and understaffed. The state financial commitment to hazardous waste cleanup varies widely, and that variation does not necessarily correlate with the severity of the hazardous waste problem within the state. Limited funding has had deleterious effects on state staffing and technical resources.[224] States may be unable to obtain the benefits of federal cooperative agreements or contracts because they are unable to ensure that RCRA-approved facilities will be available to accept any wastes removed from a site in the course of a Fund remedy or because they are unable to assume incidental long-term maintenance costs.[225]

The problems presented by state financial requirements and coordinated federal-state fund actions are severe. Hence guidance on the federal-state relationship in CERCLA enforcement is expected to take some time to put in final form.[226] The degree of state involvement in cleanup actions is directly proportional to the difficulty that EPA will face in controlling the CERCLA agenda, because CERCLA does not require state laws, cleanup standards, or settlements to be consistent with federal standards. Many states have their own "mini-funds," the requirements and administration of which may not mesh with federal priorities.[227] In this respect, CERCLA departs signficantly from its sister environmental statutes[228] which thrust their policies and procedures so deeply into state government that they risk failing the constitutional tests set out in National League of Cities v. Usery.[229] CERCLA falls far short of "conscripting" state government into the "national bureaucratic army."[230] If the state fails to perform its CERCLA obligations, only indirect sanctions are provided, i.e., the loss of planning and contract funds and the benefit of complete federal cleanup. Further, the federal obligation to list the states sites remains; the basic thrust of CERCLA is federal responsibility to provide an eventual federal remedy. Thus it appears that EPA cannot simply disavow responsibility for a state's sites, remove the sites from the NPL, and permit the state to stew in its own waste juices. Its citizens appear entitled to a CERCLA response, even if perhaps only after conditions at the sites deteriorate to emergency removal conditions.[231]

Without a specific statutory framework, EPA and the states may clash over NCP listing and de-listing,[232] settlement terms and formality, the level of cleanup required, information sharing, how the state will exercise its lead authority (and even which state agency has it), inconsistent or overlapping enforcement and money penalty policy, and the vigor with which the states exercise their lead responsibility because of resource constraints.[233] EPA, in fact, has had to relinquish the lead to states at almost half of the NPL sites currently being addressed.[234] Daily progress at these sites is subject to far greater variations than exist between the various EPA regional approaches.

c. Judicially ordered cleanup

The agency's other major option, compelling site cleanup by issuing administrative orders or suing under CERCLA's §106 "imminent and substantial endangerment" provision, has many advantages over Fund cleanup. At first, they seem quite attractive. From the agency's point of view a CERCLA lawsuit is a last, safe haven. No federal funds are spent; and deficit-watchers in the Office of Management and Budget are less concerned about the off-budget private expenditures. The Fund-balancing criterion does not apply;[235] private parties may be required to spend more on a site cleanup than the government could spend. While the private action arguably must be consistent with the National Contingency Plan, state participation, procurement, NEPA, and numerous program clearance procedures do not apply. Strictly speaking, a site need not be on the NCP at all before a §106 action could be brought. Nor, as a matter of law, need the court mandate the cleanup performance levels which would be required by the regulatory pollution control standards which EPA plans to apply to both Fund cleanups and negotiated cleanups. Additional federal resources are committed if the Department of Justice handles the case. The resources and talents of the federal judiciary are mobilized for the CERCLA implementation effort.[236] Case development proceeds through the fact-development process of cross-examination and the federal rules of procedure and evidence. A judicial decree is more easily enforced; it rests upon the authority of a judicial act, not the quasi-contractural act of parties to a negotiated agreement. Direct cleanup actions do not require secondary, cost recoupment actions under §107. Definition of major legal issues in §§107 and 106 is desirable and, in any event, inevitable. Negotiation principles suggest that each party establish and seek to improve his or her best alternative to a negotiated agreement.[237] A certain amount of posturing to establish position in forthcoming bargaining is also to be expected. Moreover, if that strategy actually becomes strong enough to overwhelm any resistance offered by site users, there will be no reason for the government to participate in give-and-take bargaining. It can simply dictate terms. Lawyers for the government believe that while for the first few cases litigation costs may be high and a long time required for them to come to fruition, the government will soon obtain strong precedents on both cost recoupment and mandatory cleanup actions, as well as on the use of administrative orders.[238] Then, in order to avoid a lawsuit, users will quickly negotiate with EPA for 100 percent cleanup of the remaining sites to the level and on the schedule provided by the agency, working out their differences about cost apportionment among themselves.

Finally, a lawsuit has political advantages. In certain essential respects, it is punitive and harmonizes well with a widespread public sentiment that pollution and health risk creation are evil and their perpetrators should be punished.[239] Oversight committees can less easily fault the agency for taking polluters to court and attempting to exact 100 percent cleanup from each strictly and severally liable site user who can be identified, no matter how large his share. Judicial cleanup orders that fall short of congressional expectations are not the agency's fault; the agency and the Department of Justice's lawyers will have presented the strongest case, conceding nothing. Merely filing a suit solves many of the agency's problems with Congress and the public; letting federal contracts or attempting to negotiate does not convey a similarly clear impression to the public that effective measures have been taken.

Yet the litigation option still has more drawbacks than advantages. CERCLA cases are hardly open-and-shut; the facts are complex, and lawyers for potentially responsible parties have already compiled an impressive inventory of major litigable legal issues.[240] The government's position is strong and will become somewhat stronger, as the government expects. But as the appendix to this paper develops in some detail, the legal doctrines upon which the strength of the government's position vitally depends, particularly joint and several liability, will cause a good deal more permanent uncertainty than the government currently believes regarding its ability to collect from or obtain cleanup by one or a few users, the extent of cleanup, and the percent contribution by the Fund.

Further, litigation in general causes long delays and imposes high costs. Cost and delay aside, other disadvantages of the adversarial process have been stressed recently and, largely in reaction to these general shortcomings, a resurgence of interest in alternatives to adversarial processes has occurred.[241] Emphasis on compelling site cleanups will stimulate a competitive approach and a countervailing resistance to compulsion.[242] At arms length, responsible parties will be less likely to understand and sympathize with the government's objectives. Soured relations can quickly develop as a result of data sheltering, the reduction or elimination of contacts between EPA officials and site users (because of client-attorney relationships), and the exaggeration of positions required by case presentation.[243] Court-ordered technical solutions are not likely to be optimal in these circumstances. The judge is less likely to develop an adequate appreciation of technical complexities and uncertainties, because the parties cannot freely admit the problems inherent in the positions advanced by each. Finally, because litigation is predicated on vigorous advocacy of a "winning" position and avoidance of the heavy losses of a "losing" one, site users are forced to invest heavily in case presentation, more heavily than if they pooled resources and engaged in joint problem-solving. Consequently, site users will shift some of the resources which might otherwise have been available for prompt site cleanup into paying the high transactions costs of litigation in an attempt to reduce (or, at least, define) their CERCLA liability.

d. Administrative orders

The agency's decision to enforce CERCLA cleanups via its authority to issue administrative orders deserves praise, and a caution.[244] Administrative orders enable the agency to maintain control of many site cleanups without enlisting the assistance of the Justice Department or the courts. Administrative consent orders will undoubtedly prove useful as a type of enforceable administrative consent decree. Use of an administrative order to capture the terms of a negotiated cleanup agreement may prove more acceptable to some responsible parties who prefer to avoid lawsuits -- even a "friendly" filing to obtain a judicially enforceable consent decree. The availability of treble "damages" -- three times the cleanup amount under §107(c)(3) -- practically ensures that the administratively-sanctioned order will not be abused.

Care in using the administrative order is necessary, however, to avoid judicial stays, invalidation, or even blanket invalidation of orders issued without a hearing.[245] The possibility of pre-enforcement judicial review arises in major part because of the availability to the government of treble damages -- an ample deterrent where the value of the cleanup is millions of dollars. The penalty for refusing to pay what the agency demands without a hearing seems severe in a statute that purports merely to allocate costs without regard to fault. A more thoroughgoing administrative hearing on unilateral administrative orders might help EPA ensure that courts do not develop too great a sympathy for a party who must risk paying four times the cost of cleanup in order to obtain a judicial hearing on paying it once. A plausible argument that once such an order issues it becomes ripe for review could conceivably be made under Abbott Laboratories v. Gardner,[246] and Ex Parte Young[247] is still law.

EPA may be able to require the responsible parties in response actions to challenge the legality of orders only as defendants in enforcement proceedings, where they risk treble damages, on the authority of a line of cases permitting the government to act summarily where safety and health are threatened.[248] More deliberate remedial actions may, however, require a greater measure of pre-enforcement due process.

2. Regional Offices and Headquarters: Managerial and Organizational Reality

As is so often the case in the American administrative process, agency vision and agency practice are not in perfect congruence. The numerous guidance memoranda on setting CERCLA implementation policy consequently mandate an orderliness that does not yet exist. The incongruence can be traced in large part to the great factual diversity existing at the individual sites and to organizational and managerial problems which EPA has not yet solved.

Regional staff welcome policy guidance from Headquarters.[249] Basic policy has drifted in recent years, and clear signals from Washington are welcome.[250] Clear national policy strengthens the hand of regional officials in dealing with their counterparts in local and state government and with the private sector. Just as EPA serves as what state pollution control officials call their "gorilla in the closet" for Clean Water and Clean Air Act enforcement, so headquarters backs up its regional waste site personnel. Inconsistency between regions caused some large national companies, an important CERCLA "deep pocket" constituency, to complain of unequal treatment.[251]

Still, the specific content and form of headquarters' CERCLA policy causes difficulty in the regional offices. The detailed guidance now being issued by headquarters staff, few of whom have had experience with sites in the field, risks defining away the discretionary decision-making authority which regional officials believe is essential for dealing with the unique circumstances at sites. Broad policy guidance, yes, cookbooks, no.[252] From the local perspective, the guidance memoranda appear to spread a veneer of rationality over the diverse approaches necessary to cope with facts that vary tremendously from site to site.[253] The greater the mismatch between national policy guidance and individual site management needs, the more headquarters becomes just another entity whose views on site management must be accommodated, with the marginal commitment of time more valuable than the marginal value of the program assistance Washington provides.

Further, the central state and local role is somewhat obscured by the guidance issued to date. Of the NPL sites singled out for attention during fiscal year 1984, almost half were assigned a state lead.[254] Perhaps 20 percent of the current NPL sites were or are state-owned, which means that the state must find half of the funds for a government cleanup.[255] CERCLA is a quintessentially federal program but its impacts are entirely local. Only a few years ago the hazardous waste problem was a municipal and state matter, as non-hazardous solid waste management still is, despite the somewhat larger federal role adopted by the extensive non-hazardous waste components of RCRA.[256]

Consequently, regional staff spend more time working with their state counterparts than might be assumed. This cooperation is frustrating to regional officials, who encounter daily both the resource constraints facing the states and the disparity between federal and state cleanup laws and policy approaches. The inability or unwillingness of states to devote adequate resources to site cleanups or to conduct negotiations and cleanups on the federal model, coupled with the heavy reliance EPA Headquarters has placed on states taking the lead at almost half the top priority sites, forms one of the least appreciated aspects of the CERCLA implementation strategy.

Finally, the guidance model calls for a clearly designated regional lead office to control the course of approvals at sites, with prompt headquarters review. But in reality, organizational inconsistency promotes the tensions, duplicative staff involvement, and "turf battles" which a more efficient organizational approach might reduce.[257] Also, organizational inefficiency encourages forum shopping by site users attempting to obtain more sympathetic treatment or attempting to deal with the officials who, for one reason or another, the users conclude are "really" in charge.[258]

Such problems may arise between EPA regional offices and state or local officials. But they may also invade the regional office itself, where each program has its separate enforcement staff, the Fund has its designates, the Regional Counsel its Fund attorneys, and the Office of the Regional Administrator a recently-appointed enforcement coordinator.[259] Tensions, delays, and forum-shopping may continue at headquarters, which must grant multiple approvals for settlements. Headquarters approvals may involve the separate Fund and enforcement offices under the Assistant Administrator for Solid Waste and Emergency Response, the small enforcement staff under the Assisstant Administrator for Enforcement and Compliance Monitoring, and conceivably the General Counsel's office.[260] Responsible parties may learn that their particular site has attracted interest at headquarters and may attempt to concentrate their efforts there. Regional control may thus be delayed or undermined. Headquarters also stays involved at major or controversial sites despite the emphasis on regionalization or decision making.

3. The Vector of Policy Making: a De Facto Regulatory Program

EPA's current implementation approach is creating by incremental steps a cumbersome *de facto* regulatory program which contributes to the agency's inability to clean sites up rapidly. The transformation is producing the "enormous, time-consuming, and costly" regulatory program which the agency eschewed when the NCP was promulgated.[261] The waste cleanup effort at EPA has come a long way since its beginnings in the simple task force which provided assistance and technical support to the Justice Department while it brought direct cleanup suits under the imminent hazard provision of RCRA.[262] A flexible "common law" of case settlement evolved which could accommodate the diverse circumstances at sites, despite the Fund-conserving philosophy and despite some admittedly poor settlements.[263] The modest early Fund expenditures also lacked guidelines, to too great an extent.

Yet today EPA guidance memoranda increasingly narrow the range of choice of agency staff regarding site cleanups. To a large extent the guidance memoranda provide welcome and long overdue substantive guidance. While not binding, the memoranda nevertheless channel and define agency discretion in ways beneficial to agency staff and their constituencies alike. But in other respects the memoranda go too far. They significantly expand the list of substantive standards which cleanups must meet, and they impose significant procedural burdens as well.[264] Settlement policy is slowly evolving into a rule-type specification of when, where, for how long, and on what specific terms the site users will be given an opportunity to clean up sites. Fund expenditures are hedged about by both statutory and discretionary guidance. For both Fund and enforcement lead sites, regions soon will have lengthy "handbooks" specifying precisely how headquarters would like each site handled. Public participation is also required for site cleanup decision making. Further, the agency plans to use the RI/FS process to produce a "record of decision" of steps taken, alternatives considered, and cleanup decisions made.[265] It will produce a "detailed justification" in case of a settlement.[266]

While still far short of findings on the record after formal hearing, the agency is on its way. While CERCLA itself does not seem to contain "law to apply" regarding EPA's choice of remedy levels or cleanup strategies (Fund, negotiation, lawsuit), the informal record of decision produced in consonance with the contents of the guidance memoranda will tempt courts to review site cleanup decisions as informal action subject to Overton Park[267] and its progeny. EPA believes it should prepare such decision records in order to satisfy NEPA.[268] Yet either its legal interpretation is overextended, or its implementation falls short of law.[269]

By far the greatest burden placed on CERCLA compliance is site cleanup to the levels of the various ambient air, water, and groundwater quality standards issued under other federal laws.[270] The rationale for this approach is unassailable: why should ambient quantity and human exposure vary in the same media for the same chemicals merely because of the point in the economic cycle at which they are encountered and because of the separate statutory regimes which apply? Yet their application to CERCLA cleanups will present enormous technical difficulties while completing the conversion of CERCLA into a quasi-regulatory statute.

First, sites do present unique scientific and technical challenges that may make standards inapplicable that were developed for other purposes. Uncertainty aside, experts in the movement of organic compounds in groundwater who could conceivably make the extrapolation are few in number. Second, the relevant standards under the Safe Drinking Water Act, the Clean Water Act, and the Toxic Substances Control Act are only best-guess first approximations even for the specific purposes for which they were adopted, and many will have to be revised. Third, the RCRA disposal site standards with which CERCLA overlaps are more plausible and provide preventive, but not corrective, design standards. RCRA "housekeeping" standards do address active leaking sites, but do not match up well with CERCLA's need for remedial designs for old sites. In any event, for all their length RCRA guidelines still do not specify new-site designs with precision.

Fourth, while EPA does not intend to apply the permit and other procedural requirements of the pollution statutes, perhaps sensing the inappositeness of the regulatory approach, it does plan to create a variance procedure to relieve specific cleanups from compliance with the standards in appropriate cases. For variances, the record of decision must be supplemented and individual approvals obtained from the Assistant Administrator for Solid Waste and Emergency Response.[271]

Why did EPA embark on converting CERCLA into a regulatory statute? First, for the most part recent EPA policy making has been both necessary and salutary. A bona fide need for policy existed, in a field of agency decision making that was highly visible and publicly volatile, that Congress had inadequately defined, and that some officials had recently abused. Second, the policies protect agency officials from criticism. Congressional oversight committees will have to work harder to find fault under the new policies. CERCLA policy now reflects that it is acceptable to spend and sue but dangerous to negotiate. Third, some type of radical management change was to be expected following the failure of the Fund-conserving approach of 1981-1983. Statutes and administrative programs typically go through cyclical reforms contingent upon "some scandal or emergency."[272]

Yet the fourth and last reason, while general, perhaps explains best why EPA policy developed as it did. EPA is a regulatory agency, and probably would have soon begun to try to convert CERCLA to a quasi-regulatory statute, regardless of the preceding factors. Its greatest achievements and most reliable work styles are grounded in quasi-legislative rule making and in rule enforcement. Site cleanup without pre-established norms cuts against the EPA grain. Particularly at headquarters, agency regulators become accustomed to abstract and generalized facts. Agency knowledge is concentrated on "systems" and nationwide impacts, and agency reward structures reflect this proclivity. "The goal of the agency is to place an entire pollution control system into operation, rather than to measure its daily progress by how well it understands and addresses specific harms, control technologies, and instances of injury. . . . The bureaucrat's achievement is the final system as it will exist in place, not any of the rather messy ad hoc steps along the way . . . ."[273] The regional counsel for Region III has called for enactment of a regulatory scheme modeled on the Clean Water Act, remarking that "emergency" powers are inappropriate for solving "general" pollution problems and that the case-by-case approach is too slow and uncertain. States would classify their groundwater according to use under EPA-determined criteria, ambient standards for the various classes of waters would have to be met, and some technology-based performance standards would also be set.[274] The head of the Superfund program has wondered seriously in print whether Congress should not adopt a regulatory solution.[275]

Because the de facto regulatory approach was fashioned in part to shield agency officials from the type of severe extramural criticism that prevailed near the end of the Gorsuch era, it will be difficult to change. These are administratively safe rules; EPA is on more familiar ground in defending a rule-based program. From this approach EPA is not likely to try risky program innovations, if long-standing experience with administrative agencies in general is a reliable guide.[276]

4. How Should EPA Make Policy?

In form, EPA's guidance memoranda are unexceptional. They conform to the pattern of internal management rules common in every federal agency.[277] They instruct personnel about how to allocate resources and enforce agency statutes.[278] In substance, however, the guidance memoranda do much more. They constitute a collection of general policies which give coherence to the implementation of a major federal statute.

The policies contained in the memoranda address such matters as the timing and extent of cleanup, who will perform it, and what enforcement actions the agency will bring -- matters of vital concern to interests affected by the CERCLA implementation process. Yet these policies are revealed through speeches, interviews, fact sheets, and informal publication of the guidance memoranda in the environmental trade press.[279] Wide dissemination of the memoranda reflects the existence of a variety of interests hungry for insight. Yet the procedure is curious: outsiders must anxiously kibitz at the agency dialogue, rather than receive directly the policy communications intended in part for them.

The agency willingly shares its internal guidance with the public and the press. Still, looseleaf services are expensive and sometimes difficult to locate. The program offices will usually provide xerox copies upon request, but learning of the existence of relevant guidance and importuning an official are time-consuming. No centrally located public document repository for CERCLA as yet exists.

To lower transaction costs and provide dependable access commensurate with the public importance of its guidance, EPA might emulate other EPA programs[280] and other federal agencies which publish similar materials in the Federal Register, make the guidance available in its public documents room, and allow for public comment before guidance is made final.[281] The agency has actually solicited comment on one draft CERCLA guidance memorandum, although it did not publish the draft guidance in the Federal Register.[282] Wider, more systematic availability and the enhanced perspective that public comment brings would typically outweigh the burdens which they would impose on administration of the CERCLA program. Congress, the courts, and the Administrative Conference have encouraged voluntary agency adoption of notice-and-comment procedures in the development of non-binding policy.[283]

Whatever the prophylactic effects of notice-and-comment procedures, informal legislative rule making is neither required nor advisable in adopting CERCLA implementation and enforcement policies. Congress was explicit when it wanted rule making in CERCLA; it requires rule making eleven times and each time spells out the scope of the rules desired.[284] Some indication exists that Congress did not want EPA to be delayed by rule making in connection with cleanup actions and selecting implementation strategies.[285]

The guidance approach grows in importance to CERCLA implementation. Yet EPA has not tried to use it to make binding policy choices, thereby satisfying what remains the bedrock distinction between general policy statements or instructions to staff which affect the public and substantive legislative rules.[286] Despite its growing quasi-regulatory nature, the approach stays informal, flexible, and somewhat ad hoc. It is still experimental, in that the agency traditionally has used other means to develop policy.[287] At present the memoranda hardly constitute a dispositive regime directing agency personnel and private interests as to their roles and obligations in carrying out CERCLA, although as they grow in scope and number, and if the agency consolidates its policy making through them, the guidance memoranda could ripen into the type of comprehensive regime that ordinarily is preceded by rule making. The agency has taken pains to point out that individual cleanup, enforcement, and settlement decisions remain within its broad discretion. Existing guidance dictates no particular site cleanup decisions.

Yet the growing agency commitment to the guidance-based approach counsels caution. The template of a "binding norm" may not take the entire measure of a general statement of agency policy. If policy statements or guidance memoranda are likely to have a "substantial effect"[288] upon parties or the agency's exercise of discretion, or prescribe a "fairly tight framework"[289] that in purpose or effect narrowly limits the exercise of broad statutory discretion,[290] then Federal Register notice, public comment, a responsive agency statement, and the additional safeguards of legislative rule making may be warranted. Taking this approach, an agency's non-binding but important general policy guidance may be subject to rule making, although the agency has tried to preserve its freedom to re-examine and apply the policy in particular cases, although it is willing to defend the policy anew without claiming it has foreclosed further inquiry, and although de novo judicial review may be available after the agency has applied its policy in particular cases.

While purporting to preserve the agency's cleanup and enforcement options, EPA's guidance memoranda could leave the impression that the agency intends to exercise its discretion within a "fairly tight framework." Reasons for the agency's ambitious agenda of some two dozen guidance memoranda and other general policy statements apparently include a desire to be able to defend site-specific cleanup decisions as to some extent pre-determined. The agency would defend its decisions against second-guessing by the agency's critics and congressional subcommittees by asserting that its decisions were largely foreordained by the cleanup criteria and other policies previously established in the guidance memoranda.

Many of EPA's guidance memoranda set enforcement and settlement priorities, categories of agency discretion toward which the courts have traditionally been more deferential than toward substantive mission-oriented policy making. Yet enforcement discretion is obviously not immune to substantial impact, tight framework analysis. Parties' rights and expectations can be as substantially impacted by enforcement and settlement policies as by substantive policies. CERCLA proves the rule.

D. CERCLA in the Courts

The "fruitful collaboration" of agencies and reviewing courts in the American system of administrative governance practically guarantees the courts an important role in CERCLA implementation, especially because fundamental interests in life and health are affected.[291] Yet CERCLA in the courts presents a paradox. On the one hand, the large number of pending enforcement and reimbursement actions suggests that CERCLA is a thoroughly "judicialized" statute.[292] The importance and doctrinal complexity of this litigation warrant a detailed analysis which has been placed in a separate appendix to this paper to prevent it from overshadowing the primary emphasis on CERCLA's administrative implementation and negotiation. On the other hand, most of the decisions which EPA makes prior to suing for reimbursement on direct cleanup involve informal agency action.[293] The availability and scope of judicial review will therefore develop hesitantly, with less clarity, and probably will be much more restricted initially than under a typical welfare regulation statute. Under the welfare statutes private conduct usually is first governed by notice-and-comment rule making, which can be readily reviewed in court. Hearings may also be available, during which a party may contest liability before it is imposed. Yet under CERCLA, the first meaningful opportunity to challenge the series of administrative decisions resulting in the choice of a remedy or its execution may occur only when the responsible party is sued for direct cleanup or Fund reimbursement.

1. Pre-expenditure and Pre-enforcement Judicial Review

While CERCLA obligates EPA to use rule making in eleven specific instances,[294] and authorizes the President to make interstitial rules if necessary,[295] these provisions require the agency to make very little substantive implementation policy. The most important rule making in CERCLA occurs in the NCP, yet the NCP merely prescribes a set of procedures to follow for consultation, site study, development of alternative remedies, and (if the Fund is used) selection of a cost-effective, Fund-conserving remedy. Other than an early suit to compel the promulgation of the Plan after the statutory deadline had passed,[296] the major judicial challenge to the NCP ended with a negotiated consent decree, wherein EPA agreed to propose additions to the Plan which (1) would require the agency to use relevant quantitative health and environmental standards developed under its other programs in determining the extent of a CERCLA remedy, (2) would resolve whether CERCLA responses must comply with other federal, state, and local laws, (3) would include federal facilities on the NPL in the future, and (4) would require community relations plans and public review of feasibility studies.[297] These are all important policy concessions for the agency to make and may provoke judicial challenges once adopted as final rules. Still, the policies contained in the guidance memoranda bear just as centrally upon the agency's site-specific choices about alternative cleanup tactics, and yet they are not likely to be held to be NCP-type rules subject to notice-and-comment procedures and judicial review.[298]

Judicial review of agency policy is severely circumscribed because rule making need not govern many key CERCLA implementation decisions. Likewise, the choice of a site-specific approach -- negotiated agreement, Fund remedy, the issuance of an administrative order for cleanup, or the filing of a direct cleanup suit -- is shielded from judicial review. The selection of an approach may be committed to agency direction because there is no "law to apply" -- no statutory criteria which a court can apply to the choice of cleanup tactics[299] -- since Congress failed completely to specify whether cleanup demand, the Fund, reimbursement, and imminent hazard relief were to function in parallel or in tandem. Prosecutorial discretion inadequately explains Congress's silence, because programmatic and enforcement elements are intertwined in the choice.[300]

Responsible parties in particular may be understandably anxious to make a case prior to the filing of a reimbursement action, a cleanup action, or an action to enforce an §106 administrative order. Three logical opportunities present themselves: at the time the RI/FS has been completed and a technical cleanup plan selected; at the time EPA indicates it will conduct the cleanup itself; and at the time the responsible party receives an administrative order directing it to conduct the cleanup itself.

Over three years after CERCLA was enacted, case law addressing these opportunities is still almost non-existent.[301] No plaintiff has yet challenged the adequacy of the RI/FS, using as analogy the scores of judicial challenges to the adequacy of environmental impact statements.[302] This is surprising, since the agency has called its RI/FS the "functional equivalent" of an impact statement, has described the RI/FS as a detailed record of decision, and has used the FS for analysis of alternatives on the impact statement model.[303] Moreover, Congress contemplated that impact statements would be prepared on some remedial plans.[304]

The prospect of judicial review of RI/FS has sobering implications for the CERCLA remedial program. If burdened with impact statement preparation on each RI/FS, the already slow-moving CERCLA remedial program might be brought to a halt, just as over a decade ago one federal district court opinion, Kalur v. Resor,[305] halted the nascent Refuse Act Permit Program for the control of water pollution. Other EPA programs have been exempted from NEPA compliance by statute[306] or by judicial fiat under the concept of functional equivalence. Still, because the contents of the RI/FS are not set by statute, their "functionally equivalent" analysis may have to conform to the specific requirements of NEPA.[307] Presumably, negotiated cleanups would not be subject to an impact statement.

At least some measure of pre-expenditure and pre-enforcement judicial review under CERCLA seems likely, although the courts have hardly begun to rule on the issue. If EPA has indicated that it plans to fund the cleanup itself, or has issued administrative orders requiring direct cleanup, a definite sequence of events arguably has been set in motion which could result in major financial liability for (or large punitive damage awards against) responsible parties. In the case of a Fund remedy, the government may argue that it may later decide not to seek reimbursement and that thus the controversy is not ripe for judicial review. A realistic appraisal of the predicament of the responsible party, however, suggests a ripe controversy. The government in all likelihood will seek reimbursement.[308] Nevertheless, the showing the plaintiff must make on the merits to obtain an invalidation or modification of the goverment decision may be so demanding that few Fund remedies would be remanded.[309] Similar considerations govern the availability of pre-enforcement judicial review of administrative orders, although again the courts may assist EPA implementation efforts by limiting the scope of review to errors of law and the reasonableness of the agency's exercise of discretion.[310]

The undeveloped state of CERCLA pre-expenditure and pre-enforcement judicial review merits further analysis. The law of judicial review of evolving agency action was shaped in decisions on challenges to agency rules and other policy making, not to specific applications of policy or law resembling a Fund remedy or §106 administrative order. Abbott Laboratories v. Gardner and its progeny establish a presumption favoring prompt judicial review of agency action found to be "final" or "ripe" after a pragmatic assessment of the issues to be reviewed and the impact of agency action on the plaintiff.[311] Other decisions extended the presumption favoring pre-enforcement review to administrative orders.[312] Barring a contrary statutory policy, and none appears to exist for the prolonged CERCLA remedial program, agency decisions to fund a remedial cleanup or issue administrative remedial orders seem ripe within the evolving law of judicial review of final agency action.[313] In each of the three situations described above in which pre-expenditure or pre-enforcement CERCLA review might be sought, responsible parties' interests are vitally affected by agency action regarding particular waste sites. Some purely legal issues will undoubtedly arise (e.g., did the party "dispose" of wastes or was a demand for cleanup properly presented?), but even the factual issues ordinarily will be presented in a concrete context capable of immediate judicial review where RI/FS or administrative orders address a particular site. RI/FS and administrative orders are final, in that no further agency proceedings are likely to modify them. To a responsible party, it is a technicality that the EPA has a choice after the RI/FS are prepared whether to negotiate a cleanup, fund it, sue for direct cleanup under §106, or issue a §106 administrative order. In the end, the party pays or performs. The scope of cleanup, its timing, the form of payment, and the ultimate amount paid after contribution may vary, but the party's responsibility remains substantial, relatively fixed, and extraordinary throughout. As the district court in Peters appreciated, EPA is almost certain to seek reimbursement (and, additionally, to enforce an administrative order ignored by a responsible party). Not to do so would arguably be an abuse of discretion under the CERCLA scheme and certainly could cause the agency grave political difficulties. The §107(c)(3) treble damages potentially available from responsible parties if a §106 administrative order has to be enforced, coupled with the penalties of §106(b), complete the case for review.

Still, if the courts routinely permit pre-expenditure and pre-enforcement judicial review of EPA remedial decision making, staying agency action where necessary to permit judicial review, the already slow cleanup effort could be slowed further. Challenges to RI/FS could become for industrial plaintiffs what challenges to NEPA impact statements sometimes were for environmental plaintiffs in the 1970s -- a way to delay federal actions, although in the case at CERCLA dilatory tactics per se may only increase a responsible party's costs and liability. To permit EPA to act promptly under CERCLA, the courts have a number of choices. Some issues may not be found ripe for judicial review. The threatened injury conceivably might not qualify as sufficiently definite nor the treble "damages" sufficiently "peculiar"[314] to warrant review. If a controversy must be held to be ripe, the standard of review may still be deferential and the scope circumscribed. The relief ordinarily requested is equitable in nature and can be denied to avoid delay. Finally, a line of Supreme Court cases affirms summary agency action to protect public health and cope with emergencies. Even the pace of remedial measures may degenerate to the point that summary agency action is warranted.[315]

In sum, pre-expenditure and pre-enforcement judicial intervention is likely to remain infrequent and its outcome unpredictable. The types of informal agency policy making and adjudication allowed by CERCLA confer on EPA wide latitude to clean up sites, collect the costs, and compel responsible parties to carry out appropriate remedial measures. The courts will rarely delay or intervene until late in the CERCLA implementation process. As a result, litigation is unlikely to become a viable alternative to bargaining and cooperation with respect to RI/FS, Fund cleanup, and cleanup demand. Judicial involvement increases dramatically, of course, where the statute requires the agency to resort to the courts to achieve its objectives. The impact of this litigation and its effect on negotiation is assessed in the next subsection.

2. Reimbursement and Site Cleanup Litigation under CERCLA: Bargaining in the Shadow of the Law.

Despite the great flexibility accorded EPA to manage the initial phases of the CERCLA remedial program as it thinks best, in the end the program depends heavily upon its success in the courts. If EPA wants to recover expenses incurred in a Fund cleanup, to compel a private cleanup, or to enforce an administrative order demanding remedial action, it must bring an action in federal district court. These actions raise complex issues of statutory construction regarding the use of such concepts as "strict" and "joint and several" liability that have been borrowed from the common law, the obligations of parties whose link with a site hazard is temporally and causally remote, the substantive or jurisdictional nature of the statute's imminent hazard provision, and the meaning of imminent hazard itself. To give these issues close attention here would deflect the study from its chosen course; instead, an appendix undertakes this task.

The willingness of the government to attempt negotiation will be directly calibrated to the outcome of CERCLA enforcement litigation. Fewer victories and weaker doctrinal precedents mean more difficulty in negotiating favorable agreements. Strong decisions vindicating the government's position mean that responsible parties will more readily negotiate favorable agreements. Indeed, until recently the government's efforts appeared to be concentrated on strengthening its legal alternative to a negotiated agreement while holding further negotiations in abeyance. Overpowering precedent might permit it to dictate terms rather than negotiate. Despite an inclination to view negotiation as power and skill based rather than normatively guided, norms define the context of negotiations, giving them direction and meaning.[316] Nowhere is the influence of legal norms more sensitively felt than in circumstances like those created by CERCLA, where negotiators carefully follow the results of each recent federal district court opinion. CERCLA will continue to develop in the norm-defining shadow of case law.[317]

Many complex factors will influence the government's choice between litigation and negotiation.[318] Leaving aside traditional disincentives to litigation such as cost, delay, enmity, and surrender of control over outcome,[319] and discounting for the moment its political and administrative advantages, the net posture of the government on the important legal issues raised by CERCLA enforcement is very favorable, but not so favorable as to permit the government to dictate cleanup terms at will. The concepts of legal liability that underpin CERCLA enforcement contain built-in guarantees that the outcome in particular reimbursement and private cleanup cases will never be highly predictable. The appendix develops the doctrinal complexities which support this assertion. The results of that analysis are summarized here.

The courts have with near unanimity accepted the government's argument that CERCLA adopted the principle of strict responsible party liability. Yet while "strict liability" -- responsibility to pay or clean up without regard to fault -- correctly if somewhat awkwardly describes a congressional policy judgment that the task of cleanup and the bills for past improper hazardous waste disposal should be assigned to the economic sector most likely to have benefited, this conclusion says nothing about the choice between government-sponsored and private cleanup, nor about the allocation to specific parties of particular tasks and costs. To maintain a powerful negotiating position, the government must be able to persuade the courts that these choices are the agency's to make. Unless the government can reliably compel direct private cleanup, it will be forced back on the slower, more cumbersome Fund remedy, which will only be available so long as the dollars last. Unless the government can reliably sue one or a few responsible parties with the deepest pockets, leaving the total pool of site disposers to work out contribution among themselves, the government will have to prove up the parties' shares, prolonging the litigation and its costs. In both these critical matters the government's position is strong but the outcome of litigation far from certain.

First, direct action to compel private cleanup rests upon the §106 imminent hazard provision. That provision may not be able to bear the weight placed upon it. Its brevity and sweeping language have raised a question, as yet neither satisfactorily framed nor answered by the district courts, about whether it expands already existing federal authority to order waste cleanups, or whether it merely confers jurisdiction on federal district courts to apply existing law--federal common law, state common law, or a federal statute. Further, the triggering requirement that an "imminent and substantial endangerment" be found to exist before relief can be granted may limit the reach of §106 to emergency circumstances and removals, although legislative history for other imminent hazard provisions read *in pari materia* would endorse the broader scope sought by the government. Finally, the section's placement, brevity, and apparent plenary scope of relief, coupled with its silence on whether liability is strict, joint, or several and to whom it was intended to apply, may lead the courts to apply it cautiously -- leaving it perhaps as more limited in scope than the more detailed §107 reimbursement provision.

Second, while the district courts have interpreted CERCLA §107 to impose joint and several liability for cost reimbursement, they have plainly reserved the right to require EPA to apportion costs in circumstances where individual waste contributions can be identified. Thus, the importance of the application of this special statutory version of the common law doctrine of joint and several liability lies in the flexibility it permits the courts in resolving the complicated issue of how the costs of cleanup are to be apportioned. And the consequence to EPA is less certainty that it can effortlessly collect total cleanup cost and walk away from the demanding task of cost allocation. Obviously, the views of the various trial courts will vary as to the capacity of EPA to assign shares. The courts may be influenced in some cases by the agency's superior expertise and information-gathering resources, its decision to include or omit particular parties from its selection of joint defendants, and equitable considerations such as how well EPA managed the site cleanup prior to filing an action. Conceivably, the court might take into consideration the agency's reluctance to permit defendants to conduct the RI/FS or carry out the cleanup themselves under a negotiated agreement.

In short, EPA enjoys a strong but not impenetrable legal position as a consequence of the way in which Congress chose to craft CERCLA's reimbursement and private response provisions. It cannot refuse offers to perform less-than-ideal remedies with confidence that it can promptly force its solution on reluctant responsible parties through the courts. Uncertainty is the seedbed of productive bargaining.[320] The agency may be able to trade a preferred (but ultimately uncertain) course of action for a less desirable (but certain) immediate negotiated cleanup.

E. Breaking Through the Policy Impasse: Principled Negotiation Should be Tried

The preceding analysis showed how EPA has replaced a politically troubled, ineffectual CERCLA program with a well-run, quasi-regulatory scheme which in its zeal to correct past mistakes threatens to choke off prompt site cleanup. In the first two-and-one-half years, the agency made little progress; the achievements of a few remedial measures and a nascent negotiation process were more than offset by staff demoralization and reductions in force, confrontations with Congress, management squabbles, misguided agency reorganizations, loss of public confidence, and other repercussions of a do-little, Fund-conserving strategy.

While the existing Fund-first strategy rectifies these abuses, it suffers from shortcomings of its own. It so straightjackets discussions with responsible parties that it practically ensures ultimate reliance on the Fund and on litigation at the majority of the sites. Despite the program's cost-effectiveness and Fund-balancing requirements, the program is not efficient. It must comply with burdensome procurement regulations, and it depends crucially upon state cooperation and revenues which have not materialized in a large number of states. Litigation to compel reimbursement or direct cleanup is costly and slow, promotes chronic contentiousness, and requires EPA to relinquish some control over outcomes to the Justice Department and the judiciary.

The agency defends its record and strategy by pointing out that it has begun to move more rapidly, that putting the new program in place will take time, that firm control over its cleanup agenda will prevent delays caused by responsible parties, and that Congress is likely to expand the Fund and strengthen CERCLA in the near future. The agency reasons that its negotiation strategy may be severe, but the public and Congress expect firmness with responsible parties, who will be more inclined to accept the agency's cleanup demands as the federal courts continue to rule in the agency's favor in reimbursement and cleanup actions. Sooner or later, these rulings will confer such an overwhelming advantage on the government that it can force responsible parties to implement its preferred remedies quickly and at low transactions costs.

Perhaps the Fund-first strategy will prevail, especially if Congress expands the Fund, gives the agency more personnel, tightens up the other provisions of CERCLA, and puts the agency on strict cleanup deadlines.[321] Further, the EPA has already begun to revise and relax some of its guidance vis-a-vis responsible parties.[322] The courts are generally providing the agency with the precedents it needs to carry out its strategy. Increased resources, greater agency flexibility, and strong court opinions may see the CERCLA program past its current impasse. The pace of RI/FS completion may pick up, and the ensuing agency cleanup demand may produce crisp, prompt agreement to perform the remedy the EPA wants. Whatever additional reforms occur, these factors seem likely in any event to dominate the future of the program.

Yet a growing body of opinion inside and outside EPA favors developing the negotiation alternative. It promises gains in promptness and efficiency, because it vests cleanup responsibility ab initio in those who ultimately will bear the cleanup costs. Negotiation promises to tap whatever technical superiority and comparative frugality the private sector can offer. Negotiation should reduce large transaction costs associated with the Fund and litigation alternatives. The agency has the necessary power and discretion to implement a renovated bargaining approach.[323] The existing negotiation process provides a sound base on which to build.[324] The use of negotiation seems initially to enhance the extent to which the CERCLA program satisfies the criteria which are used to evaluate the performance of any administrative program.[325]

Most importantly, powerful incentives exist among the principals responsible for site cleanup to develop the negotiation option. The chemical industry has played a leading role in advocating alternative dispute resolution techniques for waste site cleanup.[326] Lawyers for responsible parties have been strong advocates of negotiating waste site cleanups (perhaps because they see themselves playing the key roles).[327] Responsible parties face higher costs and practically incontestable eventual legal liability if negotiations fail. Federal cleanups are likely to be more expensive than private ones, delay may increase costs as conditions further deteriorate at sites, and the Justice Department intends to seek to recover its total transaction costs if reimbursement actions must be filed. Liability is strict, joint, and several; litigating either a reimbursement or cleanup suit is costly and risky and presents major evidentiary problems.[328] Parties are potentially liable for four times cleanup costs if they refuse to comply with an administrative order.[329] Unlike traditional regulatory pollution control schemes, which reward the polluter who is able to delay the imposition of costly pollution reduction equipment, the CERCLA scheme forces reponsible parties to bear both the accumulated externalities and the transaction costs associated with delay.

The possibility of a second generation of lawsuits seeking compensation for personal and property injuries from hazardous wastes also influences responsible party attitudes about hazardous waste cleanups. Delays again increase potential compensatory liability. The industry sees the CERCLA cleanup program as a way to ascertain and limit tort liability.[330] It has coupled willingness to clean up sites voluntarily with a call for a neutral center for study of the health effects of wastes and has loosened its trade-secrets-protection-based opposition to right-to-know laws for plant workers and neighbors.[331]

The chemical industry, which contains the largest number of potentially responsible generators and the deepest pockets, perceives that a fearful, angry, and frustrated public has blamed it for the waste site problem.[332] Negotiated cleanup agreements may avoid the bad publicity of a government suit.[333] Anxious to protect its reputation, the industry has acknowledged that a serious problem exists and has endorsed expanding the Fund.[334] Its leaders have urged companies to come forward to accept site cleanup responsibility,[335] and one company had indicated its plans to act before it obtains government approval to clean up sites at which it deposited wastes.[336] Part of the companies' motivation undoubtedly is avoiding inter-firm contribution actions in the tightly interdependent industry.[337] But its aggressively cooperative attitude, further illustrated by a "pioneering cooperative effort with the environmental community" to create a site cleanup organization,[338] cannot be explained completely by its concerns about cost control, public relations, and liability. Innovative leadership and economic success help explain this turn of events. By contrast, the leadership and economic difficulties of the auto, steel, public utilities, and lead and copper smelting industries have produced almost no environmentally creative reponse and a score of legal and political confrontations.

At the EPA, officials fear the reaction of congressional subcommittees if they negotiate cleanups but acknowledge that negotiation has produced a majority of sound agreements and that its greater use could further increase the rate of cleanups. Agency leaders are seeking defensible means of increasing the use of negotiated agreements. They now feel that because their hand has been strengthened by favorable court opinions, they may be able to adopt a more flexible bargaining posture.[339] The Justice Department position endorses negotiation in the context of a lawsuit, which the Department believes will be necessary to get responsible parties to take cleanup seriously.[340] Some Department lawyers are quite sceptical about the prospects for negotiated agreements and therefore favor further strengthening of the government's legal position under CERCLA §§106 and 107 and strong government control of the CERCLA priority agenda and the standards the responsible parties must meet.[341]

Rapid risk reduction, after all, lies at the heart of the agency's statutory mission. Shifting more of the management and cost burden to responsible parties would free EPA to concentrate on orphan sites and less tractable responsible parties. Negotiation would permit EPA to retain full control over site management and cost recovery, rather than sharing it with the Justice Department and the federal district courts. Reimbursement actions are particularly vulnerable; since the site will have been cleaned up, the Justice Department may not place as high a priority on prompt, full cost recovery as the EPA, nor may the court be as impressed by the need for Fund replenishment as for risk abatement. Possible adverse substantive rulings would also be avoided, while an informal administrative common law of agreements would be allowed to develop. Negotiation would permit long-term working relationships to develop between the agency and major responsible parties with whom EPA will have to deal repeatedly because their wastes are present at a number of sites.

Environmental organizations have joined with industry to try to develop an alternative dispute resolution process for waste site cleanup, although some environmental lawyers are opposed to negotiation as the preferred method for cleaning up waste sites.[342] Representatives of persons who live near sites and may be injured by exposure to the wastes do not oppose negotiated agreements if they can be reassured by their own experts that the agreed-upon cleanup will ensure their safety.[343]

While wide sentiment favors negotiation, its proponents tend to assume that only incremental changes in the existing negotiation process and agency policies will be necessary. Agency officials are increasingly sympathetic, but because they accept this assumption at face value they are locked into a pessimistic and somewhat circular pattern of reasoning. They concede that negotiation would reduce total costs and produce gains for all affected interests, but they also think this approach is vulnerable to criticism, particularly because it requires a federal agency to bargain in private with parties who endangered the public health. The greater the use of negotiation, the sooner the inevitable political reaction, conditioned by the experience of the Fund-conserving era. An ensuing period of quasi-regulatory domination thus must follow, the agency reasons, as must also another round of attempts to cajole site users into taking voluntary responsibility, because they possess the necessary resources and because the internal logic of the statutory scheme makes them ultimately responsible, and so on.

What is needed is a different, principled approach to negotiation which breaks CERCLA negotiation free of its past and awakens a different set of responses and expectations among site cleanup constituencies. Does such a principled approach to negotiation exist? If it does, can it be applied to the waste site remedy problem? The obvious place to look is to the recent experience and evolving strategies of the alternative dispute resolution movement. The movement's fresh look at established concepts suggests important improvements in the existing rudimentary site negotiation process and secondarily in the policies EPA has adopted toward site negotiation. To appreciate this requires a systematic look at how principled negotiation should proceed. After providing this appraisal, the next section concludes with proposed changes in the site negotiation process which, in conjunction with other reforms, should improve the rate and efficiency of site remedies.

IV. Negotiated Cleanups: A Prescription for Change

Circumstances are ripe for a significant improvement in the federal waste site remedial program based on the expanded use of negotiated cleanups. But negotiation can take many forms. Contemporary developments in the field of alternative dispute resolution provide appropriate guidance toward an improved negotiation process. The first part of this section develops the dynamics of successful negotiation, its strength relative to traditional decisional processes, the receptivity which exists among various groups to its use, its forms and techniques, and its role in the federal administrative process. The second and final section develops a negotiation process specially tailored to the federal site remedy program.

A. Negotiation: Contemporary Developments in Alternative Dispute Resolution

Negotiation is currently enjoying a renaissance as a method of dispute resolution. Fitted out with renovated techniques, a record of recent successes, new proponents and practitioners, and foundation support,[344] negotiation promises not only to play a leading role in the reform of existing political and legal institutions for dispute resolution, but to make its own contribution *sui generis* to the panoply of basic dispute resolution techniques.

Voluntary give-and-take among parties negotiating to improve their positions is, of course, a basic attribute of human conduct.[345] Early legal systems sanctioned the private bargains later accorded more sophisticated protections by civil courts and constitutional governments.[346] Social contract theory is based on hypothetical negotiations, and democratic pluralism in important part rests on coalition building and interest group accommodation.[347] Mediation and arbitration existed as alternatives to legalized dispute settlement from the early days of the Republic.[348] Despite criticism that it exacerbates conflict, the legal profession still relies upon negotiation for the resolution of most disputes in traditional adversarial processes.[349] Consensus-based policy making has provided significant contributions to the administrative process, as some New Deal legislation, negotiated consent decrees, and consensus standards illustrate.[350]

Yet qualitatively and quantitatively negotiation has entered a distinct new phase. Proponents are endeavoring to move negotiation back into administrative and judicial arenas where it has been in recent eclipse, while institutionalizing negotiation approaches to enhance their wider acceptability and ensure that the new field of "alternate dispute resolution" cannot be easily displaced in the future. The practitioners and theorists of negotiation have a new self-consciousness; they draw only to a limited extent upon established mediation and arbitration techniques, personnel, or experience; they distinguish themselves, sometimes quite pointedly, from traditional problem-brokering fields such as law practice or labor relations.[351]

Negotiation resists analysis, perhaps because it is so deeply imbedded in everyday experience. Even its cleverest apologists conclude by characterizing negotiation as "organize[d] common sense and common experience."[352] Negotiation involves a complex mix of self-interest, persuasion, compromise, and comity with one's bargaining partners. These are not difficult concepts, yet contemporary proponents usually discuss negotiation operationally and somewhat obliquely, in terms of the conditions which create a hospitable environment for negotiation,[353] the series of steps which must be completed to resolve disputes,[354] a checklist of questions to answer before a negotiation is likely to be successful,[355] or describe how to do it, rather than plotting a more direct analytic course. Many case studies exist.[356] For analytic perspective the field draws eclectically upon decision and game theory, legal writing, and social psychology.[357] Yet the prevailing approaches are practical rather than theoretical; they are based on experience, and are intended to be used. While a collective wisdom about wise negotiations is emerging, proponents point out that none of their criteria, questions, or checklist items are indispensable.[358] If a negotiation succeeds in unlikely circumstances, theory will adjust.

Because negotiation is voluntary, and unlike legislatures, agencies, and courts does not owe its political legitimacy to the state, more considered contemporary theoretical rationales may be long in coming. In the meantime, the recent literature of negotiation largely passes over the problem of reconciling power-based negotiation techniques with the traditional tenets of democratic pluralism and of responding to a latent critique of corporatism,[359] perhaps because flexible consensus techniques produce superior "self-governing" dispute resolution power-based negotiation techniques with the traditional tenets of democratic pluralism and of responding to a latent critique of corporatism,[359] perhaps because flexible consensus techniques produce superior "self-governing" dispute resolution for power-possessing majorities and may be as effective as established institutions at protecting the interest of weak, poor or unorganized minorities or generations yet unborn.[360] Still, contemporary negotiation does illustrate how necessary a preoccupation with the actual conditions under which negotiation must succeed or fail really is. Because the essence of negotiation is consensus, negotiation is vulnerable to disruption at any time. Negotiation is like a souffle. If not baked just right, it will collapse.

The fields of conflict in which negotiaion techniques have been applied are varied: consumer disputes,[361] welfare regulation,[362] information property and other commercial interfirm disputes,[363] domestic relations[364], and international relations.[365] Not surpisingly, environmental conflicts have proven to be the most amenable to application of the new negotiation techniques. A widely-accepted tenet of the Environmental Decade of the 1970s was that environmental disputes are too hotly contested, value-laden, redistributive, and multi-faceted to permit a consensual solution. So many remain, although even eighteen years of litigation over the Storm King mountain pumped storage facility on the Hudson River finally ended in a negotiated agreement.[366] Nevertheless, environmental dispute resolution has burgeoned and has compiled an impressive record of successes.[367] The success of environemtnal negotiation bodes well for consensual waste site cleanup under CERCLA. Facility siting disputes, including waste sites, have been an important proving ground for evironmental dispute resolution techniques.[368]

Why environmental negotiation has largely come of age remains unclear. Perhaps more acceptable means of satisfying developmental and environmental interests existed than was generally believed. Or environmental interests were so successful in the legislature and courts that developmental interests had no choice but to placate them. Or, conceivably, upper middle class disputants found that their common needs and value perspectives outweighed their differences. Foundation funding has made an important difference. The novelty of the approach for the moment encourages well-inentioned participants to try to agree on something, for the process' sake.

1. The Forms and Limits of Negotiation

Joint gains. For bargaining to begin each party must perceive the possibility of gain. This perception must endure throughout negotiations and be captured in an agreement. In a successful[369] bargain, each party has self-interestedly obtained some measure of gain. Mutual gain, which game theorists have usefully called a "non-zero sum" or "plus sum" game or transaction,[370] is the goal of contemporary negotiation strategies. For example, negotiations between Spotsylvania County and the city of Fredericksburg, Virginia, over the city's proposal to annex land were about to be terminated because joint gain appeared to be impossible. City and county interests appeared to be strictly opposed: the city could gain only if the county lost. This zero-sum outcome was converted to a plus-sum prospect and negotiations resumed when a city councilman raised the possibility of Fredericksburg dropping its longstanding opposition to the county's purchase of a retired industrial plant for conversion to a wastewater treatment facility.[371]

Power and uncertainty. Meaningful bargaining requires that each party possess two attributes: countervailing power and uncertainty about outcome. Without these joint gain is virtually impossible. Without some bargaining strength or countervailing power[372] a party has nothing to offer; the powerless party cannot confer gains. Power usually consists of rights or assets protected by legal rules, and most bargaining is strongly guided by the framework of legal and social norms which surround it.[373] For example, when a power project sought to construct the Grayrocks dam on the Laramie River in Wyoming to obtain cooling water for a new power plant, it was opposed by farmers concerned over irrigation water losses, the downstream states of Colorado and Nebraska also concerned about water rights, and environmentalists concerned about habitat loss for the endangered Whooping Crane. Despite many fruitless negotiating sessions, real bargaining did not begin until Nebraska and the conservationists obtained a court ruling which confirmed that the federal government and the power project owed certain limited study and permit obligations that had not been discharged. To that point all parties had felt confident of complete victory and thus had little incentive to negotiate out of court.[374]

Strong factual and equitable positions may also enhance a party's power. Political clout confers power, as does the ability to inflict cost and delay via the adversarial process, even if one's case was never strong and probably will not prevail ultimately.[375]

Without some uncertainty about outcomes, there is no reason to negotiate. If it is clear that a party will prevail at low or no cost, no incentive exists to bargain. A negotiation presents the opportunity to bargain for a known gain in lieu of an uncertain larger gain or loss. Moreover, power and uncertainty interact. The ability merely to cast doubt on the outcome is a form of power, e.g., to force the dispute into the courts when the law is as yet unclear. In the Grayrocks dam controversy, the dam's advocates sought congressional assistance after their initial losses in court. Forced to submit to a decision by a special committee (known popularly as the "God Committee") vested with life-or-death power over both projects (or species) under the federal endangered species legislation in return for study and permit waivers for the dam, the advocates preferred the less desirable but certain path of a negotiated agreement.

The interaction of countervailing power and uncertainty is behind the perception that negotiation only makes sense where parties are willing to compromise. If a party is so strong that it has no incentive to bargain away any of its strengths, or if it perceives itself as certain to prevail, other decisional processes will be more appropriate than negotiation (*e.g.*, adjudication, voting),[377] for these are more likely to permit the party to prevail completely.[378] This is hardly surprising; alternative forums such as courts and legislative bodies provide assurances that, for the powerful, their rights are vindicated, and for the powerless or less powerful, their due process rights are heeded. The essence of compromise is trading on a strength to compensate for a weakness, or exchanging a strong but ultimately uncertain advantage for a certain, even if weaker one.

The willingness and incentive to bargain. In addition to the opportunities for mutual gain that countervailing power creates by precipitating doubt about outcome, the parties must believe that it is in their respective interests to negotiate a solution.[379] Successful negotiation requires an attitude change; parties must *want* to bargain. The willingness to try negotiation involves *more* than a shrewd analysis of one's opponent's position and one's opportunity for gain; it requires a measure of trust that the other side will be forthcoming and a corresponding willingness to respond in good faith.[380]

Tolerant forbearance and a measure of mutual respect characterize most successful negotiations. The opportunities for abuse are significant. For example, if alternatives to a negotiated agreement appear to involve an acceptable (even if undesirable) result, then a party may be tempted to manipulate negotiations by stalling, misleading, or witholding information in hopes of unilaterally bettering his or her position.

Because bargaining substitutes joint problem solving for institutional "third party" decision making, it requires a measure of shared responsibility that all will never accept some of the time and some will never accept any of the time. Compromise means that an adversary will be freely permitted to have or do something although he may not possess the right or although he may legally be barred from acting. For some, such complicity with an adversary is intolerable. To them, negotiation is condonation. Formal dispute resolution processes at least preserve principle and vindicate rights, even if at a net loss to the interests of the parties.

Fundamental values. Conflict over fundamental values may do more than neutralize the incentive to negotiate. It may cause a strong rejection of negotiation as distasteful and morally wrong. Some practitioners of negotiation counsel against trying to use negotiation where value conflict lies at the heart of a dispute.[381] Yet rejecting negotiation as too value-laden may be premature if the value conflict is only dimly perceived, is based on inadequate or insufficiently understood data,[382] or is at bottom a conflict over means, not ends.[383] Some advocates of negotiation are cautious but sanguine about the prospects for negotiation even where value conflict is at the heart of a controversy. Others take the more extreme view that many, perhaps most, value conflicts can be reconciled with the right conflict resolution strategy, a view vulnerable to parody as a "hot tub" theory of negotiation,[384] but which issues a thought-clearing challenge to the assumption that value conflict is so pervasive that it need make consensus solutions impossible in a large number of cases.

Conflict over waste site cleanup easily could be classified as a dispute over means, were it not that environmental politics in the United States sometimes casts industrial polluters as evil-doers, who must be punished for the moral transgression of environmental defilement. The legislative history of CERCLA is conspicuously free of the politics of blame, which played an important role in securing the passage of earlier environmental legislation. Yet the values implicit in traditional environmental politics may have re-emerged in the formulation and execution of federal cleanup policy. Refusing to negotiate or driving hard bargains on site cleanup may be expressions of traditional environmental politics. EPA's unfortunate practices prior to the resignations of Administrator Anne Gorsuch Burford and Assistant Administrator Rita Lavelle may have rekindled the environmental politics of the early 1970s.[385]

Exploring many options and interests vs. positional bargaining. Where countervailing power has created the uncertainty that makes joint gain possible, the parties must still find a way to convert their willingness to negotiate into a concrete bargain. Bargaining usually breaks down if negotiators limit their efforts to trying to reconcile specific, hardened positions to which they have committed themselves in advance. The parties have left themselves little room to compromise. Rather than focusing narrowly on the few issues over which differences are the strongest, successful negotiators seek to bring up as many items for trading off as possible, creatively striving to invent options for mutual gain. To do so they cannot rely merely on pre-established positions; rather, they must go back to their underlying interests and concerns.[386] In general the concerns which parties share and about which they have widely different feelings outnumber the concerns which they are disputing. This provides fertile ground for compromise. By identifying commonalities and differences, items of less importance to one party may be conceded to another who thinks them very important, but in return for like concessions when the tables are turned. Considering all types of differences -- interests, timing, priorities, beliefs, forecasts -- makes maximization of joint gain possible.

For example, the event that moved the Fredericksburg, Virginia, annexation dispute beyond an apparent confrontational impasse over the single issue of the geographic boundaries of the area to be annexed was the resurrection of the side issue of a retired industrial plant into a wastewater treatment facility. When Fredericksburg agreed to re-open that question, the impasse was broken and negotiations resumed. Significantly, the interests which would have been served by purchasing the plant -- certain local area sewage treatment needs -- were the subsequent focus of bargaining, not the county's former position that a specific industrial plant should be bought and converted.[387]

If only a few issues separate the parties, and if the parties hold strongly opposed views with respect to each issue, bargaining may be inappropriate. The mismatch of intensity of preference about issues makes bargaining thrive, and mismatches are more likely to exist where several parties are in a dispute involving a number of issues. For example, if the only issue is whether or not an energy facility is to be located in an untrammeled wild area, environmentalists and the developers almost surely will hold strong contrary views which admit no compromise.[388] Yet developing options and positions to trade may still be possible where only a few parties or issues are involved. To field a large number of options, parties must re-state issues more broadly and re-examine their underlying interests to see if there is any room to maneuver.

Brainstorming sessions, carefully demarcated from the principal negotiations, may be successful in eliciting new ideas. For example, environmentalists might find that while they did not share the energy facility developers' rosy projections of future power needs, they held this view with considerably less conviction than they did the view that this particular wild area not be developed. The developers in turn might care little where the facility is sited, so long as they are able to meet projected power demand. Consequently, the environmentalists might be induced to support locating the facility elsewhere in return for a promise not to re-open the issue of siting a second facility in the wild area. Or, while the developers may have no choice but to locate the facility in the wild area, environmentalists may be less concerned that that particular wild area be preserved, so long as comparable wilderness experiences are protected elsewhere in the region. They might then agree to withdraw their opposition in return for the utilities' purchasing wild land and dedicating it to public use.

The number of parties. While negotiations may fail in a dispute involving too few issues and interests, it is also more difficult in a dispute involving too many issues and parties. The issue of who is entitled to sit at the bargaining table presents two types of problems. First, as a practical matter negotiation simply does not work when large numbers of persons are brought together in an impersonal space. The exact size of the group and type of room selected are highly subjective considerations and always admit exceptions, although negotiation specialists give such matters a great deal of thought. Fifteen to twenty persons appear to be workable numbers; the meeting space should be correspondingly intimate -- larger than a hot tub but smaller than an auditorium.[389] Second, if the table -- the metaphorically indispensable medium of all types of negotiation -- is unable to accommodate all persons or groups who possess distinct interests and sufficient power to merit a place, then the negotiations cannot be described as fully consensus-based, nor are they likely to exploit fully the opportunities for joint net gain. Parties excluded may have sufficient power to undermine the final agreement.

Several techniques are used to surmount these difficulties, and most negotiations now involve them. The key, again, is to focus on the interests at stake rather than upon the individual groups or parties involved.[390] If interests can be legitimately aggregated, then interest group representation may be used. As the number of persons or interests aggregated increases, so does the desirability of a team approach in which a number of negotiating skills can be combined (technical, political, legal). Ensuring that an individual or a team of negotiators maintains effective communication with constituents becomes harder as time passes because the negotiators may develop an empathy for the other interests present which is difficult to communicate to constituents who were not present. Selecting representatives by ballot, reliance on existing networks of organizations (trade, worker, environmental), or the judgment of an expert convener may help (but it cannot guarantee) success in a system based on achieving consensus among all those agreeing to negotiate.[391] Side negotiations may resolve disputes over representation between or within factions.[392]

Mature issues of suitable scope inevitably to be decided. Negotiation is more likely to succeed if it addresses issues of reasonably limited and well-defined scope which are ripe for resolution and inevitably will be resolved (one way or the other) in another forum within the near future unless negotiations are successful. The problem of issue definition rarely arises in site-specific environmental negotiations, or sector or company-specific economic and legal negotiations; rather, issues tend to blur when wide-ranging agreement on policy is sought through negotiation. Nevertheless, if parties try to introduce too many side-issues in an otherwise focused negotiation, the negotiation may lose sight of the matters which drew parties together and bog down.

Unless issues have matured to the point that interest groups have largely completed their efforts to establish countervailing power through legislation, public opinion campaigns, or filing lawsuits, some parties will not yet be firmly committed to trying negotiation, while others will be tempted to use their participation as a tactic to obtain delays while they enhance their position.[393] Their bad faith manipulation of other parties may make subsequent negotiation impossible after the issues have ripened. Similar abuses are possible when dispute resolution can be indefinitely delayed.

A decision may be made inevitable in a number of ways, e.g., pending legislation or litigation, scheduled agency action, or agreement of the negotiating parties. An imminent deadline gives negotiations the focus necessary to force bargaining beyond impasse.[394] Even where a date certain has not been set, economic, scientific, and legal incentives may cause parties to agree to a proximate deadline that they might otherwise find unacceptable. Site users, for example, may accept a tight EPA deadline to complete negotiations rather than incurring -- probably much later, but in any event, inevitably -- either the heavy expenses of an EPA-funded cleanup or the expenses involved in litigating and potentially losing a CERCLA §107 reimbursement action.

2. Courts, Agencies, and Negotiation: Relative Strengths and Weaknesses

The contemporary support for "alternative" dispute resolution is heavily based upon the perceived shortcomings of decision making by courts and agencies, shortcomings which proponents of negotiation say it may remedy.[395] Yet negotiation possesses virtues which go beyond the "alternative" it provides. Further, critics are prone to overstate the extent to which formal adversarial processes are costly, slow, and inefficient, unnecessarily exacerbate tensions between parties, lack "legitimacy,"[396] distort the intent of parties, produce suboptimal or temporary solutions to problems, or even the extent to which they are used in our "litigious" society to solve problems. Since frequent disagreement is practically inevitable in a pluralist society, resort to formal trials and hearings reinforces and protects diversity, while channeling conflict through neutral forums which provide for the refinement of issues, fact-based inquiry, fair and methodical procedures for controverting opposing facts and views, and a final decision after each view has been heard.[397] In this light the litigousness of the American system is an advantage; it is an alternative to dispute resolution by force, the exercise of raw political power, or homogenizing accommodation.[398] Still, the proponets of negotiation who criticize formal adversarial procedures appear on balance to be correct. Their views mesh well with the still-expanding self-criticism in which the legal profession is engaged.[399]

Ordinarily we count it a virtue that formal proceedings require the parties to hone in only on the issues defined by statute. Evidentiary and procedural rules, as well as the habits of mind of the hearer, compel the parties to restrict the facts adduced and the arguments marshalled to narrowly-defined fields of contest. The hearer expects the arguments on each issue to be complete and (in the sense of demonstrating the party's best case) extreme. The fewer and more focused the issues, the clearer and more bipolar the conflict, and the more vigorous the advocacy, the better formal adversarial processes function. Yet if overdone or poorly suited to the types of conflicts separating parties, these strengths become weaknesses which bargaining may not possess, because the interaction of dispute definition, data, and interests is quite different in bargaining. As noted, bargaining is premised on a common effort by the parties to identify issues on which they can compromise. Unlike formal processes, bargaining exploits the different underlying intensities with which parties ordinarily approach the full range of issues which separate them and the full range of concerns they share. The more concerns the parties imaginatively introduce into the negotiations, the greater the likelihood they will settle on a package of acceptable trade-offs.[400] This enterprise is easier in bargaining because, unlike formal processes, bargaining discourages the parties from arguing each issue with the same alacrity. They can modulate their final positions, revealing a more intense interest here, less concern there, thereby laying the groundwork for give-and-take in a final agreement. Further, in bargaining the parties need not conceal or distort the presentation of their true interests, as they might where a statute or policy addresses their concern only obliquely or not at all. This common failing of formal processes occurs frequently in attempts to resolve environmental disputes. Finally, joint problem solving and the search for trade-offs tend to stimulate a freer flow of information between parties, while in formal processes the interposition of the forum tends to restrict it.

Important subjective benefits are conferred by bargaining but ordinarily are lacking in formal proceedings. As the search for common ground and possible trade-offs proceeds, the parties to a negotiation develop a fuller understanding of their opposites than is possible in formal proceedings. Alignment against each other metamorphoses into joint alignment against the challenge of finding a bargained solution, an event which adversarial processes rarely achieve and lack formal mechanisms for promoting. At its best, such a realignment stimulates an iterative process: reduced hostility produces a better understanding of an adversary's underlying interest, which leads to the identification of common ground and possible solutions, which further enhances understanding and communication, which in turn leads to solutions which thus far had escaped notice -- and so on.[401] A bargained solution also enjoys the support of the parties who, while they may be unable to claim a "victory" for the compromise reached, nevertheless cannot disown the agreement which they freely endorsed. Implementing a bargained solution may thus be easier than implementing the decision made by an agency or court, because the parties bound will have designed their own "decree."[402]

Formal processes and informal negotiation cannot be meaningfully compared without inquiry about the character of the disputes resolved. Some types of disputes are better resolved via traditional adversarial means. These disputes may involve matters of principle on which a party is unwilling to compromise, two (or only a few) parties, powerful against powerless parties, one issue (or only a few issues) that can be appropriately framed in the traditional bipolar mode, important legal issues ripe for decision which are central to the parties underlying concerns, or policy determinations which, if resolved by Madisonian factions outside established legislative or judicial forums, would raise substantial questions about majority rule and the protection of due process rights of minorities.[403] Some matters cannot be resolved by negotiation as a matter of public policy, e.g., trade in inalienable rights and the state interest in the economical social obligation incurred in marriage. Yet a still-growing number of disputes challenge the capacity of agencies and courts to deal successfully with "polycentric" problems of complex scientific, economic, and social dimensions.[404] Some of these disputes are candidates for negotiated solutions; environmental disputes head the list. Where formal decision processes may try to parse polycentric disputes involving many parties and many possible outcomes into one or a few key issues and address them definitively, negotiation is better suited to the accommodation of numerous highly interactive concerns. Yes-and-no decisions on polycentric matters are unwarranted where a package of accommodations is more likely to untangle the dispute.

Formal adversarial processes possess a final characteristic which, as yet, negotiation at its best lacks. Professor Reich has argued that attorneys (both private and governmental), lobby groups, trade associations, public relations firms, and others comprise a 100,000-member network of "intermediaries" who specialize in conducting business between federal policy makers and the regulated businesses or protected constituencies with which the government must deal. To use their considerable skills and to continue their rapid growth, intermediaries tend to convert issues into the type of clear conflicts which formal processes can address, to provide exaggerated estimates of the level of conflict between opposed client groups, to prolong and intensify conflicts, and to seek to ensure that principals never meet.[405]

Negotiated solutions involving fewer intermediaries would tend to reduce polarity, shorten conflicts, define fewer issues in strictly adversarial terms, and provide an alternative for comparision to evaluate the techniques relied upon by intermediaries. While intermediaries might expand their own use of alternate dispute resolution processes, they cannot be expected to be sympathetic to negotiation-based approaches. First, their training and instincts run at cross-currents to negotiation. (Nevertheless, a suprisingly large number of attorneys has shown an interest in becoming mediators.) Second, successful negotiation will reduce the demand for intermediaries. Finally, even if the intermediaries had an incentive to use alternative dispute resolution processes, they do not possess the information, negotiation skills, or wide familiarity with client groups' ultimate objectives which would equip them to participate optimally in negotiations.[406]

3. Interest Group Receptivity to Negotiation

As with administrative and judicial dispute resolution, interest groups vary in their receptivity to negotiation. Over time groups develop general informal positions on negotiation which must be acknowledged and dealt with each time a new application for negotiation is suggested. Where consensus governs, and leader-negotiators expect not only to treat with traditional adversaries but to develop affirmative compromise positions and defend them shoulder-to-shoulder against constitutiency criticism, leaders ignore informal negotiation norms at their peril.

Attorneys' views on negotiation are important because as the preeminent "intermediary" group they often have a powerful influence over the clients' willingness to negotiate. Attorneys also are as sensitive to prevailing behavioral norms in the profession as other professionals are in theirs. Interestingly, attorneys are ambivalent about negotiation.[407] Negotiation is a staple of law practice of all types; it is used to avoid formal adversarial processes in the overwhelming majority of client disputes, including cases actually filed.[408] Yet negotiation can be stubbornly resisted, despite clients' wishes.[409] The profession is under internal as well as external pressure from the Chief Justice and others to use informal negotiation even more often to resolve disputes.[410] Some want to capitalize on the renewed emphasis to create a litigation speciality.[411] Lawyers have developed new dispute resolution techniques, such as the mini-trial and the Judicial Panel, used to address victim compensation for asbestos injury.[412] In applying innovative new approaches in polycentric environmental disputes, lawyers have played a more constructive role than is usually believed by mediation experts.[413]

Business favors negotiation in principle, especially where technical and managerial factors predominate in a dispute. It supported the "open planning" processes discussed in the early 1970s as a technique for resolving industrial facility siting disputes.[414] Industry participated in the National Coal Policy Project[415] and has founded or supported the activities of dispute resolution centers.[416]

Public interests groups are at best split and on balance cool to negotiation. Individual citizens, however, may react differently towards a specific proposal for negotiation than the national groups which otherwise play an intermediary role for them.[417] Historically lacking in power to drive forceful bargains, and frequently at issue over matters of principle and social justice, public interest groups have often preferred to resolve disputes by traditional adversarial means which provide due process protections. Inclined toward use of test cases to obtain the maximum impact with their scarce resources, public interest law firms prefer binding judicial precendents to case-specific negotiations which have little or no precedential value. Further, quiet, private negotiation affords no opportunities for public education and "consciousness-raising" which environmentalists can organize around a lawsuit. Environmentalists who are suspicious of mediation appear to offer three major reasons for their mistrust: it creates a congenial atmosphere which disarms and co-opts environmental participants; superior political and economic resources enable pro-development participants to exact unfair concessions at the bargaining table;[418] and the process redefines issues to favor those interests.[419]

Still, important successes in the negotiation field have involved environmental groups and environmentally concerned local citizens. Environmental dispute resolution centers appear to have credibility with the major environmental organizations. One major national group, the Conservation Foundation, houses an environmental dispute resolution center. A major litigating group, the Natural Resources Defense Council, agreed late in the effort to identify suitable candidate rules for regulatory negotiation to help keep the process from failing.[420] Finally, public interest groups have become skillful at using lawsuits as a means of forcing agencies to negotiate changes in agency rules. This type of negotiation confers significant leverage over agency policy decisions for relatively few hours of effort.[421]

Federal administrative agencies have always used negotiation with client groups where the law permitted; however, agencies are as yet relatively unfamiliar with novel negotiation strategies for resolving complex disputes in which an agency is one interested party. The little evidence that exists regarding alternative site-specific environmental dispute resolution techniques reveals a strong agency resistance to their use. Very limited successes were achieved in a series of "experiments" with negotiation techniques involving a variety of subagencies of the Departments of Defense, Energy, Interior, and Transportation, as well as the EPA.[422] Federal officials involved felt that the new techniques meant more work, loss of control of the agency's agenda, and legal challenges. They did not fully understand the techniques, and resisted because they were unprecedented and underfunded.[423] Regulatory negotiation has fared relatively well at the Department of Transportation, but not as well at the Occupational Safety and Health Administration. Regulatory negotiation encountered problems at the Environmental Protection Agency, for many of the same reasons site-specific environmental negotiation failed where federal agencies were involved.[424] As the search for negotiable rules began, the EPA Assistant Administrators with programmatic responsibilities indicated that their offices did not want to house the "experiment." They resisted losing control of the rule making and, in the early phases, were fearful of public opinion about informal meetings with the regulated interests. A game of drop the handkerchief followed, with the program offices ready to dash in pursuit if their colleagues came near bearing the unwelcome regulatory negotiation proposals.

4. Contemporary Forms Which Negotiation May Take

Negotiation may appropriately describe dispute resolution whenever parties choose to work out their differences themselves rather than employing either traditional voting techniques or adjudication by a decision maker who hears reasoned arguments.[425] Thus viewed, it covers a vast terrain in the field of human conflict resolution, and like voting and adjudication, takes many forms. Proponents of negotiation are at pains to provide taxonomies of negotiation techniques and technique paradigms, partly to make their concerns better understood, and partly, perhaps, to define a significant niche for particular techniques to occupy.[426]

Mediation is the best-known and most widely used of the techniques. It offers significant prospects for increasing the number of waste site cleanups. Mediation involves the assistance of a neutral outsider in helping the parties reach a permanent resolution of a reasonably well-defined dispute.[427] Collective bargaining in labor-management relations has contributed most of the experience with mediation techniques, has stimulated the greater part of the writing done on the subject,[428] and has led to the creation of the two leading organizations with institutional purposes clearly linked to mediation, the American Arbitration Association and the Federal Mediation and Conciliation Service.[429] Mediators discharge such routine functions as scheduling, recessing, and chairing meetings and maintaining order, suggesting a sequence of agenda items, and arranging for records to be kept. They may also facilitate communications between meetings, hold confidential talks with individual negotiators or groups, and suggest areas where negotiators' positions may be unreasonable.[430] Some have urged that mediators go further. Mediators would then also offer creative suggestions about resolving disputes, remind the parties of the costs of failure to reach agreement, and possibly recommend the terms of agreement.[431]

Policy dialogue applies both bargaining and joint problem solving techniques to policy issues, usually of national importance.[432] Thus policy dialogues are inappropriate for negotiating individual site cleanups although policy dialogue might be useful in refining and developing general policies and procedures to be used in negotiating wast site cleanup. The National Coal Policy Project, a group of business and environmental leaders, met over several years to address the environmental aspects of increased coal combustion within the framework of national energy policy. Members belonged to task forces (mining, transportation, air pollution, fuel utilization and conservation, and energy pricing) of approximately 10 to 15 members, plus environmental and industry "caucuses" of about one dozen panel members. Eventually, over 200 recommendations emerged, some of which appear to have influenced congressional policy making. Federal agency officials observed at several meetings but did not directly participate. A neutral, university-based institute, Georgetown University's Center for Strategic and International Studies, provided staff support, while a group of foundations and corporations funded the project.[433]

More narrowly focused policy dialogues have since taken place under the sponsorship of existing organizations, such as the Conservation Foundation[434] in Washington, D.C. and the Keystone Center of Keystone, Colorado. During 1983 and 1984 the Keystone Center sponsored a policy dialogue on victim compensation for injuries sustained as a result of exposure to hazardous and toxic substances. Stimulated by the publication in the fall of 1982 of a report to Congress on the adequacy of common law recovery for such injuries,[435] the subsequent resumption of congressional interest in enacting a victim compensation scheme,[436] and the explosion of asbestos injury claim suits, the Keystone Center convened a dialogue group consisting of approximately four dozen leaders from the chemical industry, the worker compensation field, the insurance industry, victims and citizens environmental groups, labor, occupational and environmental health groups, plaintiff and defense bars, independent research organizations, academia, and the staffs of relevant Senate and House committees and subcommittees. A Center staff member and a consultant guided the group. Both plenary sessions and working group meetings of 10 to 15 members were held, with the small groups reporting back on their deliberations to the plenary sessions. Between meetings, participants shared information and drafted reports on various technical topics. A final set of recommendations has been drafted.[437]

The mini-trial, as its name implies, consists of an abbreviated, non-binding hearing on the matter in dispute before a jointly-selected advisor, expert in the subject matter of dispute resolution, who renders an informal, privileged opinion on the strengths and weaknesses of each party's case as an aid to settlement negotiations. Procedures are informal and themselves negotiable. Typically they include brief pretrial preparation, summary presentation of the cases, questions and rebuttals, and settlement negotiations.[438] Corporate officers of high enough rank to settle cases often have entered the process early enough to play a major role in getting the company and its lawyers to try the mini-trial; they then participate directly in the trial.

The mini-trial does not seem particularly well-suited to waste cleanup negotiations. Conceived by practicing lawyers to reduce the delay and cost of resolving inter-corporate disputes by conventional adversarial means, the mini-trial has been successful in concluding a variety of information property, product liability, breach of contract, anti-trust, unfair competition, and product liability cases.[439] The subject matter characteristically is technical, the disputes bimodal, the managerial and economic content of the discussion high, and the disputants motivated not to let the controversy spread or sour ongoing relationships. Corporate officers have been able to justify the mini-trial internally because it permits the parties to defuse conflict in a discrete, friendly, business-oriented environment before it begins to elude their control. The mini-trial has its anti-lawyer aspect: corporate officials seem to regard providing their own "legal system" as a form of self help akin to their providing their own quicker, more reliable, or lower cost mail, telephone, and energy cogeneration services.

The summary jury trial bears a resemblance to the mini-trial. The summary jury facilitates pretrial termination of cases in which the principal bar to settlement is a dispute regarding a jury's likely findings on liability or damages. A six-member jury returns a "verdict" or special report on the issues an abbreviated presentation of the evidence and law, after which the parties and the presiding judge or magistrate set a timetable for settlement negotiations.[440]

The Judicial Panel concept is quite different. The Center for Public Resources, a business-sponsored institute active in promoting alternative dispute resolution techniques, has offered its panel of retired judges and leading attorneys to serve variously as fact-finders, adjudicators, neutral advisors, and dispute mediators. The panel is also involved in an ongoing negotiation with asbestos producers, their insurance companies, and claimants, all of whom are involved in attempting to resolve an expected 24,000 claims valued at $38 billion that have arisen because of personal injuries such as asbestosis and mesothielioma (a cancer uniquely linked to asbestos exposure), which are alleged to have resulted from exposure to airborne asbestos fibers. The purpose of the negotiation is to design an alternative dispute resolution process that can process claims quickly and fairly.[441]

5. Negotiation in the Administrative Process

Negotiations between agencies and their principal constitutiencies occur throughout the federal administrative process. The presence of administrative discretion[442] almost automatically implies negotiation, although in comparison with the structured and self-conscious new negotiation approaches just discussed, administrative negotiation appears to be unprincipled and sporadic. The prospects for negotiating site remedies under CERCLA will be influenced by the general norms for negotiation that prevail in the federal administrative process and by the extent to which EPA in particular uses negotiation in resolving environmental disputes. Interestingly, once again EPA is a leader. Just as the agency earlier adopted a number of innovative administrative procedures, so today it appears to be fertile ground for the development of new negotiation techniques.

The American doctrine of judicial review practically ensures that agency negotiation will involve the courts. Thus the consent decree[443] has become an important marker of the use of negotiation in the administrative process. CERCLA has already proven fertile ground for use of consent decrees.[444] Whether policy formulation or case adjudication is involved, if a dispute has ripened to the point that a potential or actual lawsuit by or against an agency may be settled by give-and-take, the results may be captured in a consent decree.[445] While systematic study is lacking, the use of consent decrees to implement federal policy is widespread and appears to be rising.[446] Their use in resolving complex disputes with far-reaching public policy implications has renewed legislative and judicial interest.[447] The concern exists that case settlement by consent decree may accommodate only the litigants' interests and short-circuit the wider public involvement that might take place if the matter went to trial or if an administrative hearing were held.[448]

a. Negotiation in the early phases of administrative policy making

Negotiation pervades the early agency policy-making process, although like Moliere's M. Jourdain, the bourgeois gentleman who was excited to learn that he spoke prose, the participants may not have realized what their discussions were.[449] Yet when agency and constituents meet to discuss policy, they often bargain. For example, despite the strictures of notice-and-comment rule making, fitful bargaining occurred before EPA set rules for variances from the wastewater treatment standards applicable to discharges by publicly owned treatment works to marine waters.[450]

On very few occasions has negotiation between an agency and interested parties met contemporary standards, e.g., agreeing to sit down together and bargain out the text of a policy subject to a consensus rule and full interest representation.[451] Consensus standards, which are developed by private organizations for their own self-regulation, may be adopted later as binding regulations. Yet while some of them may have originally been produced by exemplary negotiation processes, the agency ordinarily did not participate.[452] "Sequential" agency bargaining,[453] and bargaining with only a few parties in interest, are far more common. For example, before proposing them as rules under the Agricultural Marketing Agreement Act, the Department of Agriculture routinely negotiates minimum wholesale prices for milk with the major producers, sometimes appearing to attend to the views of the dominant producers to the detriment of smaller ones.[454] Recent legislative and judicial steps to ensure equal access to agency policy-making forums may be viewed as designed to frustrate sequential or one-sided agency negotiations, e.g., the Federal Advisory Committee Act[455] and judicial decisions imposing restraints on ex parte decisions.[456] Still, the need to accommodate interests and seek solutions puts tremendous strain on these more formal policy-making requirements.[457]

A new, much-discussed regulatory negotiation process might bring a measure of order and legitimacy to agency negotiation of rules, warranting a relaxation of these safeguards. In regulatory negotiation, substantially affected interests meet and attempt to draft a consensus rule which will be offered to the agency for formal proposal in notice-and-comment rule making. A neutral convener ordinarily would seek to identify the affected interests and the issues which need to be addressed. The conditions and procedures which enhance the likelihood of success in any negotiation are adopted in regulatory negotiation.[458]

Three agencies have attempted to use regulatory negotiation. A rule under development by the Federal Aviation Administration would set revised flight duty and rest period requirements for aircraft crews, a particularly nettlesome problem which the FAA has been unable to solve despite years of effort.[459] A negotiation group of about 19 persons was convened as an advisory committee, which meant that its meetings were open to the public and that the agency had formally to call and conduct meetings. The group came close to agreeing on a proposed rule, but in the end it came up short of its goal. The FAA built upon the negotiating group's weak consensus to fashion its own proposed rule.[460]

The Occupational Health and Safety Administration sought a consensus proposal for revision of the workplace exposure standard for benzene.[461] A 1978 revision of the rule, published after a particularly bitter rule-making proceeding, had been invalidated by the Supreme Court.[462] The agency retained two private co-mediators for the effort, and it did not participate in order to avoid federal advisory committee requirements. Several useful meetings took place, but in early 1984 the effort fell apart, perhaps because of the pressure applied by an agency-imposed deadline.[463]

Finally, the EPA has successfully concluded a long search for a suitable candidate for regulatory negotiation.[464] Its initial failure did not result from lack of enthusiasm. The agency created a regulatory negotiation project and named a director for it, hired the Harvard Negotiation Project to track progress, and announced that it would defray some costs of participation.[465] EPA and stakeholders reviewed dozens of candidates, finally selecting rule making in Clean Air Act noncompliance penalties for new vehicles which exceed federal emissions standards.[466]

b. Case settlement: negotiation to modify agency policy after it has been set

After an agency finally adopts policy or seeks to implement a program, negotiation may also occur if affected interests file a lawsuit. In the altered balance of power brought about by the lawsuit, EPA and the plaintiffs may prefer settlement negotiation to litigation for a number of reasons. Both sides may be willing to bargain away some of their putative rights in order to reduce the uncertainty and delay attendant in a lawsuit. Particularly in complex technical or managerial disputes, both sides may conclude that negotiation in which the parties fashion their own decree provides a better alternative than surrendering control over the outcome to a relatively inexpert judge. Once it has adjusted to the fact of a lawsuit and the possibility that its plans may be derailed, the agency may actually prefer the policy-making proceeding that results from the lawsuit the prior proceedings required by its governing statute or the Administrative Procedure Act: the issues are narrower, only a limited number of interests (the plaintiffs') need be accommodated, procedural _ex parte_ and other due process protections no longer apply, and negotiations may be conducted in secret. The agency may even be tempted to conduct more cumbersome initial rule-making proceedings in a pro-forma manner, husbanding its energy for the ensuing settlement negotiations where it can engage in give-and-take with only a few of the most concerned and sophisticated parties in interest.

For their part, the plaintiffs may appear to seek only the vindication of the traditional legal grievances expressed in their moving papers, _e.g._, the agency incorrectly interpreted the statute, failed to follow required procedures, or abused its discretion. Yet they may in fact achieve a good deal more. Settlement negotiations may allow plaintiffs to bargain with agency officials more nearly as equals, not only over the context of specific rules, but over broader issues of policy and program management as well. The same factors which may make settlement negotiation attractive to the agency appeal to plaintiffs for whom winning the lawsuit is less important than obtaining influence over policy and program management. Settlement negotations in a lawsuit which raises numerous issues regarding a complex regulatory program thus resemble an internal agency policy meeting at which only agency officials ordinarly would be present.

One illustrative example will suffice, although many are available.[467] The 1972 Federal Water Pollution Control Act Amendments included particularly stringent substantive and procedural requirements for setting standards to govern toxic effluents. Predictably, the EPA fell behind. Environmental groups sued to compel it to implement the amendments in the manner plaintiffs believed Congress intended. The statute itself was not helpful, because Congress had failed to appreciate the number of toxic effluents present in the environment or the formidable problems presented by proof of risk.

The parties began to negotiate an agreement which eventually grew into an innovative toxic effluent regulatory program. The agreement shifted the focus of the program away from the statutory emphasis on health-based toxic effluent regulation (the margin-of-safety requirement which arguably would have required zero discharge standards), to the technology-based effluent provisions at the heart of the rest of the amendments. The agreement required EPA to promulgate rules governing the discharge by 21 industries of 65 specified pollutants and mandated the use of certain scientific methodologies and decision-making criteria in determining whether additional controls and new pollutants should be included in the scheme. The resulting consent decree, the Flannery Decree, approved the agreement, and in denying their motions to intervene, the court relegated the industrial dischargers to the forthcoming rule-making to make their legal challenges.[468] This decision was modified one year later to allow the industrial dischargers to intervene.[469]

When EPA again fell behind, the environmental plaintiffs moved to enforce the consent order. Congress in the meantime had again amended the statute, including changes in the toxic effluent control provision which adopted the toxicant regulation program sanctioned in the Flannery Decree. The dischargers again intervened, seeking to vacate the decree as moot after the 1977 amendments to the act, only to find that the EPA and the environmental plaintiffs had again negotiated out their differences. The EPA had agreed to provide the plaintiffs with more detailed information regarding progress with the program in return for more time and flexibility in implementing the decree. The court modified the decree and denied the intervenors' motion.[470]

In continuing litigation, the intervenors stiffened their opposition to EPA policy making by negotiated settlement. By this time, however, they had been successful in obtaining a number of changes in the decree. Eight years after the Flannery Decree was first approved, the D.C. Circuit held that in approving the settlement the district court was not barred from enforcing terms of the agreement that went beyond the scope of the act, and that EPA discretion to manage toxic effluent regulation in the manner it thought best was not impermissibly constrained by the decree. The court remarked that "it would be especially unfortunate if a lack of judicial restraint stifled the evolution of less adversarial approaches to developing regulations," citing the principal law review article on regulatory negotiation.[471]

This type of policy-oriented settlement negotiation, which of course falls short of the expectations raised by the pre-decisional regulatory negotiation model, may occur after a court ruling as well as before.[472] Sensing its inadequacy to fashion complex prospective relief to correct the policy or program deficiency at issue in a suit, the court may ask the parties to negotiate an order.[473] An order that approximates as nearly as possible a consensus solution between a specialized agency and the constellation of affected interests will be both less likely to require constant judicial oversight and more likely to be accepted as politically "legitimate" in an era of administrative governance by accommodation of interests.[474] Should they come up short, the judge may try to nudge the parties to agreement, but more as an activist mediator than traditional decision maker.

Pretrial settlement of disputes over how major regulatory programs are implemented, and the consensual fashioning of relief in public law litigation,[475] are apparently increasing both in number and importance, and both depend crucially upon negotiation.[476] Yet little inquiry has been directed to the role of negotiation in pre-trial settlement or post-decisional remedial design in complex regulatory disputes.[477] On the one hand, public law litigation has been criticized for causing inefficiency and overjudicialization of the contemporary administrative process, yet the role of settlements and consent degrees suggests that public law litigation may be more socially optimal than generally thought.[478] On the other hand, case settlement and consent decrees may confer a form of insider status on the plaintiffs that undercuts the model of open administrative policy making that has evolved in recent years. Others interested in the policy decisions restructured by settlement may have great difficulty monitoring the agency's revised program and influencing its development. Nor may Congress play its traditional role when responsibility for agency action is to some extent shared in by the court. Perhaps policy negotiation at best will only sporadically relieve pressure on traditional decision-making processes. But case settlement, public law litigation, and regulatory negotiation might also produce a unified, defensible negotiation-based approach to administrative policy making.

c. Negotiation in informal agency action: settling enforcement cases

Negotiation drives informal administrative decision making, especially the exercise of enforcement discretion.[479] CERCLA remedial agreements and consent decrees illustrate the point.[480] The traditional factors considered by the sanctioning agency in the exercise of its enforcement discretion could not be meaningfully applied without a significant amount of negotiation. Plea bargaining is the easy instance.[481] Negotiated compliance schedules, negotiated orders, and consent decrees are the means by which flexibility is re-introduced into command-and-control legislation. Negotiated compliance may also be the device by which agency program staff maintain control that otherwise would have to be shared with agency enforcement personnel or surrendered to the Justice Department. The enforcement of social welfare standards, particularly environmental standards, has traditionally been subject to give-and-take bargaining between agency program officials and the managers of risk-creating sources. Both sides strive to maintain amicable long-term relationships.[482] Thus regulatory agencies, including EPA, have more experience with negotiated solutions to source-specific pollution disputes than commonly acknowledged. In the 1970s, it was true that the dominant bargaining model was partially eclipsed when Congress expanded the types of enforcement tools available and simultaneously defined and restricted the manner in which agency enforcement choices were to be exercised.[483] In Europe, the bargaining model still prevailed as it always had, although critical opinion differs as to whether the continental model is as successful as the more adversarial U.S. model in maintaining low-risk conditions.[484]

In addition to CERCLA remedial agreements and consent decrees, EPA has otherwise made frequent use of negotiation in informal adjudication.[485] A recent controversial example illustrates the agency's use of negotiation to achieve program objectives without resort to more formal prescribed procedures. In the late 1970s EPA began to explore the possibility of negotiating chemical testing agreements with industry as a more efficient means of obtaining data required for regulatory decision making under the Toxic Substances Control Act. By 1982, the rudiments of a negotiated testing program were in place.[486] The program enables the agency to avoid having to promulgate a TSCA test "rule" in order to obtain information on the risks which chemicals present to health or the environment.[487] Under the negotiated testing program, after a priority list of chemicals which may require testing is published in the Federal Register, EPA conducts a series of public and private meetings oriented toward negotiating acceptable chemical test protocols. Agency scientists, industry, and the public may participate. Memoranda on the substance of discussions are placed in the public record. Once industry has submitted an acceptable plan for testing, EPA publishes in the Federal Register a preliminary decision to adopt the negotiated testing agreement instead of initiating rule making. After comment, final decisions are also published. Approximately a dozen negotiated testing agreements have been approved.

The TSCA negotiated testing program has been challenged in a pending lawsuit, primarily because citizens groups do not have the staff resources to participate in protracted negotiations and because the agreements are not enforceable.[488] But the program has also been praised by the General Accounting Office and the Council on Environmental Quality as more efficient, quicker, and consistent with the congressional desire to avoid duplicative and unnecessary testing.[489] Congressman James Florio (D-N.J.), chairman of the subcommittee responsible for TSCA, has introduced legislation to make express the negotiated test agreement authority which EPA has implied from the statute.[490] The negotiated testing program is paralleled by a similar negotiation strategy employed in issuing consent orders under TSCA §5(e) for limiting exposure to potentially harmful chemicals.[491]

B. A Process for Negotiating Cleanups under CERCLA

The preceding suggests that negotiation could be used to improve the efficiency, lower the cost, and accelerate the cleanup rate of the CERCLA program. The task of this section is to fashion a negotiation process which capitalizes upon the desire of a wide variety of stakeholders to participate, satisfies EPA that it should join in and encourage negotiation, and reassures congressional committees that negotiated cleanups protect the public.

The process described below is premised on negotiation before a lawsuit is filed. While settlement of a lawsuit may be more successfully negotiated using the principles developed here, negotiation so deep in the shadow of the courthouse is not likely to achieve as much, so rapidly, as negotiation before the compulsion of law. Further, settlement negotiations are in a sense less principled. The public is excluded; guidelines are thin. Nor does EPA's substantive guidance necessarily apply to the terms on which a lawsuit is settled. Although responsible parties may be given 60 to 120 days to negotiate a cleanup agreement with EPA, after cost recoupment or imminent hazard actions have been brought, comparably strict deadlines do not apply to settlement negotiations.

Two essential reforms flow from the foregoing analysis: EPA should modify its policies to encourage private party cleanups without recourse to the Fund; alternate dispute resolution techniques should be mobilized to provide this encouragement. The first reform was discussed above in section III. The second was suggested in the preceding subsection and will be applied to the specific problem of CERCLA site cleanups in the remaining portion of the paper.

1. The Catalyst for Cleanup: Convening and Mediating Negotiations

A revision in EPA's current policy will suffice to stimulate a few more negotiations. For these, no catalyst is needed. EPA and the parties will work things out as they have before, through the RI/FS process, meetings called by EPA, and generator committees, without need for special assistance.[492] Yet to increase the number of voluntary cleanups at additional sites, the services of conveners and mediators may be needed. (Ordinarily, the convening and mediating functions will be combined, as the ensuing discussion develops).

Several possibilities exist for selecting appropriate conveners and mediators: the responsible parties themselves, independent conveners and mediators paid for by the parties, EPA itself, independent conveners and mediators paid for by EPA, state and local governments, or another federal agency.

Site users are neither suitable nor likely to play a wider direct role in stimulating negotiations. Few are likely to seek the role, in part because their interest in negotiation may be taken as a sign of weakness. Even if they try, others who will end up as principals in negotiating sessions are not likely to be forthcoming when solicited by an adversary. This situation frustrates some large companies with wastes at numbers of sites. They believe negotiation is the preferable alternative at most sites for virtually all interests, but have felt that EPA has used its power to refuse to negotiate as a device for exacting unacceptable preconditions before bargaining can begin.

Faced with disincentives under present EPA policy, site users have begun to explore another strategy for negotiating cleanups: an independent entity supported with private funds.

An informal group composed of representatives from major generators, the Chemical Manufacturers Association, and major environmental groups has proposed that a new quasi-public entity be organized to "coalesce" negotiating sessions at which responsible parties would apportion shares.[493] Initial funding would be provided by a number of corporations.

The Clean Sites Institute (CSI), as it has been named, does not intend at present to expand negotiations beyond site users. Its negotiating effort would be focused on the potentially responsible parties, to try to obtain their accord about how costs or cleanup responsibilities should be apportioned among themselves. This is a tall order, one that attempts to tackle one of the two greatest CERCLA challenges. CSI would also try to tackle the second: designing remedies acceptable to EPA without diverting staff resources from EPA's cleanup priorities. Finally, it would also be available to carry out remedies.

In a sense, EPA already convenes negotiations. Notice letters inform site users that they have "an opportunity" to meet with and discuss privately-financed cleanup with agency personnel. The letters also encourage the formation at multi-party sites of steering committees composed of representatives of responsible parties. After the RI/FS, the agency informs parties that they have 60, or exceptionally, 120 days to complete negotiations on the schedule supplied by the agency. Yet attempting to conduct negotiations in this manner is more characteristic of a party with power to issue ultimata.

The EPA itself is not a suitable convener or mediator.[494] It will be a party to virtually all site cleanups. It has to determine the standards which remedies will meet, pay for some or all of a number of cleanups, and ask that suit be brought for direct cleanup or reimbursement in the event negotiations fail. As a party, EPA cannot expect that other principals will confide in it the type of information an effective convener or mediator needs. Citizens and responsible parties can justifiably refuse to share perspectives, data, intentions, and other confidences with the agency. Moreover, a preliminary negotiating group convened by EPA may appear to be selected to enhance the agency's position when bargaining begins.

An agency official who suggested that someone from the EPA Office of Standards and Regulations facilitate the agency's first regulatory negotiation succeeded in provoking a major debate over whether selecting an inside facilitator would violate the principle of neutrality. He felt that the office was appropriate because it deals only neutrally with the regulatory process. It could assume the costs of facilitating the negotiation and soon would accumulate general expertise in conducting regulatory negotiations. EPA decided nevertheless to use an outside facilitator, apparently yielding to the argument that the still-experimental process might be damaged if perceived to be controlled by the agency.[495]

The experience with regulatory negotiation suggests that placing even an "independent" site cleanup mediation office within EPA is inadvisable, just as drawing conveners from within the agency would not be likely to produce the optimum number of attempted site negotiations. Conceivably, an "impenetrable wall" could be erected between a new EPA mediation office and the CERCLA program offices.[496] Traditional administrative law techniques could be used to police this separation of functions, but the successful adaption of formal safeguards to informal discretionary CERCLA decision making seems unlikely and unwieldly. In any event, even if formal separation of functions is achieved and satisfies its severest judicial or academic critics, the stakeholders in a site negotiation do not have to accept it. Willingness to negotiate would still be determined by consensus.

Other interests such as states, municipal governments, and citizens' groups which might initiate and mediate negotiations are vulnerable to the same criticisms as are site users and the EPA. Local governments and citizens groups lack the resources, although if the circumstances are right convening a negotiation may be quite inexpensive. A town or county is a particularly likely candidate. It may have direct contact with the significant users, citizens, and local governmental units involved and may be uniquely situated to accelerate cleanup beyond the contemplation of the EPA agenda. But as a party with an interest without skills and resources, local government is not likely to capitalize on its unique position.

Independent federal entities not party to cleanups could play a role. The Federal Mediation and Conciliation Service (FMCS) was created to provide mediation services in labor-management conflicts. Its commissioners are spread across the country, which would be convenient if they served as conveners and mediators for site cleanups. However, the commissioners usually were selected from labor or management backgrounds. Environmental dispute resolution presents a quite different set of demands. The option of seeking legislation to expand the FMCS role to CERCLA needs to be explored, but initially FMCS does not appear to provide the initiation or mediation skills which site cleanup requires.

The Council on Environmental Quality and the Administrative Conference itself are more likely alternatives than the Office of Management and Budget. The former are more likely to welcome the role than the latter, which in any event would encounter skepticism from some parties who view the OMB as an adversary in other contexts. More importantly, all three offices have roles which fully occupy their small staffs at the present time. To expand their functions would require new funds or (more likely) a transfer of EPA funds. Their staffs are not presently skilled at initiating cleanup-type negotiations. Skilled conveners and mediators would have to be hired by these offices, which would then turn to the EPA for financial support.

Conveners and mediators must be paid. Locating financial support is problematic, because a stakeholder who is willing to pay may only succeed in creating the impression that the intervener is somehow obligated to the stakeholder or, worse, has been "bought." Foundations support alternative dispute resolution centers but foundation priorities are focused on providing initial support for innovative programs. Foundations are not likely to subsidize site cleanup dispute resolution, a long-term effort with limited opportunity to innovate after the first negotiated agreements set the pattern. Nevertheless, foundation-supported centers could play a useful initial role in demonstrating the viability of mediation in CERCLA cleanups. Apparently no foundation-supported group has yet conducted a site cleanup negotiation.

EPA could play a creative role in promoting negotiated cleanups. To do so EPA would have to overcome the reluctance which it shares with other federal agencies to try contemporary negotiation techniques. Yet by investing marginally more time and money at the critical initiation stage, EPA might catalyze a larger number of prompt negotiated cleanups. Actively seeking to convene negotiations might reduce the total money and time the agency invests in cleanup and conserve Fund revenues for true orphan sites. This could be accomplished by contracting with skilled conveners -- experienced mediators, attorneys experienced in negotiation, former public officials -- to seek to bring the major interests at a site together to see if a negotiated agreement is possible.

Direct EPA financial support for an independent convener or mediator is less vulnerable to criticism than if EPA directly provides an EPA employee as the convener or mediator. Flexible cost-plus personal service contracts, perhaps using the Fund itself, would permit EPA to pay for negotiation. Accountability, however, would have to be in the first instance to the stakeholders, not to the agency, except for minor accounting such as verification of expenses.

Hazardous waste cleanup negotiation should not require skills different from those appropriate in other polycentric disputes where the facts and issues are uncertain and the stakes comparably high. Still, the experience with environmental mediation suggests a number of variants which may enhance the chances of success in site cleanup negotiations. While emphasis should lie on mediation skills per se, it might prove useful if mediators also possessed technical, political and legal skills as well. Few individuals are so endowed; however, a mediation team might be tried. A number of environmental disputes and policy dialogues and a regulatory negotiation have been co-facilitated or co-mediated.[496a]

In a number of environmental disputes elected politicians provided the persuasion necessary to convene the stakeholders and keep them on track. Politicians are also useful in opening up the range of options considered so dispute resolution may become a plus-sum game. While this help would probably not be frequently needed, mayors, state legislators, and occasionally a Congressman or Senator might be similarly effective with slow-moving site cleanups.[497]

For their part, attorneys are skilled in directing parties toward a single-text agreement and formulating specific enforceable agreements.[498] Sometimes useful expertise is possessed by activists, persons who are experienced in the subject-matter of the negotiation and who may consequently have personal views on a dispute and how it should be resolved. Surprisingly, some activist mediators have been successful in obtaining acceptance as mediators and in working toward agreements which they favor.[499]

Finding an adequate supply of talented convener/mediators poses a serious but not insurmountable problem. First, the convener/mediators with the most directly relevant experience have conducted negotiations in rather complex environmental disputes with numerous stakeholders. To date, some 165 mediated negotiations in environmental disputes have taken place. In almost a hundred of these the stakeholders sought to produce an agreement, and in 70 disputes they were successful.[500] A handful of persons led these negotiations, and not all began as experienced mediators, but they now constitute an experienced handful -- perhaps over three dozen individuals. Further, their numbers grow daily.[501]

Second, a collection of attorneys now exists which has participated in site cleanup negotiations, usually on behalf of site users. A portion of them may no longer have site users as clients and therefore could possibly be employed as mediators. Despite the general reputation of attorneys as conflict-promoters, some who have participated in environmental negotiations received praise for playing constructive roles.[502] In addition, a number of attorneys skilled at dispute resolution might be attractive as mediators despite their lack of direct environmental experience.[503]

Third, mediation skills have been developed in fact by a variety of individuals in recent polycentric disputes or conflicts of non-environmental origin, e.g., policy dialogues, regulatory negotiation, and mini-trials. Their skills should be transferable. Fourth, some 300 of the 50,000 panelists of the American Arbitration Association reportedly have environmental experience;[504] other AAA members without environmental experience nevertheless have mediation skills that might be applied to the waste site problem. Fifth, the potential involvement of the Federal Mediation and Conciliation Service has not been explored, either as a funding mechanism for the groups above or as a direct source of mediators.

2. Initiation of Negotiations and Convening the Parties

Negotiation has two particularly critical phases: obtaining the agreement of the parties even to try to negotiate a solution, and (once assembled) deflecting them from an adversarial contest into joint problem solving. To agree to negotiate, parties must already have made a preliminary assessment of the factors relevant to their willingness to negotiate and the probability of success of a negotiation.

In some situations initiation is easy. The parties communicate willingly and informally and agree to meet. Thus, established bargaining relationships as in the labor management field, or prior business relationships and a shared professional viewpoint as in the inter-firm disputes negotiated out through mini-trials, may postpone the involvement of intermediaries until impasse is reached. Some CERCLA cleanups fit this model. The agency and certain large interstate responsible parties have already met several times to negotiate over different sites. In such circumstances a convener may be unnecessary and might actually complicate things unnecessarily.

Yet in some environmental disputes where negotiation did eventually succeed, initiation was the critical step. Such disputes usually have arisen between a large number of parties who have not worked together or resolved disputes before and who usually disagree significantly on facts, law, and perhaps principle. Many site cleanups are likely to resemble a traditional environmental dispute more than a labor or business dispute, although site disputes involve a more focused set of issues and fewer policy differences about the development or destruction of environmental resources than many of the environmental disputes already successfully resolved through negotiation. Thus the optimal number of site cleanup negotiations is not likely to be achieved without careful attention to attracting the parties to the table for the first time.

A skillful convener may substantially increase the likelihood of a negotiated solution to site cleanup. Parties (including government agencies) may have to be shown how it is in their interests to negotiate. A convener could inquire quietly and informally to see whether there is interest in a negotiated solution, who the parties are, and whether enough common ground exists for an eventual agreement. A convener would have to make it clear that his or her mission was only to explore the possibility of convening a first bargaining session. All remarks would remain permanently confidential. The parties could then decide for themselves whether to continue. In seeking to define the issues and identify a viable negotiating group, the convener might have to call or visit more than once with the site users, government officials, and citizens.

Conveners will inevitably encounter resistance to negotiation at some sites. Discussing the likely impact if EPA proceeds to use the Fund or enforce cleanup under §106 may convince resisting interests at least to try negotiation. Not every holdout will be important enough to merit abandoning the attempt to convene the initial group. The party may later change its mind. Or it may be adequately represented by interests which have already indicated their willingness to negotiate. Embarrassing the recalcitrants into bargaining may be counterproductive, because they may then bargain in bad faith, manipulating the sessions to try to take unfair advantage or merely to obtain delays. Bargaining should not be attempted unless such recalcitrants can be coaxed to the table believing that their self-interest requires them to bargain in good faith.

The convener may discover that limited-purpose agreements are necessary merely to induce or continue negotiations.[505] This is a permissible procedure, but only if used in moderation, because it risks becoming a technique for a party to shoehorn in "non-negotiable demands" that should properly be the subject of later negotiations. Still, potentially responsible site users might agree up front that _if_ a final document is signed, it will contain contingent liability provisions (e.g., insurance, escrow) adequate to cover specified categories of currently unidentified groundwater contamination problems. Or EPA might agree that _if_ an agreement is reached, EPA will covenant first to seek any reimbursement for cleanup tasks outside the agreement from the non-negotiating site users and to support with legal and technical assistance the contribution claims of any settling parties who are later interpleaded. Similar up-front agreements might govern the subsequent use and confidentiality of information disclosed during negotiations, whether the negotiations succeed or fail.

Site users might provide up-front assurances to citizens living near the site that if they negotiate and an agreement is reached, at a minimum the users will agree to provide temporary relocation assistance, a property buy-out, specified medical tests, or other specific damage mitigation or injury avoidance measures if particular contingencies occur (e.g., groundwater contamination, off-site seepage, and air emissions at specified levels).[506] Thus the risk that government funds may be unavailable or slow in coming can be anticipated for by a side agreement with private corporations. Potential victims enter negotiations already assured of a "floor" below which their future safety will not descend.

The convener would have to lay a careful foundation with the parties in interest. He or she would have to explain that a convener owes professional allegiance to a process, not to the government, and that a convener's skill is measured by how well judgment has been exercised in identifying relevant parties, scoping issues, and convincing them to meet to discuss it. Independence is indispensable.

Assuming a skilled, disinterested convener can be located and funded, when should he or she begin to make inquiries? Much could be gained by encouraging negotiated cleanups in advance of the rather extended EPA schedule. Public health risks would be reduced sooner, public fears assuaged by more immediate cooperative efforts, program entanglements could be avoided, private funds rather than the Fund would be spent, and commitments secured while private funds are still available and before tensions rise.

NPL sites not slated for Fund-financed RI/FS in the immediate future and sites likely to appear on the NPL at a future date may already be ripe for negotiated cleanups. Yet the agency has made it clear that it does not want even to consider private cleanup initiatives at these sites -- and there are well over a thousand of them -- until it has Fund reserves and staff resources adequate to do the job itself. This approach does not make optimal use of the total pool of public and private resources available to achieve CERCLA's ultimate objective of eliminating the inactive and abandoned waste dump problem, because risk priority is not likely to correlate highly with the myriad of additional factors that contribute to the ripeness of a site for cleanup--party solvency, state resources, neighborhood cooperation, available leadership, corporate goodwill, removed-waste disposal capacity, and the like.

The advantages of reducing risks by cleaning up NPL sites in rank order of risk are high, but the cleanup expense and transactions costs of this strategy are enormous. The advantages of paying some attention to sites of lower priority are fewer, but if negotiation produces a reasonably prompt agreement, cleanup expenses and transactions costs are likely to be markedly lower as well. This suggests a change in the EPA approach to negotiation in order to make optimal use of all the resources available for cleanup: employ a portion of Fund revenues and staff time in trying to bring about "unscheduled" negotiated cleanups if the net advantages of some "unscheduled" cleanups are likely to produce greater net advantages than do some scheduled ones. The first step is an affirmative effort to locate likely "unscheduled" sites by putting skilled conveners in the field.

A commitment to support conveners and to engage in negotiations would not simply renew the discredited policy of negotiation at all cost. Instead, a mixed approach allows more sites to be cleaned up than the current approach allows with the same investment of agency resources. Negotiations that are likely to bog down or are not likely to produce large net gains should not be pursued. When negotiation begins but proves counterproductive, agency personnel would withdraw and invest their energies at sites where more progress can be made.

3. Who Presides: The Use of Mediated Negotiation

The convener's role is to try to get the relevant interests together for a first meeting. A small group of less than 20 persons is desirable, even for this initial session. Some larger groups may have held organizational meetings to select representatives. The participants will have a number of critical tasks: deciding if others should also be present, describing the limits of their authority to sign a cleanup agreement, determining the agenda, adopting a tentative schedule, and defining the ground rules for the ensuing negotiations, especially the meaning of consensus (Will all possess veto power? May dissents be entered?). If the convener has correctly sized up the parties and the issues, the result will be a series of bargaining sessions leading eventually to an agreement. If things do not go well, the participants may conclude that negotiation will not work, or that they are not yet prepared to commit to substantive bargaining.

Among the issues which will have to be addressed at this initial session is who will preside at the bargaining sessions. The convener's work is done; the participants have a variety of choices about how to proceed. They may be content simply to have one of their number chair the sessions, or to rotate the chairmanship.[507] In some instances an EPA or other governmental official will prove to be an acceptable chair.[508] Not all CERCLA sites will require an outside facilitator once the relevant interests have met.

Thus a mediator is not indispensable. Yet equally, a chair is not the same as a mediator. A neutral mediator can be expected to receive and protect confidences, meet with parties individually, act as go-between for two or more groups, suggest confidentially that a party's position is unreasonable, or suggest fruitful lines of discussion to pursue at the next session -- all roles which mediators can and do assume to shepherd negotiators toward mutually agreeable solutions.

Mediation might significantly improve the chances of success in a number of site cleanup negotiations. Frustration, suspicion, or hostility may momentarily prevail in the web of relationships between site operators, generators, government officials, and local citizens. Where the convener was necessary as catalyst, a mediator may be necessary to continue to act as go-between and ice-breaker. Nor are the problems and possible solutions likely to be well-defined. Some parties will have considerable technical knowledge, others none. A shared understanding of the dimensions of the problem at a site, even if the RI/FS are underway or completed, may be slow in developing. Site users possessing information about the types and quantities of waste present, their handling, and the resources available to help put together a remedy may be initially reluctant to share this data. Government officials may find it hard to communicate informally with other interests. The situation in fact may seem destined for solution by a neutral forum.

And yet good mediators thrive in such an environment. The presence of multiple diverse interests should create opportunities for joint gain. Uncertainty of outcome for any of the large number of parties who feel stymied but would like to be free of the risk, rid of the liability, or further along in discharging the government's obligation should create opportunities for a negotiated solution. The impressive array of opposed interests represented -- local, state, federal, private -- also represent an impressive array of resources to effect a solution. The task is to guide them into a common assault on the problem.

Locating and funding a mediator who is acceptable to all the parties could prove difficult. In most negotiations the convener becomes the mediator. This pattern is likely to prevail in CERCLA cleanups. After all, the participants will have already placed a certain amount of trust in this individual, who will also probably already know quite a lot about the site. But the convener may have other assignments which require attention. While they may want to negotiate, participants may not want the individual who convened them to remain on as mediator. Issues first faced in locating the convener may have to be faced anew: what type of person is best suited to mediate? Are such persons available? Who pays? How can the mediator be made accountable for his or her performance?

The actual costs of a mediated site cleanup agreement are hard to estimate. Excluding all the costs which individual parties will incur in participating (time, travel, and lawyers and consultants fees), the cost of a mediator, meeting rooms, secretarial assistance, telephone contacts, and the like probably would not exceed $30 to $50 thousand even at the most complex site negotiations.[509] Economies of scale may also occur as the pool of mediators, federal and state agency officials, and the large national chemical companies which are site users at numerous sites gain experience and bargain simultaneously with respect to different sites.

If federal and state governments have filed a lawsuit, no convener is needed. A mediated case settlement, however, is still possible. Judges may play the key role in initiating mediated settlement negotiations. Some proponents of negotiation would welcome greater judicial involvement in promoting negotiated solutions to environmental disputes.[510] Courts encourage and facilitate settlement by a variety of means,[511] and a large number of CERCLA cases have been settled.[512] Rule 16 of the Federal Rules of Civil Procedure was recently amended to encourage pre-trial settlement; the Rule seems to allow a court to appoint a mediator.[513] Courts have exercised their power to appoint third-party assistance in reaching settlement and to order the parties to pay.[514] Other proposals have been fielded to encourage settlement in general.[515] A party's behavior in court-ordered negotiations, at least in policy-laden public law litigation, may influence the court in subsequent review of the case.[516] Although no third-party assister was involved, in the Hyde Park landfill case (a site near Love Canal also used by the Hooker Chemical Corporation), the court noted "the clear policy in favor of encouraging settlements" in approving the settlement agreement for cleaning up the site.[517] In the Stringfellow case,[518] the judge ordered the state and federal plaintiffs and defendant site users to discuss third-party assistance in negotiating the cleanup. Plaintiffs suggested locating a mutually acceptable mediator from a panel of professional mediators, retired judges, and practicing lawyers, but defendants preferred that the court appoint a settlement judge.[519] Because of the defendants' opposition to a mediator, the court will probably have to select a settlement judge rather than pursuing mediation, which federal counsel in the case called "an exciting possibility to facilitate settlement of these complex hazardous waste cases."[520]

The movement toward encouraging settlement may help reduce transaction costs for CERCLA cleanups which require that lawsuits be filed. Problems ensuring mediator accountability and payment may be solved if a judge appoints a mediator for a site cleanup dispute. But a site cleanup dispute that has already resulted in litigation has missed its best opportunity for a negotiated solution.

4. Who sits: Parties and their roles

Most cleanup settlements have only involved governmental plaintiffs and potentially responsible parties -- the defendants who have the funds to clean up the site. Certainly, these are indispensable stakeholders in any site cleanup negotiation. But other interests may also deserve a place at the table: other site users, other units of local, state, or even federal government, and citizens who live near the site. Anyone who would be materially affected by an agreement if one were reached, who will negotiate in good faith, who is not otherwise represented by parties already at the table, who cannot prevail immediately in their desires through the courts or otherwise, yet who could exercise countervailing power to frustrate or delay agreement, has a valid claim to a seat at the table.

Of course, all interests cannot be represented. Most sites affect widening circles of persons, including at the outermost perimemter participants in the regional and national economy, future generations, and surrogates for the wider environment itself.[521] The more parties that are present, the harder it is to focus on an agreement. Many "yesses" are needed in consensual bargaining, but only one "no" will derail it. As numbers increase, side arrangements and concessions become too numerous and difficult to incorporate in an agreement, and divisive coalitions within the bargaining groups are likely to form.[522]

Finding a viable negotiating group of 15 to 20 persons will be difficult; however, as with regulatory negotiation,[523] the formation of bargaining coalitions and committees of responsible parties, representation of citizens by local governmental leaders or the heads of citizens groups, and the designation of a bargaining leader for the larger federal and state bureaucracies will help solve this problem. The key criterion in selecting individuals to represent larger factions is whether the person or team has been delegated adequate authority to propose, compromise, and agree.[524] Having principals at the table helps achieve this objective. Principals include officials of the corporations which are site users, program officers from agencies, local elected officials, and citizens who live near the sites. An intermediary with limited or ambiguous authority may be vulnerable to vetos from headquarters, so that other parties come to resent their uncooperative hidden adversary. Such a recalcitrant "hard-hearted partner" can attempt to obtain further concessions when the negotiation appears to others to be completed.[525]

a. The agency

A cleanup negotiation is not liikely to take place without EPA's participation. Even at sites which have not yet been placed on the NPL, EPA is a practically indispensable party, because there is no guarantee if a cleanup is negotiated that EPA will subsequently agree that the responsible parties properly discharged their liability. Getting EPA to agree to participate faces several obstacles, all discussed earlier: the political history of negotiation at the agency, the fear of losing control of the cleanup agenda, and the desire to implement programs by regulatory fiat. The reluctance of federal officials to experiment with untested implementation measure also is likely to discourage negotiation, as the EPA experience with regulatory negotiation suggests. If mediated negotiation to obtain more private party cleanups is to succeed at EPA, the Administrator must support the concept visibly and forcefully, must take an active interest in its implementation, and must defend the agency's exercise of judgment in the agreements reached against second-guessing by congressional oversight committees and other critics. Middle-level officials at a variety of federal agencies have confirmed that they would remain cool to a new process as bureaucratically risky as mediation until they received approval from the leadership.[526]

Leadership and guidance are necessary, but it should not be overdone. Much of the responsibility and the opportunity to make negotiation work lies beyond the agency's control and means. Since agencies are highly skilled at constructing systems capable of routinely handling the many tasks with which they are charged, perhaps EPA should be cautioned away from attempting to fashion, by itself, a comprehensive mediated negotiation program for CERCLA cleanups. Its willingness to negotiate and possibly some of its financial resources are needed, but its talents for specialization and organization should not lead it to attempt to control negotiation and outcomes.[527] A policy dialogue might sensitize the agency to these concerns.

Most of EPA's difficulty with negotiation under CERCLA occurs because CERCLA burdens the agency with a profound role conflict. The agency cannot be expected to modify its current policies to encourage negotiated cleanup, nor to participate either willingly or meaningfully in cleanup negotiations, until it has sorted out its disparate roles and recombined them to accommodate the statutory scheme. On the one hand, EPA must ensure that sites are cleaned up adequately, a familiar standard-setting exercise which could draw upon EPA's regulatory strengths. But CERCLA does not define the standards to be developed and appears to contemplate case-by-case decisions about site cleanups. As a regulatory agency EPA is also familiar with the role of enforcer, and CERCLA imposes sweeping liability for cleanup costs on site users. But the statute does not specify how liability is to be apportioned nor how the agency is to select among enforcement options. On the other hand, CERCLA also requires EPA to play a role very much like a responsible party with direct site cleanup obligations -- a role more like a regulatee's than a regulator's. EPA must clean up priority sites if site users do not; it is potentially the responsible party of last resort. Further, although EPA is striving uncomfortably to avoid such situations, whenever the agency contempltes paying the orphan share of a site cleanup rather than obtaining 100 percent of costs from existing responsible parties on a pro rata basis, it may become one among several equal share-takers -- primus inter pares, perhaps, but still in the role of a cost-minimizing responsible party. EPA's posture vis-a-vis other parties in reimbursement actions, its contingent liability after it grants releases, and its competition with other parties for information about what each knows re-enforce this role.

Consequently, agency officials are certain to feel conflict and confusion about the posture they should adopt toward negotiation. They feel compelled to be norm-defining regulators, enforcers, and monitors while also somehow participating as a deep pocket that will try to minimize its obligation. This mixed mission is a far cry from the New Deal model of an agency as standard-bearer for the public interest, which it protects by the application of technical expertise and specialized functions. Nor does it square with the more recent model of the agency as an accommodator which synthesizes the viewpoints of the various interests importuning it. Nor, for that matter, does it square with the model of an agency as fiscal agent or construction company for Congress's public works projects. In this predicament, the agency has attempted to return to its strength, which is in its regulatory programs. But the dominance of the regulatory role has recently produced an opportunity to "negotiate" which does not possess the key characteristics of negotiation. Current policy only allows responsible prties to make offers of payment to execute an EPA plan, not to work at a comprehensive agreement after give-and-take between the interests involved.

How should EPA approach negotiation? First, it should view negotiation as a means of improving its performance in implementing CERCLA. Negotiation may save EPA money and time, even if it requires temporarily stepping out of the norm-defining regulator's role. The agency need not negotiate, nor continue to negotiate when the opportunity to save time and money evaporates. This is basic: a negotiation must always continue to present an opportunity for joint gain, even for federal agencies.

Second, EPA must accept the uncomfortable position of becoming just another party. It lacks power to achieve faster, cheaper cleanup unilaterally. To choose compulsion over persuasion relegates it to travel a path mined by state participation constraints, procurement policy, the slowness of legal processes, limited revenues, and compliance with its own guidance policies. Accepting that other interests possess some measure of countervailing power, EPA may join in an effort to identify alternative cleanup plans acceptable to all the stakeholders.

Third, EPA will have to forego to some extent its tough enforcement-oriented negotiation posture. EPA's litigation posture is strong but beset by uncertainties about how the courts will handle such issues as joint and several liability when apportionment is possible, party liability, and jurisdiction and substance under § 106, as the appendix develops. Some changes would be mostly cosmetic, e.g., adopting other terms than "case settlement" and "draft enforcement document," but they would help carry the message that EPA is not dickering with a potential defendant about a lawsuit but rather is trying to work out a cleanup plan acceptable to itself, site users, and other stakeholders. Still other changes are procedural. Allowing only 60 or, exceptionally, 120 days for negotiations to be completed does not convey a sense that the agency really expects negotiation to work. Nor does failing to offer substantial assistance to responsible parties who are struggling to organize suggest that the agency attaches much importance to the critical cost apportionment problem. If the agency actually plans to bring some enforcement actions merely because they will set impressive case settlement or doctrinal precedents, this policy should be abandoned.

Most importantly, an overly litigation-minded approach to negotiation--whether for recoupment or direct cleanup--has discouraged the productive sharing of information between EPA and site users.[528] Obviously, both EPA and site users may weaken their positions in subsequent litigation if in a negotiation they share data the other side would not otherwise have. Yet both sides also stand to gain if by sharing information in a negotiation they can reach a mutually acceptable agreement. Recently-developed techniques for developing and sharing data, such as data mediation, may assist this effort. Still other devices would permit freer sharing of data without the possessor prejudicing a position in litigation, such as agreements adapting the evidentiary rule prohibiting the use at trial of settlement offers[529] or protective orders that preserve privileges and confidences for data shared in discovery or in settlement negotiations.[530]

Lastly, EPA could better promote negotiation if it directed its guidance memoranda to concise statements of the interests of public safety which it perceives it must protect under CERCLA, rather than to positions it will take in negotiation. Currently, EPA has allowed a rather narrow window of opportunity for negotiation by defining precisely when it will negotiate and on what terms. Each condition restricts the opportunity for initiating discussions. Here substantive policy and procedural innovation are intertwined. The suggestions made here that EPA widen its window of opportunity are not intended to persuade the agency to change its interpretation of CERCLA; rather, they invite the agency to explore whether the additional procedures proposed here are valuable enough to warrant a concomitant relaxation of substantive restraints, both procedural and substantive, that make negotiation less likely to take place.

Definition and self-limitation in the exercise of broad discretion are hallmarks of sound administrative practice, as Professor Davis has reiterated.[531] Lack of policy guidance once seriously jeopardized the CERCLA cleanup effort. Yet a surfeit of it could now jeopardize that effort. Discretion need not be artificially narrowed to prevent its abuse; other techniques can be employed to check agency overreaching and arbitrariness. For example, consensus-based negotiations with the full range of stakeholders at CERCLA sites would tend to promote a principled exercise of agency discretion far more effectively than would a quasi-regulatory solution where the agency may compel rather than convince. Policy guidance is needed, but of a type which allows EPA to move quickly and flexibly to capitalize upon circumstances where negotiation appears to benefit the agency and the public.

The principal suggestion made here, of course, is that a mediated negotiation process be encouraged, funded, and used. But changes in existing policy would better enable EPA negotiators to exploit such a process. For example, EPA might agree to let site users perform "unscheduled" RI/FS, if site users agree to pay for an expert overseer selected by the agency to test split samples, to inspect the work under way, and to monitor the RI/FS results. A § 107 consent decree might be used to capture the terms of the agreement.

As a second example, suppose that in the course of negotiations EPA were offered a less-than-80 percent commitment from some site users, e.g., a firm offer to provide 50 percent of cleanup costs, if the agency would agree for its part to pay 45 percent (with the state agreeing to pay the remainder). EPA might be tempted to accept but for its current policy of seeking 100 percent cleanup--as the necessary implication of its legal interpretation that CERCLA imposes joint and several liability. To preserve this position, EPA might attempt to persuade its bargaining partners not to ask for releases, sweetening its proposal by offering to seek reimbursement first from any non-negotiating responsible parties and to help defend suits joining those who are party to the agreement. Specifically, EPA might convenant to urge the court to give positive consideration to those who come forward early and voluntarily, to argue that their shares be minimized, and to support their counterclaims for contribution. If nevertheless liability is ultimately apportioned, the government could agree to adjust the shares of the parties for inflation.

A final, more complex example would require that EPA compromise its current liability-based bargaining position regarding 100 percent responsibility for any site user who can be located. This is a sensitive policy area at present, especially since EPA is reluctant to endorse any type of joint funding or "comingling" which might weaken its legal campaign to establish joint and several liability. If EPA were to agree to pay for the verifiable orphan share of wastes at a site, using the combined data developed by the agency and the responsible parties, the agency would enhance the prospects for negotiated cleanups. From a process-oriented perspective, EPA would significantly enlarge its flexibility and bargaining position by adopting an approach based on percentage contribution. It could participate in numerous arrangements, e.g., by providing "completion funding"[532] to cement an agreement.

In this example, if responsible parties use the negotiation process to haggle with EPA over shares, EPA and other stakeholders may break off the negotiations as dilatory and counterproductive. Not all sites are appropriate for negotiated cleanup, not all stakeholders capable of agreeing. But suppose they are able to proceed. Negotiation then might achieve the second critical turning-point--instead of attacking each others' positions, the parties turn against the problem of cleanup. If this point is reached, non-negotiating responsible parties may wish to reconsider and join. Their incentive to do so would be considerably enhanced if the commitments which EPA made in the second example as to conduct of a § 107 action were also made here. The non-cooperating parties would be forced to defend a § 107 reimbursement action in which, if they interplead the settling parties they will face the combined legal and technical resources of EPA and the co-signers of the agreement. The incentive to join the negotiations could be further enhanced if EPA, instead of first bringing a § 107 action, covenants to issue administrative orders seeking reimbursement from the hold-outs. Failure to reimburse would expose the recipients to possible damages three times the cleanup contribution demanded by EPA.

An approach based on percentage contribution need not deplete the Fund, especially if the number of Fund-financed cleanups is reduced, if Congress expands the fund, and if EPA and the contributing PRPs combine their legal and technical talents to seek reimbursement from the non-participating site users for the remaining non-orphan share.

A last, practical problem remains with EPA's role in site negotiations. A small negotiating team which can speak authoritatively for the agency will have to be designated. At least one technical person and an attorney should be in the group.[553] Failure to designate officials who have the confidence of, and ready access to, principals with power to bind the agency may result in indecisiveness and delay that might cause negotiations to break down.

Regionalization of negotiations comports well with the agency's decentralized management style. Regional officials often have developed prior working relationships with local and state officials who may be present at the table. Regional officials also usually are excellent pulse-takers of local public sentiment, although in the approach suggested below, organized significant neigborhood citizens groups would be present as stakeholders at the table. Whether headquarters shold participate directly depends on the importance of the site and the agency's judgment about the need. A better role for headquarters is review and final approval of the agreement as it approaches final form. Headquarters might consider organizing its current disparate approval authorities into a negotiated agreement review panel to discuss and approve proposed negotiations. Possible members include the Associate Administrator for Solid Waste and Emergency Response, the enforcement and Fund office directors under him, the Associate Enforcement Counsel for Hazardous Waste, and for an initial period a representative from the General Counsel's offices. Thus headquarters might afford expeditious peer review similar to EPA's now-defunct Civil Penalty Policy Panel and the review and approval which the Deputy Attorney General gives settlements exceeding a certain dollar value.

b. Site users: the "potentially responsible parties"

All site users are stakeholders in the negotiation, because they may be jointly and severally liable for the complete cleanup. Organizing the numerous parties to negotiate continues to present a major challenge. The problem is so important that a panel of industry, environmental, and former agency leaders has proposed creation of a nonprofit corporation which would focus on "coalescing" responsible parties to apportion shares, designing technical cleanup programs that satisfy EPA, and actually carrying out the cleanups.[534]

The site users present a diverse array of interests.[535] The generators usually are the focus of governmental attention, because they have resources that normally are adequate to fund the cleanups. In prior negotiations to settle RCRA and CERCLA cleanup suits, a division emerged between large and small generators.[536] Smaller generators in general were less willing to settle on terms favorable to the government, because they had fewer resources to contribute, often were marginal operations, sometimes had only contributed small amounts of wastes to the sites, and were less concerned about their public images than the larger national or multinational generators. Still, a strong incentive to find a solution exists because the various generators and site users have long-standing relationships which they would like to avoid disrupting. This is especially true of the larger chemical generators, who are each other's customers and suppliers in a complex market for chemical feedstocks, ingredients, and finished products. These companies do not look forward to scores of lawsuits against each other for contribution at sites where the government has been successful in holding one or a few of them jointly and severally liable for total cleanup costs.

Central to the difficulty of securing site user participation in negotiation are the absence of sound techniques for apportioning cost shares and the issue of EPA-approved ceilings on user liability. First, reliance on a simple waste volume ratio formula to determine each generator's individual share of the total cleanup costs, while strongly favored by some generator groups,[537] does not seem adequate in circumstances where toxicity, mobility, and other factors figure more prominently in hazard and cost increases than does volume. The district court in the Chem Dyne decision seemed to acknowledge as much,[538] creating doubts that the courts would go along with a volumetric approach and strengthening the hand of generators who oppose the volumetric solution. A cost allocation model used to help settle the Petro Processors case[539] appeared to be strong enough to satisfy the allocation burden placed on defendants in the Chem Dyne case, but further examination casts doubt on its general applicability.[540]

The issue of EPA approval of ceilings on responsible party liability necessarily raises the twin problems of EPA's release policy (it will grant them, but rarely, for discrete tasks performed, and virtually never for long-term groundwater contamination remedies) and how clean the site must be made. EPA and site users frequently reach impasse because some users take the position that they should be able to obtain a release from liability in return for a sum certain. Often this proposition is at bottom a legal one, suggested by the desire of companies to eliminate as many contingent liabilities as possible from their financial reports. EPA estimates tend to be high on the cost of RI/FS, surface cleanups, or other discrete tasks in order to cover the possibility that studies will be more extensive or sites will require a more extensive remedy than the current estimates suggest. Each office reviewing the estimates factors in another layer of security, and often the cost estimates exceed both what the site users are willing to invest and what they estimate they could do the same task for if given the opportunity.

By focusing on positions, not interests, the site users limit their possible roles in negotiating solutions. Perceiving this, in an attempt to move negotiations beyond impasse, a former EPA chief enforcement lawyer who now is an attorney for responsible parties apparently counsels clients to abandon the quest for releases and instead to try to negotiate an agreement wherein the site users agree to perform tasks to the technical standard overseen by EPA. Attention is directed away from exaggeratedly high estimates of the maximum liability parties may incur.

Further, the approach can be applied to the long-term groundwater contamination problem. In return for EPA adopting a cleanup plan based on the "most probable" remedy that the site requires, the users would agree to pay for long-term monitoring which, if predetermined contaminant levels are detected, would trigger expenditures from an escrow, bond, insurance, or other financial guarantee. Thus users in a sense vouchsafe the most probable remedy, relieving the agency of requiring "a Cadillac solution to a Chevrolet problem."[541]

The composition of the bargaining team of the responsible parties presents the same basic challenge as representation does for other stakeholders. Principals generally will have better access to specific technical data and advice. Attorneys may also be able to have the information or expertise supplied, but principals can usually obtain them in fewer steps. Attorneys caution against "inadvertent discovery," which they feel may give away information useful to the other side in subsequent litigation. To an extent, the attorneys have a point; their involvement to check client loquacity can be helpful. But in general these qualities which are ordinarily the attorneys' strongest asset--refining issues, stripping away the irrelevant, focusing and shortening discussion--become liabilities in negotiation. Business persons (and agency program personnel, for that matter) are usually less conscious of what they cannot do and of the risks of open discussion.

The presence of corporate executives at the table may have symbolic value to governmental officials and especially the public. Their simple presence may tacitly convey the message that they have nothing to hide and that they value a solution highly enough to meet face-to-face with officials and those at risk. Their absence may tacitly convey the message, "talk to my lawyer."

Nevertheless, a strong case exists for attorney representation on the site user bargaining team. Many now are already experienced at settlement negotiations. They have been successful at organizing site users into committees, a task requiring the attorneys' process skills. Attorneys have always negotiated and can be cooler under pressure (it's not their money). Moreover, site users may end up in litigation with the government, and they are entitled to advice of counsel.

c. State, municipal, and county governments

State and local governments are also indispensable stakeholders in cleanup negotiations. State government especially has a powerful incentive to negotiate cleanups rather than allow Fund cleanups, and CERCLA clears the way for the state rather than the EPA to play the leading governmental role. Local governments will ordinarily be necessary stakeholders, because they represent citizen interest and because effective cleanups are unlikely without their full cooperation. Moreover, each of these units of government may have separate status as stakeholders. Tensions may quickly develop, not only between "coordinate" federal and state efforts,[542] but between county and city governments, as they did in the mediated annexation dispute between Fredericksburg, Virginia, and Spotsylvania County.[543] Further, in states such as New York and California where governors and state attorneys-general are separately elected, stakeholder status may be required for each for political reasons.

State governments have strong incentives to promote negotiation.[544] For example, if Fund revenues have to be spent, the state must provide 10 percent of the costs and 50 percent when the state or local government owns the site at the time of any disposal.[545] Further, to draw freely on the Fund the state must ensure that a RCRA-permitted facility is available for wastes moved from the site and must have signed a contract or cooperative agreement with EPA, which will impose terms and conditions.[546] As many as 20 percent of the sites currently on the NPL may trigger the 50 percent contribution requirement, which for many state or local governments will be difficult to produce.[547] Negotiation also affords a way for states to impose stricter requirements[548] or to apply their own mini-funds in lieu of CERCLA.

CERCLA is unlike most federal environmental regulatory statutes in that it does not provide for state assumption of program operations, but the statute does potentially permit a major state role in negotiated cleanups. CERCLA contemplates a state-federal partnership, even if the federal government is indisputedly the senior managing partner. In addition to the basic legal obligations required by the statute, the federal government must consult with the states before selecting "any appropriate remedial action"[549] or bringing a §106 action.[550] To facilitate state or local government lead initiatives in site cleanups, the President may delegate to them, not only the authority to obligate Fund revenues, but "to settle claims."[551] Such a delegation has not yet been made. The current EPA fiscal year remedial action plan assigns a state lead to 45 percent of the 235 sites covered.[552]

The state-federal scheme puts a premium on good state-federal relations, which at the same time the scheme may destabilize.[553] Bargaining may reflect these factors, and federal and state teams may have to conclude side agreements to clear up problems which their relationship may create. First, because states may act as the lead agency and be delegated the authority to ogligate money in the Fund and to settle claims, there may be disagreement between EPA and the states as to who should dominate in the settlement negotiations. Second, there are times when the federal government and the states are in an adversary relationship. For example, if a state has not complied with its cooperative agreement, it may be subject to a suit brought by the federal government. Third, it is unclear how a state or local government should be aligned when it was the owner or operator of a facility where hazardous waste was disposed. It may be both a claimant and a liable party. Fourth, and perhaps most significantly, states may have established greater liability for responsible parties than is imposed by CERCLA. In those circumstances, the state may be demanding more in the settlement process than the federal government. Moreover, the state law may be clearer in its standard of liability. Thus, even when EPA might wish to proceed cautiously, a state may take a tougher negotiating stance.

d. Citizen participation: but at the table?

Citizens who live near a site should be party to an agreement so vitally affecting their health and property. If they are perceived as lacking a stake, it is because they lack power. Yet their powerless position in a democratic society may itself become a source of a form of power to challenge, test, and delay, because their plight is politically attractive to elected officials, and judges are likely to be solicitous of their health and safety claims.

Persons living near a site are members of the public whose health and safety are protected by the governments which implement CERCLA and other hazardous substances control laws. But arguably their interests are less well served when the government is bargaining than when it is remedying or litigating. The considerations which go into a negotiated agreement or a case settlement are not well articulated, nor may they even be public. Attorneys familiar with the factors applied in negotiating government enforcement compliance orders can appreciate why this is so.[554] Further, the more government may be motivated by factors ordinarily associated with the concerns of its private sector adversaries, i.e., avoiding responsibility, saving money, or limiting contingent liability, the less members of the public may want to trust to their representation.

Still, citizens living near dump sites do not ordinarily possess enough countervailing power to entitle them to a place at the table. Even mediators sensitive to environmental concerns were not worried in several much-studied disputes where powerless or inarticulate groups failed to secure a place at the table.[555] Further, some argue that local citizens are too emotional about the dispute, do not have the technical training to appreciate either the risk analyses performed or the remedial measures available, or can only present unreasonable one-sided demands ("dig all the dirt up and ship it at least five states away."[556]). They have no incentive to agree to on-site waste stabilization, and bear none of the responsibility for securing an off-site RCRA-permitted alternate facility or funding the large public works project required for a complete removal.

The case against citizens at the table is probably overstated. Their power to affect CERCLA implementation may become, not only significant, but disproportionate, if their first real opportunity to be heard occurs only at a well-orchestrated congressional hearing. (For contrast, consider the impact of testimony by citizens who participated in a cleanup negotiation and are willing to defend it.) Whether citizens are "hysterical" about waste sites is doubtful and bears closer examination;[557] their concerns are aired differently depending on the forum available.

Citizens may well appreciate that a demand to "dig up" the site may be unacceptable. They also can appreciate that a Fund remedy will be subject to the Fund-balancing criterion while a negotiated solution would not, that finding the state share may delay risk reduction, and that litigation would delay cleanup even further. Most citizens would understand that demanding terms so onerous that an agreement would be impossible could only result in recourse to alternatives where they gain less, or to their exclusion from the negotiation and consequently their loss of the opportunity to influence the terms of any agreement which the remaining negotiators approve. The leader of the principal national waste site victims organization believes persons living near sites want medical examinations, immediate risk avoidance measures, and a rapid but reasonable remedy. Primarily they want their own trusted expert to say that the proposed remedy is adequate.[558]

On balance, citizens should be invited to the table for negotiation of the type and level of the remedy. Their presence is less appropriate when the negotiations turn to cost share allocation. Responsible parties may resist citizen participation in cost allocation on the grounds that they have no greater interest than any other member of the public in ensuring that each responsible party contributes appropriately to cleanup (governments can therefore oversee cost allocation) and that in some cases citizen participation during discussion of the amount, longevity, toxicity, and condition of a responsible party's wastes would amount to free discovery to a subsequent tort action to recover damages to persons or property. Phased negotiations in such circumstances are just as appropriate as phased cleanup, which already is EPA policy. Ordinarily, they should have the full rights accorded other stakeholders, although the participants may negotiate ground rules under which citizens would have more limited participation.

Under some circumstances responsible parties may see advantages in having citizens become full participants in remedial bargaining. United responsible parties and citizens could galvanize local and federal governments into action, speeding up cleanup by dramatically altering the expected interest alignment at sites. Responsible parties could play the leading role. Citizens may be enticed to participate or to agree on a final cleanup by side-transactions with site users, who perhaps can address citizen interests in preventive health care, flexible and immediate exposure mitigation measures, and a more rapid remedy which allows the community to plan more sensibly for the future, more effectively than can units of federal and state government. Governmental participation in these arrangements may even be prohibited.[559]

Such citizen involvement, however, has never occurred. Citizens ordinarily have been excluded from settlement negotiations, as they were despite their request to participate in the deliberations over the Velsicol site in St. Louis, Michigan.[560] Committees of citizens have been formed and kept informed of progress in waste site negotiations.[561] Short of both complete exclusion and full participation, many acceptable arrangements might be established. For example, a citizens advisory panel was formed to assist the negotiations of the Metropolitan Water Roundtable in Denver.[562]

The current EPA approach is conservative. It opts strongly for a public information program, with limited citizen input to all types of CERCLA implementation, including negotiation, which remains under firm EPA control Current policy guidance has made it clear that EPA intends to control contacts with the public during a CERCLA response, before, during, and after negotiations, and possibly when site users conduct cleanup operations or perform the RI/FS.[563] Community relations plans will be prepared for each site and will specify "when and how the public will receive information about the negotiations."[564] Typically, small group briefings, press releases, fact sheets and a specially established "local information respository" will be used. Public information programs will begin when the first notice letters are sent. A regional Superfund community relations coordinator guides the community relations effort and, if negotiations occur, acts as go-between for the negotiating team with the public. The public has some measure of input into the negotiating team's posture via the coordinator.[565] If responsible parties conduct cleanup operations or the RI/FS, EPA may delegate the community relations program to them, if circumstances allow.

Citizens will not participate in negotiations,[566] which apparently will be restricted to agency officials and the site users. (Guidance on state lead sites has not yet been issued.) Consent decrees will be placed in the Federal Register for a required 30 day period of comments to the Justice Department.[567] Consent administrative orders similarly will be publicized for 30 days by EPA. The conduct of parties and their deliberations will be kept permanently confidential.

The citizen's place at the table will be practically guaranteed if pending citizen suit amendments to RCRA become law. Under both Senate and House amendments to §7003 of RCRA, which is virtually identical to §106 of CERCLA, citizens could either sue directly to enjoin anyone whose hazardous waste disposal may be contributing to an "imminent and substantial endangerment," or intervene in pending federal §7003 actions to compel abatement an cleanups.[568] Dissatisfied citizens who have been excluded from pre-litigation or settlement negotiations simply have to bring their own §7003 action to seek a court-ordered cleanup more to their liking. The §7003 amendments may provide citizens the countervailing power they formerly lacked. Moreover, an amended §7003 would considerably diminish the site users' incentive to bargain with federal and state governments, at least without key citizens present at the table. The amendments in this respect may be too much of a good thing. Providing citizens with precisely the same power government has to abate imminent hazards may lessen the overall incentive of all the stakeholders to bargain for a consensual solution.[569] Government attorneys' attempts to shield CERCLA §106 actions from the RCRA citizens' suit would almost surely fail.

FOOTNOTES

Footnotes to I

1. See Anderson, Human Welfare and the Administered Society: Federal Regulation in the 1970s to Protect Health, Safety, and the Environment, in *Environmental and Occupational Medicine* 835, 837-842 (W. Rom, ed. 1983).

2. 42 U.S.C. §§6901 - 6987. See especially subchapter III: Hazardous Waste Management, 42 U.S.C. §§6921-6931. Following the Toxic Substances Control Act, 15 U.S.C. §§2601-2629, by only 10 days, RCRA was the last comprehensive federal environmental regulatory statute to be adopted.

3. H. Rep. No. 1491, 94th Cong., 2d Sess. 4 (1976).

4. Pub. L. No. 96-510, 94 Stat. 2767, 42 U.S.C. §9601 (Supp. V 1981). CERCLA is commonly called the Superfund; however, as will become clear, CERCLA embraces many more administrative and judicial options than direct federal cleanup. I have referred to CERCLA where the broader statute is meant and the "Fund" or the "Superfund" where the $1.6 billion cleanup fund and its requirements are meant.

5. A 1977 consultant's study for EPA estimated that the number of sites that could pose significant health and environmental risks could rise to between 1,200 and 2,000 after investigations are conducted. After six years of additional work, the same consultant has recently reported that in a study of 929 hazardous waste sites, suspected or documented contamination of groundwater, water, and soil has occurred at 90 percent and some level of human health injury has occurred at 18 percent. Remedial action was under way at 30 percent, investigation at 55 percent, and some type of enforcement action at 19 percent. 14 Env't Rep. (BNA)--Curr. Dev. 125 (May 27, 1983).

6. The emphasis in CERCLA is upon preventing human exposure to hazardous chemicals. Even if human exposure can be anticipated and prevented by restricting use, irretrievable losses of millions of dollars worth of usable groundwater are also results of careless waste disposal. The groundwater trapped in underground aquifers (porous layers of rock, sand, or gravel) supplies one-quarter of all fresh water used in the United States. It supplies half the population with drinking water. The "most pernicious"

consequence of land disposal may be that improperly maintained waste sites have caused hundreds of drinking water wells to be closed. H.R. Rep. No. 1491, 94th Cong., 2d Sess. 89 (1976). Congressional Research Service, Resource Losses from Surface Water, Groundwater, and Atmospheric Contamination: A Catalog (1980); Council on Environmental Quality, Contamination of Groundwater by Toxic Organic Chemicals (1981). See also Sharefkin, Kneese, & Shechter, The High Cost of Contaminated Groundwater, Resources, Winter, 1984, at 27, which discusses contamination of groundwater in New Jersey at the Price Landfill.

7. Schwartz, The Public is Not Hysterical, 2 Envtl. F. 40 (January, 1984).

8. Current EPA analysis predicts that at least one site user -- the owners, operators, transporters, and generators which the agency refers to collectively as "potentially responsible parties" (PRPs) -- will be identified at 95 percent of the priority sites, leaving a small number of true orphan sites -- the category which Congress had most in mind when it enacted CERCLA. Between 10 and 25 percent of sites will involve 50 or more generators, and the bulk of sites, some 70 to 75 percent, will probably involve less than 50 generators. Presentations by Lee M. Thomas, EPA Assistant Administrator for Solid Waste and Emergency Response, and Gene A. Lucero, Director, EPA Office of Waste Programs Enforcement, Aspen Institute conference on Superfund, Wye River Plantation, Maryland, November 29-30, 1983. The companies and individuals who qualify as potentially responsible parties are astonishingly diverse, ranging from a large number of Fortune 500 companies (chemical, steel, electronics, aircraft, autos) and their suppliers and customers, to an array of present and former disposal site owners or operators, many of whom possess slender means and a wavering commitment to their occupations. Offsetting this diversity, which might unleash centrifugal forces only strict adversarial processes could overcome, are equally powerful centripetal forces created by the economic interdependence of many of the largest site users. Most of the major companies in the chemical industry are each others' customers and suppliers for a large array of feedstocks and final products. Interview, Gene Lucero, Director, Office of Waste Programs Enforcement, January 6, 1984. CERCLA threatens to precipitate scores of contribution actions among participants in this tightly interconnected market, a

fratricidal prospect which most of these firms would like to avoid.

9. The inability to determine the dimensions of the cleanup problem was the most troubling aspect of the CERCLA program in its early years. EPA first estimated that over 32,000 uncontrolled closed or inactive sites contained hazardous wastes, but later revised its estimate from 30 to 50,000. The inventory of sites which must be examined to see if they warrant a CERCLA response, now at 17,000, may increase to 22,000. William Hedeman, Director, EPA Office of Emergency and Remedial Response, presentation at a conference on environmental law co-sponsored by the ALI-ABA Committee on Continuing Professional Education, the Smithsonian Institute, and the Environmental Law Institute, Washington, D.C., February 23, 1984. The inventory does not contain federal sites, sites permitted under RCRA, radioactive mine tailings piles, or other mine waste piles. The agency estimates that 1,400 to 2,200 of the currently inventoried sites will eventually find their way into a list of sites destined for priority treatment. 14 Env't Rep. (BNA)--Curr. Dev. 1245 (November 4, 1983). Other private estimates are higher. *E.g.*, Douglas Costle, former EPA Administrator, believes the number will easily reach 3,000. Interview, December 14, 1983. EPA has completed preliminary assessments for approximately 7,000 sites. Fact sheets distributed by Lee M. Thomas, EPA Assistant Administrator for Solid Waste and Emergency Response at a conference on negotiated cleanup settlements of CERCLA, sponsored by the Natural Resources Law Section of the American Bar Association, Crystal City, Virginia, December 9, 1983.

Deputy Administrator Barbara Blum testified in 1979 that the total cost of cleanup could fall in the range of $26 to 42 billion, although her estimate was almost twice as high as the $13.1 to $22.1 billion estimate of the leading EPA consultant's study on costs. 9 Env't Rep. (BNA) -- Curr. Dev. 2085 (March 9, 1979). EPA has estimated more recently that Fund cleanup will require $8.4 to $16 billion. 14 Env't Rep. (BNA)--Curr. Dev. 1725 (February 3, 1984). The GAO has pointed out, however, that EPA's figures assume that 40 percent of the 1,400-2,200 sites will be cleaned up privately and that groundwater cleanup costs are not included in the estimate. *Id.* at 1943 (March 9, 1984). Surface cleanup at a site is averaging $6.5 million, and where groundwater problems exist, $10 million. Hedeman, *supra*. Present cost estimates for direct remedial methods for a 22-acre landfill including present worth of twenty years operation and maintenance vary widely depending on the amount of work required. Surface water control by contour grading costs $510,000 (1980 dollars); surface sealing by either clay, fly ash, concrete or PVC ranges from $639,000 to $1,336,000; and groundwater flow control ranges from $1,860,000 for simple slurry trenches to $11,000,000 for bottom sealing four feet deep. If excavation and burial is needed the estimated cost is $12,686,000. Environmental Protection Agency, Guidance Manual for Minimizing Pollution from Waste Disposal Sites (1978). A convenient summary is provided by Sharefkin, Kneese & Shechter, supra note 6, at 27,29.

10. The necessary investigations, remedial actions, and legal measures are just under way at the sites needing the most attention. Six sites have been completely cleaned up using the Fund in the past three years; a number of negotiated private cleanups have been completed. See EPA Office of Public Affairs, Environmental News: Superfund Status Report (March, 1984). The EPA estimates that only 170 of the priority sites can be addressed with the Fund's $1.6 billion. 13 Env't Rep. (BNA)--Curr. Dev. 2304 (May 15, 1983).

11. The President announced his support for Fund reauthorization in his 1984 State of the Union Message. 14 Env't Rep. (BNA)--Curr. Dev. 1643 (January 27, 1984). (The Fund's revenue-gathering mechanism expires in 1985). He also requested for fiscal year 1985 a 56 percent increase in EPA's CERCLA program budget and a supplemental Superfund appropriation of $50 million for fiscal 1984. 14 Env't Rep. (BNA)--Curr. Dev. 1715 (February 3, 1984) Some key members of Congress appear to have much more in mind. Together with several colleagues, Congressman James Florio (D-N.J.), the Chairman of the Subcommittee on Commerce, Transportation and Tourism of the House Energy and Commerce Committee, has introduced a bill to extend the Fund tax past its 1985 expiration date and to enlarge it by $1.8 billion a year for five years. Thereafter, $600 million would be raised annually, except in a year when the closing balance for the preceding fiscal year exceeded $3 billion. The current chemical and oil feedstock tax would be supplemented with a waste end tax. A number of strict deadlines would be enforced. EPA would have to complete all remedial investigation and cleanup feasibility studies (RI/FS) for priority sites within 18 months of enactment. All current priority sites

would have to be cleaned up within five years; RI/FS for new priority sites would have to be completed within 12 months of listing; remedial actions would be nearly complete by the end of the decade. Numerous other action-forcing provisions were included. H.R. 4813, 98th Cong., 2d Sess. (February, 1984) (referred to the Committee on Energy and Commerce). Senators William Bradley (D-N.J.) and Frank Lautenberg (D-N.J.) and 16 co-sponsors had already introduced two bills (S.816, S.2012) which would increase the Fund to $3.2 billion and set site cleanup deadlines. 14 Env't Rep. (BNA)--Curr. Dev. 1253 (November 4, 1983). The EPA has estimated that $8 to 16 billion in additional Fund revenues will be required to clean up priority sites. 14 Env't Rep. (BNA)--Curr. Devts. 1725 (February 3, 1984). The National Conference of State Legislatures has recommended that Congress increase the Fund to $12 billion. 14 Env't Rep. (BNA)--Curr. Dev. 1493 (December 30, 1983). Even the Chemical Manufacturers Association has endorsed Fund reauthorization. 14 Env't Rep. (BNA)--Curr. Dev. 1309 (November 11, 1983).

12. EPA has wide, near-unreviewable discretion to fashion a new CERCLA approach. See the discussion notes infra in III.D.1. Contrast the difficulty of selecting a flexible approach in the regulation of sulfur dioxide and particulate emissions from coal-burning power plants under the Clean Air Act, as discussed in B. Ackerman and K. Hassler, Clean Coal/Dirty Air 104-116 (1981).

Footnotes to II

13. Superfund is technically the Hazardous Substance Response Fund. 42 U.S.C. §§9631-33 (Supp. V 1981). It was the most visible portion of the federal hazardous waste cleanup program and responsible for the commonly expressed view that the heart of CERCLA is government-initiated cleanup.

Superfund revenues are to be collected over a five-year period ending in 1985, with $1.38 billion collected from taxes on the manufacture of petroleum products and certain inorganic chemicals and $220 million from general federal revenues. Id. §9631(b)(2). The statute specifies a per-ton tax, ranging, for example, from $4.87 for benzene and several other substances to 22 cents for potassium hydroxide. The tax on crude oil and petroleum was set at 79 cents per barrel. 26 U.S.C. §4611 No. 96-510, Title II (Hazardous Substances Response Revenue Act of

1980, Supchapter A). The creation of special industry-wide taxes and fees earmarked for environmental cleanup and victim compensation is another of the many federal legislative innovations in environmental law which originated in the 1970s. Congress enacted an industry-wide fee for compensation of certain coal miners who contracted lung disease, 30 U.S.C. §§901-962 (Supp. III 1979), and in a measure similar to CERCLA, enacted a fee and a fund to pay for the cost of reclaiming abandoned strip mines, 30 U.S.C. §§1231-1243. Money in the Fund may be used to pay the costs of government response claims, to pay any claim for necessary costs incurred by any other person, and to pay claims for damages to natural resources unless they occurred wholly before CERCLA became law -- December 11, 1980. 42 U.S.C. §9611(a), §9611(d)(1) (Supp. V 1981).

CERCLA also creates a $200 million Post-Closure Liability Trust Fund, which operates in tandem with the regulatory provisions of RCRA. After a hazardous waste disposal facility has been finally closed and sealed under RCRA's strict closure requirements, including monitoring and maintenance for 5 years, all liability of a site owner or operator passes to the federal government for any harm which may materialize in the indefinite future. 42 U.S.C. §9607(k). The Fund is financed by a tax on the dry weight of hazardous wastes deposited at RCRA-approved sites. The Fund is not subrogated to claims for damages against the facility that any party may have. Thus, the combined effect of the Fund provisions is to transfer title to the interred wastes to the federal government. Government assumption of hazardous waste liability is similar to the policy embodied in the Nuclear Waste Policy Act of 1982, Pub. L. 97-425, 96 Stat. 2201, by which the government actually takes title to civilian nuclear power plant wastes.

14. While willing to endorse the $1.6 billion cleanup effort, Congress was not willing to endorse a Senate-proposed $4.1 billion cleanup and victim compensation fund, which would have added federally fueled pressure to the 14 percent-plus inflation afflicting the nation's economy at the time. S.1480, 96th Cong., 2d Sess. §5(b), 126 Cong. Rec. S.14942 (daily ed. Nov. 24, 1980). The final bill passed by the Senate was, in fact, a substitute for the original S.1480, but bore the same title, _See_ Grad, _A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980_, 8 Col. J. Envt. L. 1, (1982) ("the bill put

forward in the nature of a substitute was in part the result of compromise and in part the result of a rout"). See also Trauberman, Compensating Victims of Toxic Substance Pollution: An Analysis of Existing Federal Statutes, 5 Harv. Envtl. L. Rev. 1 (1981). Recovery for personal injuries was left to the common law, although detailed personal injury recovery provisions were included in the bill up until the final votes, and extensive hearings and debates prior to CERCLA's enactment focused on the compensation issue. S.1480, 96th Cong., 2d Sess. §§4(a), 4(c), and 4(n), 126 Cong. Rec. S.14940-42 (daily ed. Nov. 24, 1980). Congress did, however, authorize a 12-member study commission to report on the adequacy of common law recovery for injury from hazardous substances. 42 U.S.C. §9651(e). See Section 301(e) Study Group Report, Serial No. 97-12 (Comm. Print), 97th Cong., 2d Sess. (September 1982).

15. 42 U.S.C. §9605. Section 311 of the Clean Water Act, 33 U.S.C. §§1251-1376, created a $50 million fund which was used throughout the 1970s for emergency cleanup of spills of oil and of a few hazardous substances with acute aquatic toxicity in navigable waters. 33 U.S.C. §1321.

16. 42 U.S.C. §9605(8)(B). The NCP had to be promulgated before EPA could begin a full scale cleanup program with Superfund revenues. The Plan was not readily promulgated because of OMB scrutiny and EPA internal disagreement over the contents of the Plan, see McChesney, [curr. dev.] 12 E.L.R. 10040 (1982), and court action was necessary to get EPA to act. EDF v. Gorsuch, 12 Envir. L. Rep.(Envir. L. Inst.) 20376 (D. D.C.), order modif., 1 Envir. L. Rep. (Envir. L. Inst.) 20401 (D. D.C. 1982). The NCP is now codified at 42 C.F.R. Part 300 (1983). CERCLA mandates that governmental response actions are to be conducted in accordance with the provisions of the Plan "to the greatest extent possible." Id. §9605. Section 104 of CERCLA authorized the President to order the direct cleanup of wastes and spills, but the President delegated this authority to EPA. Exec. Order 12316, August 14, 1981, 46 Fed. Reg. 42237.

17. Id. §9611(f).

18. Id. §9604(c)(1). An emergency situation consists of three elements:

> (1) "response actions are immediately required to prevent, limit, or mitigate an emergency;"

(2) "there is an immediate risk to public health or welfare or the environment;" and
(3) response actions "will not otherwise be provided on a timely basis."

19. Id. §9604(c)(3). That section requires a state to assure the future maintenance of the removal and remedial actions for the duration of the cleanup; assure the availability of an off-site storage facility; and pay or assure payment of 10 percent of all remedial actions or at least 50 percent of all remedial actions if the state or its political subdivision owned the facility at which hazardous wastes were disposed. Id. The state or a political subdivision may take responsibility as the lead agency in a cleanup action if the state or political subdivision has the capacity to carry out response actions. Id. §9604(d)(1).

20. Id. §9607. Section 107(a) provides that past and present owners and operators of facilities, transporters, and generators or hazardous wastes shall be liable for all costs of removal and remedial actions incurred by the federal or state government. Id. §9607(a).

21. Id. §9607(a)(4)(A), (B) and (C). States can sue responsible parties for remedial and removal costs and for damage to natural resources. Id. §9607(a)(4)(A). Their efforts must be consistent with the NCP. Of potentially great long-term importance, "any person" acting consistently with the requirements of the National Contingency Plan may sue for its costs of cleanup. Id. §9607(a)(4)(B). That section provides that "any other necessary costs of response incurred by any other person consistent with the national contingency plan" can be recovered from responsible parties. Id. The provision is worded differently than a parallel section allowing persons to present claims against Superfund. There the cost must be "approved" under the NCP and "certified by the responsible Federal official." Id. §9611(a)(2). The express language of the statute and the legislative history overcome the strictures on implied federal causes of action presented by Cort v. Ash. 422 U.S. 66 (1975). Section 107(a)(4)(B) was the subject of litigation in City of Philadelphia v. Stepan Chemical Co., 544 F. Supp. 1135 (E.D. Pa. 1981), where the court denied defendant's motion for summary judgment when defendants argued that Philadelpha could not recover under §107(a) because it had owned or operated the waste site. The court in City of Philadelphia

pointed out that a state or political subdivision may be both a responsible party and a plaintiff in §107 actions.

22. 42 U.S.C. §9607(a)(1)-(4). The liability created by§107 is not absolute liability, because several defenses are available to site users. They incur no liability if the actual or threatened release is caused solely by acts of God, certain third parties, or some combination. §107(b). The Act also establishes liability limitations that apply unless the actual or threatened release was the result of willful misconduct. §107(c). Under certain circumstances the Fund can also sue insurers and other guarantors directly for amounts already expended. Id. §9612(c)(3). The statute prevents the transfer of liability by conveyance or indemnification, hold harmless, and similar agreements, although this does not bar agreements to insure or indemnify in order to meet the costs of liability. 42 U.S.C. §9607(e). An important exception exists for properly-permitted facilities under RCRA which have been permanently closed under the strict RCRA requirements. Then liability in effect passes to the federal Post-Closure Liability Trust Fund. §9607(k).

23. 42 U.S.C. §9604(b). The technical terminology of CERCLA defines three principal activities: "removal," or prompt short-term stabilization of a site; "remedy," or longer-term permanent measures to clean up sites; and "response," which covers both removal and remedial measures. Id. §9601(23), (24), and (25).

24. 42 U.S.C. §9604(a)(1). CERCLA mirrors the government initiated cleanup provision of §311 of the CWA, 33 U.S.C. §1321(c)(1), which also limits government action to those instances when responsible parties will not properly cleanup the spill. Like Superfund, Section 311 provides for cleanup using federal funds after a determination that voluntary clean up is not available §311(c)(1), and for recoupment from responsible parties (§311(f)). Under §311, the requirement that EPA first determine the availability of voluntary cleanup of spills into the rivers and other waterways has proved highly successful. A large percentage of spills are cleaned up voluntarily, thus allowing cleanup to take place expeditiously with a minimum of red tape and delay. See, e.g., Anglo Fabrics, Co., Inc. v. United States, F.2d No. 279-77, slip op. at 15, 23 (Ct. Cl. Jan. 9, 1981) ("the policy behind the FWPCA . . . encourages owners and operators of oil facilities to promptly and efficiently clean up

any oil spills . . ."). Recognizing the efficiency of this approach, Congress authorized government §311 cleanup only "[i]f the owner or operator fails to do so." S.Rep. No. 351, 91st Cong., 1st Sess. 17-18 (1969). Thus, the Coast Guard routinely seeks private cleanup before resorting to the government's authority. See, e.g., Union Petroleum Corp. v. United States, 651 F.2d 734, 740 (Ct. Cl. 1981).

25. There are policy reasons for supporting voluntary cleanup by responsible parties. First, those persons can utilize superior technical and management skills and ensure that cleanup is obtained in the most cost-effective manner. Second, limited Superfund revenues can be used for truly orphan sites when no responsible, solvent parties can be found. Finally, a negotiated cleanup avoids the expense and delay of the litigation process. If responsible parties are found and they refuse to clean the site up voluntarily, the government has an option to exercise its authority under §106, 42 U.S.C. §9606, rather than undertake response actions itself.

26. Section 106 figures prominently in the government's CERCLA implementation strategy. It is analyzed in detail in section V.

27. Any person who willfully violates an order is subject to a fine of not more than $5,000 for each day that a violation occurs. Id. §9606(b). For treble damages, see §107(c)(3).

28. CERCLA §101(23) (removal); §101(24) (remedy); §101(25) (response means removal, remedy, and remedial action). Removals are not well named for CERCLA purposes. They often do not involve removal of materials at all; rather, removals may include fencing a site, in-situ treatment, or other stabilization measures to convert the site to a "remedial" one.

29. The NCP provides another way emergency removals can jump the queue and command attention as long-term remedies. The NCP provides for "planned removals," which are taken where converting the emergency response to a remedial action is either cost-effective, because the necessary equipment and resources are already mobilized, or necessary to prevent risks arising if response is delayed. 40 C.F.R. §300.67(a). Very few planned removals have been allowed -- fourteen in fiscal years 1981-1983. Fact Sheet provided by Lee M. Thomas, EPA Assistant Administrator for Solid Waste and Emergency Response

at an American Bar Association Natural Resources Law Section conference on Superfund, Crystal City Mall, Arlington, Virginia, November 9, 1983. The EPA does not intend to lower the rank of a site because site users voluntarily undertake cleanup measures which reduce the risks it presents. Hedeman presentation, supra note [19].

30. See National Contingency Plan, 47 Fed. Reg. 31180, 31182 (July 16, 1983). (EPA must adopt a detailed procedure for remedial actions, because its experience is practically nil.) Novick, What is Wrong with Superfund?, 2 Envtl. F. 6, 7 (November, 1983). Sheldon Novick is Regional Counsel for EPA Region III in Philadelphia. But the end of fiscal year 1983, 193 removals had been carried out. Thomas fact sheet, supra note 29.

31. Still, in defining hazard and toxicity Congress pragmatically incorporated by reference the substances designated as hazardous under the major environmental regulatory statutes. The Clean Air Act, 42 U.S.C. §7412 (Supp. IV 1980), the Clean Water Act, 33 U.S.C. §§1321(b)(2)(A) and 1317(a) (Supp. IV 1980), the Resource Conservation and Recovery Act, 42 U.S.C. §6921 (Supp. IV 1980), and the Toxic Substances Control Act, 15 U.S.C. 260. The pre-existing definitions provide few practical limits to the substances subject to CERCLA, although some hazardous substances were excluded. Most importantly, CERCLA does not cover all spills. For oil spills see §9601(14). Congress also authorized EPA to designate additional substances if they "may present a substantial danger to the public health or welfare or the environment. §102(a). As a fail-safe mechanism, the President can take action if "any pollutant or contaminant" -- not just those listed under the Act -- may present an imminent and substantial danger to public health or welfare. §104(a). The exceptions include pesticide applications under the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§136-136k (1982), transportation exhaust emissions; direct releases from consumer products; radioactive releases from licensed facilities in nuclear accidents or in the course of uranium mining (including mill tailings releases covered by the Uranium Mill Tailings Radiation Control Act of 1978, 42 U.S.C. §§7901 et seq.); the normal applications of fertilizer; and workplace releases if an injured party can assert a claim against the employer for injuries.

32. Congress recognized that flexibility was required which allowed the President to determine what action best protected public health in a given instance, e.g., a complete removal in some circumstances, a minimization of the risk in others. "The President must carefully fashion the appropriate remedial action in each instance." S. Rep. No. 848, 96th Cong., 2d Sess. 55 (1980). The NCP established procedures for selecting a remedy but not substantive standards to govern each remedy, because "experience in developing remedies for hazardous waste sites is limited. Moreover, each hazardous waste site has unique characteristics which merit individual attention. Often the unique characteristics of sites will represent factors that have never been dealt with before." Preamble to the NCP, 47 Fed. Reg. 31180, 31182 (July 16, 1982). See 40 C.F.R. §300.68. The development of substantive remedial standards will be attempted in forthcoming rule making under a settlement of a suit challenging the NCP brought by the Environmental Defense Fund.

33. 42 U.S.C. §§6901-6987.

34. Id. §§6921-6934; See generally J. Quarles, Federal Regulation of Hazardous Waste: A Guide to RCRA (1982). Several thousand pages of regulations have been proposed or promulgated under RCRA -- 500 on one day in May, 1980. [Id. at 43.]. There are three basic strategies for the minimization of the risks created by hazardous wastes: (1) process changes to reduce the volume of the waste stream, (2) treatment, storage, or disposal, and (3) resource recovery, such as recycling. RCRA addresses only the second strategy. Congress assumed that little could be done to reduce the volume of generated waste and still preserve the benefits of the chemical era. Further, Congress did not want to mandate the adoption of technology to force resource recovery.

35. Two procedures are available under RCRA for designating a waste as hazardous. §3001(1). Under the first method, a waste is hazardous when EPA determines after informal rule making that the waste possesses one or more hazardous waste characteristics. This technique, followed by some states and European nations in their own statutes, is the least complex, because it simply requires a generator to consult a list to see if a substance is regulated. The second method requires the generator to test unlisted wastes to determine if they possess dangerous characteristics. If the tests confirm the

hazard, then the wastes must be accounted for through the RCRA system. *See* 45 Fed. Reg. 33,105 ff. (1980) (generator identified wastes). *See also* Note, *EPA's Responsibilities Under RCRA: Administrative Law Issues*, 9 Ecology L. Q. 555, 567 (1981).

36. Generators dispose of approximately 75 percent of their wastes on site, but if a generator contracts for offsite waste services, it must originate a detailed paper manifest for each waste shipment, select responsible transporters, specify a fully permitted facility to which delivery is to be made, and report irregularities if receipt of the wastes is not confirmed. §3003. Transporters must meet rigorous requirements to ensure that wastes remain within the regulated waste handling system. An important open issue concerns whether RCRA regulates the transfer of wastes from a cleaned up CERCLA site to an RCRA-approved facility. The implementation of §3003 must be consistent with the requirements of the hazardous Materials Transportation Act of 1975, which attempts to unify federal oversight of the transport of all types of hazardous materials by whatever mode. §3003(b). See 45 Fed. Reg. 12,722 (1980). The EPA and the Department of Transportation have issued regulations which attempt to mesh their efforts under the two statutes. There is an emerging consensus that process changes and resource recovery represent the best long-term management solutions to hazardous wastes. This consensus is reflected in proposals supported by some industry and environmental groups alike to change the funding mechanisms of CERCLA from a chemical and oil feedstock-based one to a wastes-based one. That change would furnish a financial incentive to companies to recycle wastes, reduce waste streams, and treat on-site. States such as California and Illinois have exercised their authority under RCRA §3009, 42 U.S.C. §6929, to enact higher standards than those required by federal law and have sharply constrained the use of land disposal. Yet such an approach seems incapable of producing adequate revenues for the state cleanup funds. *See* 45 Fed. Reg. 51,645 (1980); 40 C.F.R. §§260, 263 (1982); 49 C.F.R. §§171 et seq. (1981).

37. 42 U.S.C. §§6921-6925; (RCRA §§3001-3005).

38. Id. §6926; (RCRA §3006). EPA does not, however, have the discretion to take over operation of a state program that meets federal requirements. *Id*.

39. 42 U.S.C. §6925; (RCRA §3005).

40. RCRA's "fail-safe" system requires specific operating and design standards. The technologies involved were initially designed essentially for zero discharge, although EPA has more recently asserted that perpetual protection is an unrealistic goal, because dump liners (clay, plastic sheeting) will eventually be penetrated. 47 Fed. Reg. 32,286 (1982).

41. Id. at 32,273; Bromm, EPA's New Land Disposal Standards, 12 Env't. L. Rep. (Env'tl. L. Inst.) 15027 (1982).

42. See discussion in infra III.B.

43. 42 U.S.C. §6925(e) (RCRA §3005(e)). Interim status must be sought by the existing facilities and minimum standards must be complied with. See EDF v. Lamphier, 12 Env'tl. L. Rep. (Env'tl. L. Inst.) 20, 843 (E.D. Va. May 14, 1982).

44. 33 U.S.C. §§1251-1376.

45. Id. §1321.

46. See Grad, supra note 14, at 22.

47. Hazardous and Toxic Waste Disposal (1979): Joint Hearings on S.1341 and S.1480 Before the Subcomm. on Environmental Pollution and Resource Protection of the Senate Comm. on Environment and Public Works, 96th Cong., 1st Sess pt. 4 at 420-22, 480-85 (1979).

48. See 42 U.S.C. §9605; (CERCLA §105). Other federal measures regarding oil spill liability include the Deepwater Ports Act, 33 U.S.C. §1517; the Offshore Oil Spill Pollution Fund, 43 U.S.C. §1814; and the Trans-Alaskan Pipeline Authorization Act, Id. §§1653(a)(1) and 1653(c)(1).

49. If effluent from a site is "permitted" under the CWA, it is clear that response costs may not be recovered under CERCLA §107. See §107.

50. 2 U.S. Water Resources Council, Second National Water Assessment 20 (1978). See also Wilson, Groundwaters: Are they Beneath the Reach of the Federal Water Pollution Control Act Amendments? 5 Envtl. Aff. 545 (1970).

51. See Kentucky ex rel. Hancock v. Train, 6 E.L.R. 20,689 (E.D. Ky. 1976).

52. Tripp and Jaffe, Preventing Groundwater Pollution: Towards Coordinated Strategy to Protect Critical Recharge Zones, 3 Harv. Envtl. L. Rev. 1 (1979). Changes in the Clean Water Act could establish a more viable approach to controlling groundwater pollution. An amendment to the Act which was rejected in 1972 would have defined pollutant discharges to include "any addition to any pollutant to ground waters from any point source. Environmental Policy Division, Congressional Research Service, A Legislative History of the Water Pollution Control Act Amendments of 1972, 93rd Cong., 1st Sess. 589 (Senate Comm. Public Works Print 1973). If such changes were made today, hazardous waste sites could come within the scope of the CWA.

53. Pub. L. No. 94-469, 90 Stat. 2003, codified at 15 U.S.C. §§2601-2629. TSCA is unusual in a number of respects. First, no federal statute since the 1930s has visited such sudden, complete regulation upon a major industry. Approximately 11,500 establishments employing 1.1 million persons produced or distributed chemicals worth over $162 billion in 1980--more than 5 percent of the nation's gross national product. Council on Environmental Quality, Environmental Quality: Thirteenth Ann. Rep. 115 (1982). Cumulative compliance costs over the decade ending in 1988 will probably exceed $8.2 billion. Council on Environmental Quality, Environmental Quality: Twelfth Ann. Rep. 397 (1981). Second, although its political support originated in the environmental movement rather than in the worker or consumer protection movement, TSCA's emphasis falls high in the stream of commerce. As a product safety law TSCA more closely resembles the Federal Inseticide, Fungicide, and Rodenticide Act and the Federal Food, Drug, and Cosmetic Act, than, for example, the Clean Air and Clean Water Acts, the Consumer Product Safety Act, or RCRA and Superfund. Third, TSCA's "action-forcing" provisions setting deadlines and authorizing citizens suits have been disappointing to its proponents, who do not believe that its testing and pre-manufacture review provisions have improved chemical product safety.

TSCA requires that EPA be given pre-manufacturing notice of data and test results regarding new chemicals. EPA then determines if the new chemical presents an unreasonable risk, or if more testing must be done. 15 U.S.C. §2604. Manufacturers or others who put chemicals in commerce must perform tests on both new or existing chemical substances and mixtures if EPA determines that they present unreasonable risks or that existing information is insufficient to allow an informed preliminary assessment to be made. Id. §2603. Ample enforcement authority empowers the Administrator to limit or forbid the manufacture of both new and existing chemicals which studies show present an unreasonable risk to health or the environment. Id. §2605.

54. Id. §2603(a); (TSCA §4(a)).

55. Id. §2605(a); (TSCA §6(a)).

56. Id. §2605(a)(6)(A); (TSCA §6(a)(6)(A)).

57. 42 U.S.C. §§300f-300j-10.

58. Id. §300f(4); (SDWA §1401(4)).

59. For a summary of the public health problems arising from the contamination of groundwater and drinking water, see Okun, Philosophy of the Safe Drinking Water Act and Potable Reuse, 14 Envtl. Sci. and Tech. 1293 (1980); General Accounting Office, Ground Water Overdrating Must be Controlled (1980); Council on Environmental Quality, Contamination of Ground Water by Toxic Organic Chemicals (1981).

60. 42 U.S.C. §300g-1(b); (SDWA §1412(b)). See 40 C.F.R. §§141, 143. The primary maximum contaminant levels (MCLs) for drinking water from public water systems include levels for microorganisms, turbidity, and organic and inorganic chemicals. The secondary standards address color, odor, and the appearance of water. See also Council on Environmental Quality, Environmental Quality: Eleventh Annual Report 87 (1980). One court has held that the Act does not regulate the discharge of pollutants into waterways and therefore does not provide a cause of action to a municipality whose drinking water supply was contaminated by a toxic chemicals discharge. City of Evansville v. Kentucky Liquid Recycling, 604 F.2d 1008 (7th Cir. 1979). See also United States v. Price, 523 F. Supp. 1055 (D. N.J. 1981), in which the court held that the imminent hazard provision of the Act [§143] authorizes broad relief, including the treatment of hazards and the provision of alternate water supplies. The court maintained that "the relief available under section 1431 [of SDWA] is broader than that available under section 7003 of RCRA." 523 F. Supp. at 1075.

61. The UIC Program regulations set injection well specifications and regulate radioactive and hazardous waste disposal wells, industrial and municipal wells within one-quarter mile of an underground drinking water source, oil and natural gas recovery wells, and wells for the extraction of minerals and geothermal energy. 42 U.S.C. §300h; (SWDA §1421). Underground injection refers to "the subsurface emplacement of fluids by well injection." *Id*. §300h(d). Underground injections can result in the contamenation of groundwater destined for drinking water use.

62. After designation, federal financial assistance may not be committed to a project which may contaminate an aquifer through a recharge zone so as to create a significant public health hazard. 40 C.F.R. §122.32 (1981). Sole-source designation can be done on the Administrator's initiative or at the request of any other person. 42 U.S.C. §300h-3(e); (SDWA §1424(e)). The sole-source provision could affect a decision regarding a dump site's suitability for inclusion on the National Priority List. The EPA's discretion in designating an aquifer as "sole source" is very broad. *See* Montgomery County v. EPA, 662 F.2d 1040 (4th Cir. 1981) (seven drainage basins designated as a single aquifer).

63. Title I of the Transportation Safety Act of 1975, Pub. L. No. 93-633, 88 Stat. 2156, codified at 49 U.S.C. §§1801-1812. For the history of federal hazardous materials transport, *see* S. Rep. No. 1192, 93d Cong., 2d Sess. 6-7 (1974) and Note, *Regulation of the Transportation of Hazardous Materials: A Critique and Proposal*, 5 Harv. Envtl. L. Rev. 346-48 (1981).

64. 49 U.S.C. §1802(2). The DOT has more than fulfilled HMTA's promise to regulate the "packing, repacking, handling, labeling, marking, placarding, routing (except with respect to pipelines) of hazardous materials" and the "manufacture, fabrication, marking, maintenance, reconditioning, repairing, or testing of a package or container" used in transport with extensive regulations. 49 C.F.R. §172 (1981). The Department has placed a great deal of emphasis on ensuring use of containers which will not leak or rupture in all modes of transport through which they may pass (highway, rail, air, water, and pipeline). The DOT's Materials Transportation Board, created in 1975, was given overall authority to develop HMTA regulations and to police container integrity and intermodal transport, but the separate DOT agencies still retain important consultative, inspection, and enforcement powers within their modes.

65. EPA's RCRA regulations must be consistent with HMTA. 42 U.S.C. §6923(b); (RCRA §3003(b)). EPA and DOT have issued regulations, 49 C.F.R. §§171-177 (1981), 40 C.F.R. §263, and have attempted to cooperate and define their respective responsibilities. 45 Fed. Reg. 51,645 (1980).

66. The Atomic Energy Act, 42 U.S.C. §2011, gives the NRC broad authority to control all aspects of the use of radioactive materials. DOT has worked to coordinate its authority with that of the NRC.

67. OSHA has promulgated some transport workplace regulations that affect the transportatin of hazardous materials. OSHA regulates the transportation of compressed gases, inflammable or combustible liquids, explosives and blasting agents, liquified petroleum gases, and anhydrous ammonia. See 29 C.F.R. §§1990.101-.116 (1981).

68. The Interstate Commerce Act, 49 U.S.C. §15021, gives the ICC the authority to regulate hazardous materials, but the Commission has largely deferred to DOT. See Note, supra note 51, at 353; Comment, Hazardous Wastes at the Crossroads: Federal and State Transit Rules Confront Legal Roadblocks, 12 Envtl. L. Rep. (Envtl. L. Inst.) 10,075 (1982).

69. See 42 U.S.C. ch. 68 for the general federal disaster relief acts. Before assistance may be made available, the President must declare an emergency based on a recommendation from the governor of the affected state. 42 U.S.C. §§5142, 5145. Although the federal government coordinates disaster relief activities, cleanup and recovery actions are undertaken by the state or local governments. Federal assistance directly to citizens occurs through unemployment assistance, grants, and food assistance. Long-term disaster recovery loans are made available to communities. §§5143-5144; §5184. In contrast to disaster relief, a number of federal programs merely provide for research and information dissemination. The thrust of such programs is to deal with problems that are expected to occur or problems that are not yet clearly understood. For example, the Earthquake Hazards Reduction Act of 1977 deals with expected yet unpredictable future hazards by seeking to improve understanding of earthquakes and to develop mitigation strategies. Id. Pub. L. 95-124, 91 Stat. 1098, codified at 42 U.S.C. §§7701-7706. A similar law is the Acid Precipitation Act of 1980, which established a ten year research program to identify the sources

and effects of acid precipitation. Publ. L. 96-294, 94 Stat. 770, *codified at* 42 U.S.C. §§8901-8912.

70. Publ. L. 91-695, 84 Stat. 2078, codified at 42 U.S.C. §§4801-4846.

71. Pub. L. 95-604, 92 Stat. 3021, codified at 42 U.S.C. §§7901-7942.

72. Publ. L. 96-270, 94 Stat. 487, codified at 20 U.S.C. §§3601-3611.

73. Publ. L. 91-173, 83 Stat. 742, codified at 30 U.S.C. §§901-962.

74. 30 U.S.C. §§1231-1243.

75. 30 U.S.C. §§ 1201-1328.

76. 30 U.S.C. §§1235 and 1237.

77. *Id.* §§1231 and 1232. The abandoned mine reclamation program is to the Surface Mining Control and Regulation Act (SMCRA), what CERCLA is to the Resource Conservation and Recovery Act (RCRA). Both SMCRA and RCRA establish comprehensive regulatory schemes to minimize future harms flowing from environmentally threatening conduct. The abandoned mine program and CERCLA are designed to eliminate conditions that were in existence at the time SMCRA and RCRA were passed and for which those acts offered no solution.

78. 42 U.S.C. §9601(32).

79. 33 U.S.C. §1321(f).

80. *See*, e.g., Stewart Trans. Co. v. Allied Towing Corp., 596 F.2d 609, 613 (4th Cir. 1979).

81. *See* United States v. A & F Materials Co., No. 83-3123 (S.D. Ill. Jan. 20, 1984).

82. Pub. L. 93-627, 88 Stat. 2126, codified at 33 U.S.C. §§1501-1524.

83. 33 U.S.C. §1517(d) and (e).

84. Pub. L. 93-153, 87 Stat. 584, codified at 43 U.S.C. §§1651-1655.

85. 43 U.S.C. §1653(a)(1) and (c)(1).

86. 43 U.S.C. §1814(a).

87. 33 U.S.C. §1517(f).

88. 43 U.S.C. §1812(a) and (d).

89. 43 U.S.C. §1653(c)(4) and (5).

90. For example, the oil spill liability acts create liability and tax industry regarding spills that will occur in the future. In contrast, CERCLA's purpose is to remedy preexisting hazardous conditions by imposing liability on persons who used a given site.

91. 30 U.S.C. §§932 and 934. See also 26 U.S.C. §4121.

92. 30 U.S.C. §1232.

93. 33 U.S.C. §1321(c)(1). See also 33 U.S.C. §1517(c)(1) (Deepwater Ports Act).

94. 33 U.S.C. §1321(g).

95. Id. §1321(g) and (h). The CWA demonstrates that when Congress wants to establish a right, such as contribution, it can do so by express language.

.96. See 42 U.S.C. §9607(a).

97. See 33 U.S.C. §§1321(c)(2) and (e).

98. For example, one of CERCLA's features, suits against responsible parties to recoup response costs when the conduct giving rise to the liability occurred before enactment of the law, is also found in the Asbestos School Hazard Detection and Control Act of 1980, 20 U.S.C. §3607.

Footnotes to III

99. RCRA §7003. See Note, Using RCRA's Imminent Hazard Provision in Hazardous Waste Emergencies, 9 Ecology L. Q. 599, 601 n. 9 (1981). The Justice Department filed its first suit under RCRA §7003 in February, 1979. United States v. Kin-Buc, Inc., No. 79-514 (D.N.J. filed Feb. 7, 1979). By the time Attorney General Benjamin Civiletti created the Hazardous Waste Section in the Land and Natural Resources Division on October 7, 1979, four suits had been filed. The government filed suit against Hooker Chemicals and Plastics Corp. over the Love Canal dump in December of 1979, United

States v. Hooker Chemicals and Plastics Corp., Civ. No. 79-990 (W.D.N.Y. filed December 20, 1979), one of four suits filed against Hooker in the same day. By the end of the section's first year, in October 1980, 51 cases had been filed and six had been the subject of consent decrees by responsible parties. Annual Report of the Hazardous Waste Section, Land and Natural Resources Division, U.S. Department of Justice (October, 1980). By year's end, the section had filed four more actions. Note, *supra*, 9 Ecology L. Q. at 601 n. 9. *See also* 11 Env't Rep. (BNA)--Curr. Dev. 813 (Oct. 17, 1980).

100. In March of 1979, EPA Deputy Administrator Barbara Blum organized a small Hazardous Waste Task Force composed of various headquarters technical and legal personnel to give support to the Justice Department initiative. Similar regional task forces were also formed. *See* 9 Env't Rep. (BNA)--Curr. Dev. 2292 (April 6, 1979). By the time it was phased out in February and March of 1981, it was known as the Office of Hazardous Waste Enforcement and had a professional staff of approximately 35, divided roughly half-and-half between attorneys and technical personnel. Its staff continued to report to the Assistant Administrator for Enforcement until July, 1981, when the first of a series of agency reorganizations releasing or transferring enforcement personnel took place. Telephone interview, John Wheeler, Attorney, EPA Office of Enforcement Counsel, April 20, 1984. Mr. Wheeler was hired for the Task Force in late 1980 and experienced the various reorganizations. *See* note 119 *infra*.

Ordinarily, EPA makes the key decisions under federal pollution control statutes. If litigation is necessary to enforce the statutes, EPA may request the Land and Natural Resources Division of the Department of Justice to bring suit. The attorney-client relationship between the Department and EPA is not in all respects traditional; it provides a cameo study of the government-wide struggle for agency autonomy from the Department, the desginated broker of executive relationships with the judiciary. *See* Olson, Agency Litigating Authority as a Factor in Court Policy Making, paper delivered at Annual Meeting of the American Political Science Association, Chicago, Ill., September, 1983, at 15-18. *See generally* D. Horowitz, *The Jurocracy: Government Lawyers, Agency Programs, and Judicial Decisions* (1977). The struggles resulted in a 1977 joint Memorandum of Understanding which provides that if prompt departmental representation in an enforcement action is not provided, EPA may bring the action itself, and that EPA lawyers will be allowed to participate in actions prosecuted by the Department. Section 305 of the Clean Air Act Amendments of 1977 codifies the Memorandum in part. The text appears at Env't Rep. (BNA)--Fed. Laws 41:2401 (March 23, 1979). Since the 1977 agreement, all referrals to the Department must be made by EPA headquarters. The earlier, somewhat uneven practice of regional referrals directly to the United States attorneys or the Land and Natural Resources Division ceased except on rare occasion in federal districts where the United States attorney has traditionally played a strong enforcement role (e.g., the Southern District of New York, the District of New Jersey, and the Northern District of Indiana). Hazardous waste enforcement cases are handled almost without exception through the Department of Justice. Federal Water Pollution Act §311 spill cleanup case management followed the centralizing influence of the Memorandum. Federal enforcement had no significant role to play under the Solid Waste Disposal Act until it was amended root-and-branch by RCRA in 1976. RCRA implementation consisted almost entirely of rule making until the early 1980s, except for the cases brought under §7003.

The 1977 Memorandum has served its peacekeeping purpose well, although Congress has the jurisdiction over waste litigation under review. Legislation has been introduced by Congressman John Dingell (D-Mich.) which would give EPA broad authority to manage its own hazardous waste litigation if the Department fails to act within 30 days of an EPA request that suit be brought. H.R.2867, §11d, 98th Cong., 1st Sess. 1983. A recent modification to the 1977 Memorandum permits the EPA regional offices to refer cases once again directly to the Department on an experimental basis, but the experiment has not yet been extended to hazardous waste cases. 14 Env't Rep. (BNA)--Curr. Dev. 924 (September 30, 1983).

101. In statements to the American Bar Association on August 10, 1981, Department of Justice Section Chief Anthony Z. Roisman encouraged the chemical industry to begin negotiating clean-ups instead of resorting to litigation. He based his recommendation on the government's "get-tough" posture coupled with its successful litigation track-record up to that time. Of 61 cases filed, the government had received 10 temporary restraining orders and 11 consent decrees. See 12 Env't Rep. (BNA)--Curr. Dev. (Aug. 14, 1981).

102. See IV.A.5 infra.

103. Telephone interview, James W. Moorman, former Assistant Attorney General, Land and Natural Resources Division, Department of Justice, April 8, 1984. The use of consent decrees in the enforcement of public law litigation has recently renewed judicial and legislative concern about how well they protect the public interest. See IV.A.5 infra.

104. The conversion underway now of the flexible cleanup approach of CERCLA to a quasi-regulatory program parallels in interesting respects the difficulties encountered by the 1970 Refuse Act Permit Program (RAPP), 36 Fed. Reg. 6564 (1971), a deceptively simple water pollution cleanup scheme under which Corps of Engineers permit authority (under the 1899 Refuse Act, 33 U.S.C. §407 (1976)), a Corps permit was necessary to authorize release of any "refuse matter" into U.S. navigable waters) was exercised to implement effluent standards developed by the EPA. RAPP foundered under the technical difficulties and sheer bulk of 40,000 permit applications and soon become enmeshed in controversy over whether NEPA impact statements had to be prepared on each permit. Kalur v. Resor, 335 F.Supp. 1 (D.D.C. 1971), had required them. The RAPP was superceded by the Federal Water Pollution Control Act Amendments of 1972 (FWPCA), Pub. L. No. 92-500, 86 Stat. 816, a complex regulatory scheme occupying 72 pages of the U.S. Public Laws. See J. Quarles, Cleaning Up America at 114 (1976). But RAPP and the FWPCA addressed long-existing surface water pollution that had already been covered in numerous state laws, and federal law since 1947. Moreover, surface water pollution involved ongoing, point-source discharges from an expanding number of sources. CERCLA requires a one-time cleanup of inactive and abandoned sites; RCRA was specifically enacted to regulate active sites.

105. See Fielding, The Environmental Interregnum -- It's Over, 2 Envtl. F. 10 (June, 1983); The EPA Controversy: How the Nation's Editorial Writers Viewed It, Id. at 44-45.

106. EPA's 'Ins' and 'Outs," 2 Envtl. F. 47 (June, 1983); The "Old" EPA: Where Are They Now?, 2 Envtl. F. 47 (March, 1984).

107. CERCLA §303, 42 U.S.C. §9653, precludes the collection of Superfund taxes after September 30, 1985 unless reauthorized by Congress. EPA Assistant Administrator Rita Lavelle, director of the CERCLA program,

testified at a congressional hearing that her policy of negotiating settlements with waste dumpers instead of using enforcement proceedings against them had been adopted by the EPA Administrator with White House approval. Newsweek, Mar. 7, 1983, p. 18.

108. CERCLA §105 42 U.S.C. 9605. Although CERCLA did not make promulgation of the Plan a condition precedent to remedial expenditures from the Fund, the Plan was to establish the National Priority List of sites and put in place numerous other procedures for systematically addressing the site cleanup problem. Thus EPA made priority listing a condition precedent by rule. See 40 C.F.R. 300.68(a).

109. Environmental Defense Fund, Inc. v. Gorsuch, 12 Envtl. L. Rep. (Envtl. L. Inst.) 20376 (D.D.C. Feb. 12, 1982), order modif. id. at 20401 (1982). See McChesney, EPA proposes Court-ordered Contingency Plan Revision under Superfund; Stresses Flexible Clean-up Standards, 12 Envtl. L. Rep. (Envtl. L. Inst.) 10040 (1982).

110. Prior to publication of the Plan in mid-1982, 47 Fed. Reg. 31180 (July 16, 1982), EPA had obligated just over $24 million for removals and remedial actions, although the Fund contained over $250 million. 12 Env't Rep. (BNA)--Curr. Dev. 1490 (1981). EPA accounting figures through September, 1982 showed that $452 million had been collected under CERCLA but only $88 million had been spent. 13 Env't Rep. (BNA)--Curr. Dev. 884 (1982). An interim NPL identifying 115 sites was published on October 23, 1981; an additional 45 sites were added in July 1982; a proposed list of 418 sites was published only on December 20, 1982. 47 Fed. Reg. 58476 (Dec. 30, 1982).

111. 13 Env't Rep. (BNA)--Curr. Dev. 2307 (April 13, 1983).

112. Scattered reports emerged that CERCLA funds were spent to aid Republican candidates or withheld to harm Democratic candidates, e.g., that EPA delayed a $6.1 million Superfund grant to clean up the Stringfellow Acid Pits site in California to avoid aiding then-Governor Jerry Brown's senatorial campaign. Washington Post, Feb. 9, 1983, p. A1; The N. Y. Times, Feb. 24, 1983, p. 13; Newsweek, Mar. 7, 1983, pp. 17-18.

113. Charges of EPA mismanagement came from many quarters. A draft report by EPA Inspector General Matthew Novick said he had been unable to show that $53.6 million from the Superfund had been spent for its intended purpose. The N.Y. Times, Feb. 19, 1983, pp. 1, 10.

114. In October 1982, the House Energy and Commerce Subcommittee on Oversight and Investigations and the House Public Works and Transportation Subcommittee on Investigations and Oversight requested EPA enforcement documents on varios hazardous waste sites, curious whether negotiated voluntary settlements fell short of what the public should recover in expenses. 13 Env't Rep. (BNA)--Curr. Dev. 882 (1982). The Administration claimed executive privilege, stating that the documents were "enforcement-sensitive" and that their release would reveal litigation strategy for cases under development. Id. at 881. Both committees then voted to issue contempt citations to Administrator Gorsuch, and the 259-105 vote of the full House followed on December 16, 1982. 13 Env't Rep. (BNA)--Curr. Dev. 1435 (1982). After the government suggested it might not prosecute the citation, a negotiated settlement provided that members of Congress could inspect but not copy the documents. Id.

115. In February 1983, Rita M. Lavelle, Assistant Administrator for Solid Waste and Emergency Response, was dismissed from her position. Initial reports of the dismissal indicated that EPA Administrator Gorsuch deemed the dismissal an agency "personnel issue." The N.Y. Times, Feb. 10, 1983, p. 1. Subsequent coverage of the dismissal suggested collusion by Lavelle with the companies subject to cleanup litigation. Newsweek, Mar. 7, 1983, p. 18. One of the companies on the list of dumpers at the Stringfellow Acid Pits site was Aerojet Liquid Rocket Company. From 1979 until her appointment to EPA, Ms. Lavelle was director of communications of the Cordova Chemical Company, a division of Aerojet. The N.Y. Times, Feb. 10, 1983, p. B10. EPA memos indicated that Lavelle continued to play a role in negotiations over cleanup of the Stringfellow site despite the obvious conflict of interest. The N. Y. Times, Feb. 9, 1983, p. B13. Ultimately, Ms. Lavelle was indicted and convicted both for perjury in her testimony to the House Energy and Commerce Committee about the date on which she learned of her former employer's involvement with the Stringfellow site and for obstructing congressional investigation of these events. 14 Envtl. Rep. (BNA)--Curr. Dev. 1417 (Dec. 9, 1983). At the time of conviction, the chairman of the House Energy and

Commerce Committee, John Dingell (D-Mich.), was quoted as saying, "I would hope that the painful experience of Miss Lavelle can be a useful reminder both to these public servants who were dutiful and upheld the law -- that they did the right thing -- and to those who will be called to account in the future. Id. at 1418.

116. One report, prepared at the request of Administrator Burford prior to her resignation, blamed conflicts between top EPA officials and regional offices for most of the problems in implementing the Superfund clean-up program. See 14 Env't Rep. (BNA)--Curr. Dev. 52 (May 13, 1983). In testimony before a Senate subcommittee, Rita Lavelle charged that there was no established chain of command at EPA, which resulted in disorganization and internal splits. Newsweek, March 7, 1983, at 17.

117. The problem in fact transcends EPA. Programmatic and enforcement functions shade imperceptibly into one another in the spectrum of administrative acts comprising the implementation of complex schemes to regulate the economy or protect workers, consumers, patients, or the environment. With such statutes as the anti-trust laws, "enforcement" begins when Department of Justice lawyers in the Civil Division bring (or threaten to bring) legal action to secure judicially ordered compliance with the statutory norms. In such relatively "self-executing" schemes, program rule makers have no role. But in more complex social regulatory programs, such as the pollution control statutes which EPA administers, large program staffs maintain frequent contact with the regulated communities, from inception of rule making through permit issuance, compliance, rule modification, repermitting, and adjusted compliance, in never-ending reiteration. Statutory sanctions reflect this progression by providing a spectrum of compliance-seeking measures -- permitting, self-reporting, notice, conferences, administrative orders, inspections, civil penalties, various delayed or adjusted compliance orders, injunctions, fines, and imprisonment. When sought by a rule-defining program office, compliance initially has a strong managerial component, characterized by non-adversarial negotiation to secure performance with the norm. Yet at the same time the failure to comply is a latent or actual violation of law, which soon must shade over into efforts to compel rather than cajole. As the coloration of agency efforts darkens, the management response yields to a legal one; law and lawyers figure more prominently, and technical personnel begin to

lose control of the implementation process. Agency "enforcement" stands in this twilight zone. At EPA, enforcement has variously been dominated by the technical programs or the General Counsel or has been sui generis. Enforcement personnel similarly may or may not hold law degrees and may or may not have a strong "enforcement mentality." Indeed, the alacrity and toughness of the Janus-faced enforcement function varies considerably depending upon the organizational treatment it receives and whether the agency views it as a lawyer-dominated function, to be staffed predominantly by attorneys, or as a mixed function, with strong program involvement or even supervision.

118. In the first EPA organization, one individual held the title of Assistant Administrator for Enforcement and General Counsel. See EPA, The First Two Years -- A Review of EPA's Enforcement Program (February, 1973); EPA, EPA Enforcement: Two Years of Progress (1975). His fairly small, policy-oriented office advised and supported the primary regional enforcement effort, which paradoxically was organized into separate offices under the regional administrators. A regional enforcement division housed most of its lawyers in a legal branch. The regional counsels occupied a separate, coordinate niche. Prior to 1974, regional enforcement personnel primarily wrote NPDES permits, helped review SIP components, conducted air quality compliance conferences, and (of subsequent importance to CERCLA) enforced the oil and hazardous substances spill provisions of FWPCA §311. Interview with Kirk Sniff, EPA Associate Enforcement Counsel for Waste, February 24, 1984.

In 1975, EPA split the functions of General Counsel and Assistant Administrator for Enforcement. Headquarters enforcement was staffed with a mix of attorneys and program personnel; its small, policy-oriented effort was focused on management and coordination, not hands-on enforcement. Regional structure was unchanged, so that regional and headquarters enforcement and legal review were both finally organized in parallel. EPA, EPA Enforcement: A Progress Report, December 1974 to December 1975 (1976).

119. Under Administrator Gorsuch, three turbulent enforcement-program reorganizations occurred within 12 months. On July 15, 1981, the agency created the new post of Assistant Administrator for Legal and Enforcement Counsel, to whom the General Counsel and the director of a new Office of Enforcement Policy (a

small group of enforcement policy specialists) reported. All but a few technical and legal personnel from the former enforcement operation were dispersed to the programs in which they specialized. But chagrined at the loss of power as the result of the dispersal of so many staff members to program offices six months earlier, on Christmas Eve, 1981, the head of the Office of Enforcement Policy prevailed on the Administrator to move all the attorneys, but not the technical enforcement personnel, back under his aegis. The Office of Enforcement Policy (now renamed the Office of Enforcement Counsel) created among other things two "multimedia" bureaus in a misguided attempt to integrate enforcement. The post of Assistant Administrator for Legal and Enforcement Counsel then was unoccupied; the General Counsel and the director of the Office of Enforcement Policy were at war, bureaucratically speaking, if trade press reports were accurate. 12 Env't Rep. (BNA)--Curr Dev. 645, 684 (1982). The July 15 reorganization virtually destroyed the regional enforcement divisions. Their attorneys were moved to the regional General Counsel's offices, others to the programs with which they were most concerned. By late March, 1982, the General Counsel had defeated the director of the Office of Enforcement Counsel and had advanced to the post of Assistant Administrator for Enforcement and Legal Counsel. Advised by a special enforcement task force that the multi-media approach failed to permit EPA to capitalize upon its expertise and ability to specialize and was disliked by almost all agency personnel involved in enforcement, the Assistant Administrator assigned all OEC personnel to one of four units: air, water, wastes, or pesticides and toxic substances. No changes were made in enforcement in the regions, nor was the MOU with the Justice Department modified. Enforcement Task Force, Final Report to the Associate Administrator for Legal and Enforcement Counsel and General Counsel (May 28, 1982). A fourth reorganization occurred in the summer of 1983. See note 145 infra.

120. Without exception, the present and former EPA officials whom I interviewed mentioned Committee Chairman John Dingell and raised the spectre of oversight hearings if negotiated agreements for cleanup are entered into by the agency.

121. The site at Seymour, Indiana, involved some 20,000 tons of wastes -- 60,000 drums and 98 bulk storage tanks -- deposited by approximately 364 known generators. Federal emergency removal actions

responded to fires, explosion, and immediate threats to health, but a long-term Fund remedy could not be launched, because the site was municipally owned and Indiana could not provide the 50 percent of remedial costs required by CERCLA §104(c)(3). Relegated to lawsuits or a negotiated cleanup, the government accepted the offer of 24 large generators who accounted for about half the wastes to conduct a complete cleanup of the surface in return for federal covenants not to sue for any further costs incurred at the site. The EPA had estimated that total cleanup would cost $30 million -- $15 million for the surface, the remainder for soil and groundwater cleanup and protection. The settling generators were able to obtain the cleanup for $7.7 million. The court upheld the reasonableness of the settlement. United States v. Seymour Recycling Co., 554 F.Supp. 1334 (S.D. Ind. 1982). The EPA sent demand letters to 340 smaller non-settlers for their pro-rata shares of the remaining cleanup, still estimated to cost $15 million. By late 1983, some of the smaller generators had provided an additional $5 million. The federal government has sued the remaining generators and operators for the balance of its projected cleanup costs. Surface cleanup has been completed. 14 Env't Rep. (BNA)--Curr. Dev. 1437 (December 16, 1983).

The Seymour settlement provoked a storm of protest ranking it ahead of Chem Dyne as the most studied and criticised CERCLA settlement. Critics charged that the large settlers had obtained a "sweetheart deal" because they had paid into the Seymour cleanup at a rate half what EPA estimated surface cleanup would cost and half what the smaller, subsequent settlers were allowed. The total releases further shielded them from any additional expense, should sums otherwise collected prove inadequate for the groundwater cleanup. *See* 13 Env't Rep. (BNA)--Curr. Dev. 877, 878 (1972). *But see* Bernstein, *The Enviro-Chem. Settlement: Superfund Problem Solving*, 13 Envtl. L. Rep. (Envtl. L. Inst.) 10402, 10403 n. 7 (December, 1983) (appearance of sweetheart deal based on inflated cost figures). Often, small generators disfavor allocation methods that could create financial responsibility in excess of the volume of waste that they sent to a site. *See* Ward, *Settling at Chem-Dyne*, 1 Envtl. F. 7.15 (December, 1982). The Enviro-Chem settlement refined the allocation methodology employed by the Seymour settlement. The refinements were designed to allocate more fairly each defendant's costs. *See* Bernstein, *supra* at 10403.

122. The General Disposal Site at Santa Fe Springs, California, contained 50,000 drums of sludge and chemical waste. The principal generator was the Inmont Corp. which obtained a complete release from all federal claims under all statutes in return for a settlement of $700,000 on September 26, 1981. No consent decree was entered. An assistant to Administrator Gorsuch reportedly leaked the government's negotiating position to Inmont's lawyer. At a point when negotiations seemed to break down, Inmont offered the EPA's bottom line position of $700,000. EPA accepted. See Hazardous Waste Enforcement, Report of Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, H.R. Rep. No. 97-NN, 97th Cong. 2nd Sess. (1982). General Disposal was the first CERCLA settlement.

123. Wastes at the Chem-Dyne waste facility near Hamilton, Ohio included some 11,500 drums and 14 bulk tanks or silos, some of which were damaged and leaking. The water table lies 20-30 feet below, through sandy, porous soil. EPA estimated surface cleanup to cost $3.4 million. In a negotiated settlement announced August 26, 1982, 116 of the nearly 300 identified potentially responsible parties provided 70 percent of the estimated surface costs and groundwater studies or $2.4 million, the remainder to be paid by the Fund while the U.S. and Ohio sue 25 non-settling major generators for reimbursement. No releases were given for groundwater cleanup. Ward, Settling at Chem-Dyne, 1 Envtl. F. 7-17, (December, 1982) (treating the agreement in detail, including a list of the 116 settling parties and amounts, a list of non-settlors, and the full text of the agreement). See also 13 Env't Rep. (BNA)--Curr. Dev. 597 (September 3, 1982).

Praised contemporaneously, Ward, supra, at 7, the Chem-Dyne settlement nevertheless was not subject to public-interest judicial review, because the settlement was not incorporated in a consent decree. (Because payments were made at the time the bargain was struck, subsequent enforcement via decree was arguably unnecessary.) Further, a 70 percent settlement falls 10 percent short of the amount EPA currently requires even to enter negotiations, and 30 percent short of its negotiating goal. See III.B. infra. Finally, the U.S. and Ohio agreed not to sue the settlers for any surface cleanup, should the $3.4 million estimate prove to be low. Additionally, the U.S. agreed that should the settlers be impleaded for contribution in the court action against the non-settlors, and should the judge subsequently find that the impleaded settlors owe the non-settlers contribution over and above the settled amounts, the U.S. will reduce the settlement contributions by the amount of court-ordered contribution, thereby effectively forcing the Fund to pay the settlers' contribution.

EPA drew criticism for its lack of action at the Chem-Dyne site. For more than six months after the settlement for surface cleanup was reached with responsible parties, EPA struggled with the Army Corps of Engineers and the state-appointed receiver over access to the property. The Army Corps of Engineers, which was to manage the clean-up for the EPA under the agreement, refused to enter the property without written consent from the property owners. Washington Post, Feb. 26, 1983, §A, at 11.

124. As of the fall of 1983, 36 agreements for complete cleanup had been reached (21 of which are NPL sites), while particular settlements, e.g., for surface cleanup and studies, affected 31 additional sites. The total value of these settlements was $175.6 million, slightly exceeding the federal commitment from Superfund ($172.9 million) for the same period. Fact Sheets provided by Lee M. Thomas, EPA Assistant Administrator for Solid Waste and Emergency Response, Conference on Superfund, sponsored by the American Bar Association Natural Resources Law Section, Crystal City Mall, Arlington, Virginia, November 9, 1983. During fiscal year 1983 alone, the Justice Department and EPA obtained some $70 million in consent-ordered cleanups. Mary Walker, Deputy Assistant Attorney General, U.S. Dept. of Justice, Statement in Hearings Before the Subcommittee on Investigations and Oversight of the House Comm. on Public Works and Transportation, December 15, 1983, at 1. By March 15, 1984 the EPA had negotiated 42 full or partial settlements calling for the expenditure of more than $150 million by private industry to conduct cleanups or to compensate government agencies for their response and cleanup expenditures. Hinden and Tasher, EPA Hazardous Waste Enforcement: A Policy in Evolution, printed in Hazardous Waste Litigation 1984 (Practicing L. Inst. 1984). An additional 17 consent decrees were negotiated in Fiscal Year 1983. Id. By May, 1984, negotiated settlements reached by the agency totalled $278.1 million. Letter from Lee A. Thomas, EPA Assistant Administrator, to Loren Smith, Chairman, Administrative Conference of the United States, May 17, 1984, commenting on an earlier draft of this paper.

125. In some instances, settling parties have agreed to clean up the entire site. See United States v. Olin Corp., No. 80-PT5300 (N.D. Ala.) (consent decree to clean up extensive DDT contamination arising from a plant near Huntsville, Alabama); United States v. Occidental Petroleum, No. 79-989 MLS (E.D. Cal.) (cleanup and other remedial action to end groundwater contamination from facility in Lathrop, California).

Several settlements that have been reached are for the purpose of reimbursing governments for their response actions. See, e.g., Philadelphia v. ABM Disposal Services, No. CA 80-4464 (E.D. Pa.) (city reached out of court settlement with four defendants who agreed to pay $1.3 million, bringing total out of court collections to $5.9 million); United States v. Petro Processors, No. 80-358-B (N.D. La. 1983) (10 defendants agreed to cleanup toxic chemicals and other wastes at two sites over a 15 year period and to maintain and monitor the sites at a cost of $60 million. Written case summary provided by Kirk Sniff, Director, Office of Associate Enforcement Counsel for Waste (3 pp.) (no date)).

The first settlement reached under the Ruckelshaus administration concerned the Enviro-Chem site. See Bernstein, The Enviro-Chem Settlement: Superfund Problem Solving, 13 Envtl. L. Rep. (Envtl. L. Inst.) 10402 (1983). The settlement involved 246 generator defendants who agreed to pay $2.9 million for surface cleanup activities and for the study of groundwater. Settlers were released from liability for any damages occurring to a depth of four feet at the site, and the government agreed to pursue nonsettlers first for claims involving groundwater. The government has filed suit against the owners and operators of the site and 26 other companies who allegedly sent wastes to the sites, but did not settle. The companies who did settle plan to sue non-settlers, seeking reimbursement. See id. at 10404.

Settlements have also been reached concerning defendant's obligations under preliminary injunctive relief. See, e.g., United States v. Westinghouse, No. IP83-9-C (S.D. Ind.), where Westinghouse and EPA reached agreement concerning the removal and disposal of electrical capacitors and PCB-contaminated soils; United States v. Vertac Chemical Corp., Nos. LR-C-80-109 and 110 (E.D. Ark.) where the consent decree fulfills the terms of a preliminary injunction issued by the court on May 12, 1980, United States v. Vertac Chemical Corp., 489 F.Supp. 870 (E.D. Ark. 1980).

126. Supra note 121.

127. Statement of Mary Walker, supra note 124.

128. See generally Pain, Mega-Party Superfund Negotiations, 12 Envtl. L. Rep. (Envtl. L. Inst.) 15054 (November, 1982).

129. For example, EPA sent letters to the 47 major generators at the Chem-Dyne site notifying them of a meeting to be held in Columbus, Ohio, on April 27, 1982. At the 5-1/2 hour meeting, EPA, the Justice Department, and Ohio demanded $3.4 million in cleanup costs and set settle-or-be sued deadlines of six weeks for groundwater issues and eight weeks for surface issues. After substantial prodding, the government negotiators ranked the top 29 companies in groups of five. The 47 major generators became known as Tier I generators, the 243 smaller generators as Tier II generators. Ward, supra note 123 at 8.

130. The first industry negotiating committee of significance was apparently formed by the 13 generators at the Bluff road site in South Carolina. Government lawyers believe this committee was the model for committees at subsequent sites. Telephone interview, John Wheeler, Esq., EPA Office of Enforcement Counsel (formerly assigned to Bluff Road), April 20, 1984. After the Chem-Dyne Tier I generators' meeting with the government negotiators, supra note 129, the generators met alone to arrange a second meeting and to establish a preliminary steering committee. At the second meeting, twelve steering committee members were assigned as liaison to the parties in both tiers. A single document repository was created. In mid-July the companies named by secret ballot a three-member Industry Negotiating Committee. Ward, supra note 123 at 2. Ward reports that the model for the Chem Dyne committee was the Seymour site committee. Id.

131. At the Capri site in Los Angeles County, California, four tiers were established: transporters, large and small generators, and a residual third group. Telphone Interview, James W. Moorman, April 13, 1983.

132. For example, at Chem Dyne Tier I companies paid $500 each, Tier II companies $50 each. Ward, supra note 123, at 2.

133. E.g., at Capri, a $50,000 groundwater contamination study was assessed. Moorman interview, supra note 131.

134. See IV.B.3. infra.

135. See EPA case summary, supra note 125.

136. Telephone interviews, Michael Brown, Esq., May 9, 1984, James W. Moorman, supra note 131.

137. Upon taking office as EPA Administrator, William Ruckelshaus, was quoted as stating that there was "too much emphasis now on who pays; we don't need to answer who pays before we clean up." 14 Env't Rep.(BNA)--Curr. Dev. 55 (April 13, 1983). A draft list of 35 agency-wide program priorities ranked CERCLA removal and remedial actions first and second but negotiation of responsible party cleanup 33rd. Alvin Alm, EPA Deputy Administrator, EPA Memorandum and List of Candidate Priorities for Agency Activities in Fiscal 1985 (September 26, 1983) reprinted at 14 Env't Rep.(BNA)--Curr. Dev. 942, 943 (September 30, 1983). After "extensive discussions with the associate and assistant administrators, the regional administrators, and outside groups," removal and remedial actions remained first and second, but negotiations moved to eighth place on the final list. Alvin L. Alm, EPA Deputy Administrator, Memorandum on Development of Operating Year Guidance for FY 1985 and FY 1986, at 11 (November 2, 1983). Hazardous and toxic substances programs have come to dominate the overall EPA agenda. Of the 31 priorities in the final Alm Memorandum, 18 addressed toxic substances, and of these, 13 were closely related to the waste site cleanup problem. Of the top 15 priorities, 13 were toxic and hazardous substances-related. Id.

138. The National Contingency Plan requires notice-and-comment rule making before it can be adopted, but apparently it does not have to contain the many substantive matters addressed in the guidance. Still, in settling litigation over the NCP the agency has agreed to revise the Plan to include provisions for public involvement in site cleanup planning, inclusion of federal facilities on the NPL, requirements for cleanups to comply with RCRA and other regulatory statutes, and other standards for ensuring a safe level of cleanup. Settlement Agreement, Environmental Defense Fund v. EPA, Nos. 82-2238, 2238 (D.C. Cir. January 16, 1984).

139. EPA is limited to remedying NPL sites only by rule, not statute. See note 108 supra. Using the rather elaborate hazard ranking system set out in the NCP to estimate the probability and magnitude of human and environmental exposure (a classic risk assessment),

National Contingency Plan, 40 C.F.R. § 300.64 and Appendix A (1983), EPA has targeted 546 sites for action. The last 133 sites were proposed for addition to the NPL at 48 Fed. Reg. 46674 (September 8, 1983). EPA estimates that between 1,400 and 2,200 sites will eventually have appeared on the NPL. See note 9 supra.

140. Guidance for Selecting Enforcement Action or Fund Financed Response (EPA July 27, 1983). This guidance appears to supersede similar draft guidance dated June 8, 1983, reprinted in 14 Env't Rep. (BNA)--Curr. Dev. 325 (June 24, 1983). Of the 419 NPL sites listed before the fall of 1983, 113 were designated for enforcement lead. Environmental Protection Agency, Report to the [House] Appropriations Committee 42 (November 1, 1983). Presumably, the remainder were intended initially for a Fund response.

141. Four categories are actually used: (1) Fund-financed sites (dim prospects for successful enforcement actions within a reasonable time period); (2) Enforcement sites (financially viable responsible parties clearly exist and the government's case is strong); (3) Limited negotiation sites (marginal enforcement case and marginal prospects for negotiated cleanup, so handled like category 2 until negotiations break down, then placed in category 1); (4) state enforcement lead (states control site cleanup under varied state approaches). On occasion, assignments to category 2 will occur "if they may be useful in setting valuable legal or policy precedents. July 27 Guidance, supra note 140.

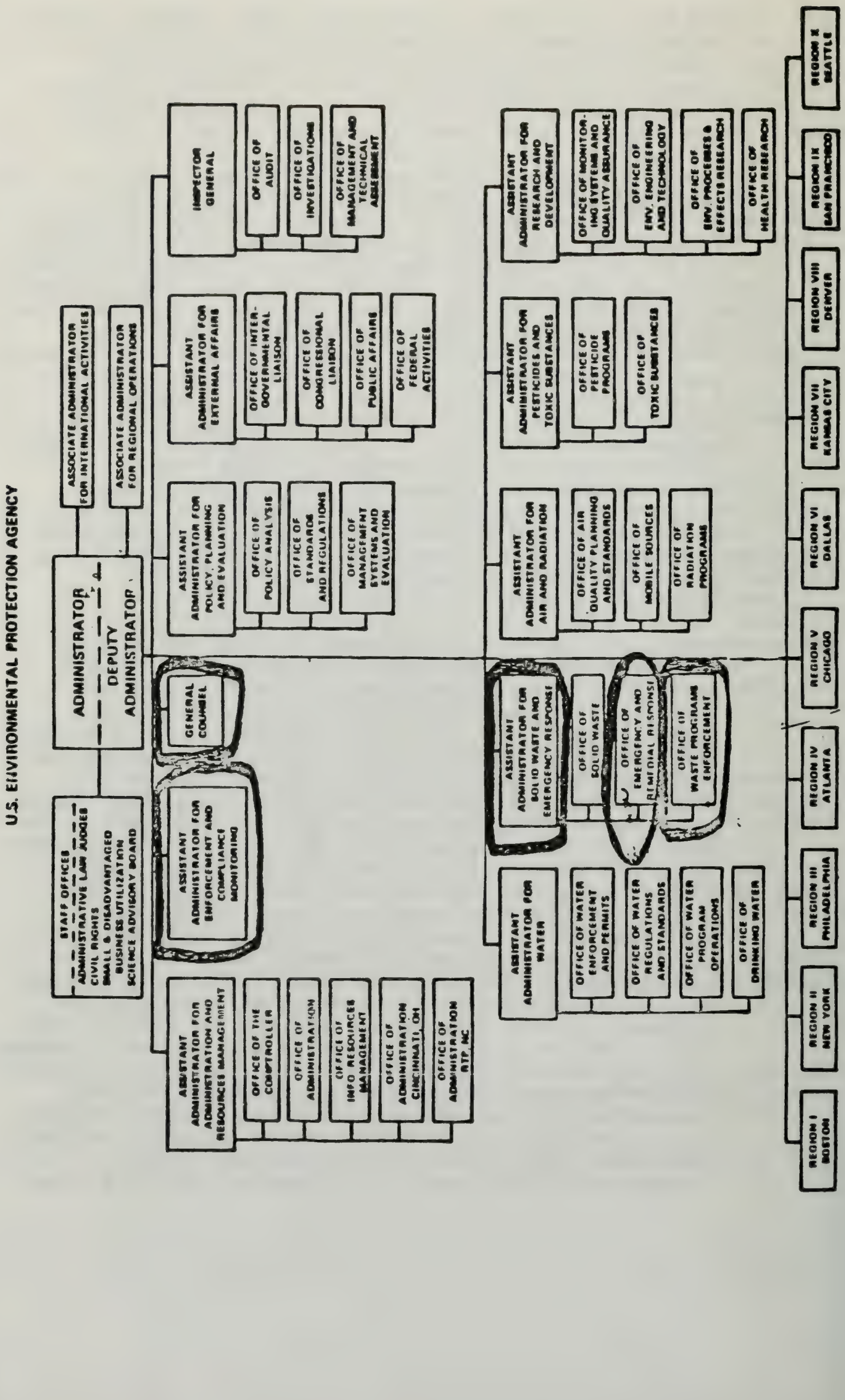
142. The July 27 Guidance de-emphasizes state leads (category 4) by urging that the "best" enforcement cases be placed in category 2. EPA could then decide later how to apportion cases between state and federal enforcement. Id. at 1. Still, of 235 NPL sites slated for attention in fiscal year 1984, 105 were initially designated state lead. Lee M. Thomas, Final FY 1984 Remedial Accomplishments Plan (RAP) (October 25, 1983). At these sites the federal role is difficult to describe: regional personnel may oversee, merely observe, or not be involved to any appreciable extent. Telephone interview, Kirk Sniff, March 2, 1984.

143. See, e.g., July 27 Guidance Memorandum, supra note at 8-13; June 8 Draft Guidance, supra note 140; 14 Env't Rep. (BNA)--Curr. Dev. 325, 327-28 (June 24, 1983).

144. July 27 Guidance Memorandum, supra note 140 at 6.

145. EPA was created by presidential order, Reorganization Plan No. 3 (effective December 2, 1970), borrowing authority and programs from the Departments of Agriculture and Health, Education, and Welfare, the Federal Radiation Council, and the Atomic Energy Commission, on recommendation of the Ash Council. President's Advisory Council on Executive Reorganization, A New Regulatory Framework (1971). See also Council on Environmental Quality, First Annual Report 24-26 (1970). It is not an independent regulatory commission, as often assumed. See also 40 C.F.R. §1 (1983) (EPA regulations on organization and general information). The current agency organization plan has been in effect since the summer of 1983. 14 Env't Rep. (BNA)--Curr. Dev. 941 (September 30, 1983). The EPA organization chart appears on the next page. It reflects a variety of considerations: the influence of the three Gorsuch era reorganizations (note 119 supra); the tension between program and enforcement functions (note 117 supra); new emphases such as decentralized management and renewed enforcement efforts; and the resolution of "turf battles" based largely upon the length and strength of association with the current Administrator and upon his working style. Interview, Michael Brown, Esq., former EPA Enforcement Counsel (1981-1983), January 14, 1984.

146. Generally, the 10 EPA regional offices are divided into four parts: air, water, evironmental services (technical support and direct surveillance), and policy and managment. Program responsibility for wastes, pesticides, and toxic substances is combined with air quality in a single division in six regions (despite the closer affinity of toxic wastes with water pollution); responsibility for hazardous wastes and toxic substances occupies its own division in the remaining four (Regions 1, 2, 5, 9). EPA Headquarters Telephone Directory (Winter, 1984). Enforcement no longer has a separate organizational niche on the regional divisional level, although the program divisions have enforcement branches. Moreover, the Environmental Services Division is responsible for surveillance, analysis, and inspections -- all vital enforcement activities. Further, attorneys in the regional offices spend about seventy percent of their time on enforcement and report to the Regional General Counsel, who in turn reports at the divisional level to the Regional Administrator. Thus, enforcement responsibility coalesces only at the topmost regional level, the Regional Administrator's office. 14 Env't Rep. (BNA)--Curr. Dev. 644 (August 19, 1983). Consequently, the Deputy EPA Administrator has asked


U.S. ENVIRONMENTAL PROTECTION AGENCY
ADMINISTRATOR
DEPUTY ADMINISTRATOR
STAFF OFFICES
ADMINISTRATIVE LAW JUDGES
CIVIL RIGHTS
SMALL & DISADVANTAGED BUSINESS UTILIZATION
SCIENCE ADVISORY BOARD
ASSOCIATE ADMINISTRATOR FOR INTERNATIONAL ACTIVITIES
ASSOCIATE ADMINISTRATOR FOR REGIONAL OPERATIONS
ASSISTANT ADMINISTRATOR FOR ADMINISTRATION AND RESOURCES MANAGEMENT
OFFICE OF THE COMPTROLLER
OFFICE OF ADMINISTRATION
OFFICE OF INFO. RESOURCES MANAGEMENT
OFFICE OF ADMINISTRATION CINCINNATI, OH
OFFICE OF ADMINISTRATION RTP, NC
ASSISTANT ADMINISTRATOR FOR ENFORCEMENT AND COMPLIANCE MONITORING
GENERAL COUNSEL
ASSISTANT ADMINISTRATOR FOR POLICY, PLANNING AND EVALUATION
OFFICE OF POLICY ANALYSIS
OFFICE OF STANDARDS AND REGULATIONS
OFFICE OF MANAGEMENT SYSTEMS AND EVALUATION
ASSISTANT ADMINISTRATOR FOR EXTERNAL AFFAIRS
OFFICE OF INTER-GOVERNMENTAL LIAISON
OFFICE OF CONGRESSIONAL LIAISON
OFFICE OF PUBLIC AFFAIRS
OFFICE OF FEDERAL ACTIVITIES
INSPECTOR GENERAL
OFFICE OF AUDIT
OFFICE OF INVESTIGATIONS
OFFICE OF MANAGEMENT AND TECHNICAL ASSESSMENT
ASSISTANT ADMINISTRATOR FOR WATER
OFFICE OF WATER ENFORCEMENT AND PERMITS
OFFICE OF WATER REGULATIONS AND STANDARDS
OFFICE OF WATER PROGRAM OPERATIONS
OFFICE OF DRINKING WATER
ASSISTANT ADMINISTRATOR FOR SOLID WASTE AND EMERGENCY RESPONSE
OFFICE OF SOLID WASTE
OFFICE OF EMERGENCY AND REMEDIAL RESPONSE
OFFICE OF WASTE PROGRAMS ENFORCEMENT
ASSISTANT ADMINISTRATOR FOR AIR AND RADIATION
OFFICE OF AIR QUALITY PLANNING AND STANDARDS
OFFICE OF MOBILE SOURCES
OFFICE OF RADIATION PROGRAMS
ASSISTANT ADMINISTRATOR FOR PESTICIDES AND TOXIC SUBSTANCES
OFFICE OF PESTICIDE PROGRAMS
OFFICE OF TOXIC SUBSTANCES
ASSISTANT ADMINISTRATOR FOR RESEARCH AND DEVELOPMENT
OFFICE OF MONITORING SYSTEMS AND QUALITY ASSURANCE
OFFICE OF ENV. ENGINEERING AND TECHNOLOGY
OFFICE OF ENV. PROCESSES & EFFECTS RESEARCH
OFFICE OF HEALTH RESEARCH
REGION I BOSTON
REGION II NEW YORK
REGION III PHILADELPHIA
REGION IV ATLANTA
REGION V CHICAGO
REGION VI DALLAS
REGION VII KANSAS CITY
REGION VIII DENVER
REGION IX SAN FRANCISCO
REGION X SEATTLE

the Regional Administrators to name a regional enforcement coordinator, suggesting that the Deputy Regional Administrator is a suitable candidate and that the Regional Counsel should not be selected. (Enforcement was recently focused in the Regional Counsel's office and in the office of the General Counsel at headquarters, to whom the regional attorneys looked for guidance, instead of to their regional program colleagues.) Appointing the Regional Counsel apparently will displease program personnel, who find the enforcement cases and provide the technical support and who might neglect enforcement if they had reason to conclude that it was exclusively the province of the attorneys. Interview with Kirk Sniff, supra note 118.

147. The addition of the words "compliance monitoring" to the title of the Assistant Administrator for Enforcement was somewhat confusing. The words are supposed to connote oversight of decentralized direct regional enforcement efforts (as distinct from direct enforcement by headquarters staff). Yet in the EPA regional offices, "compliance monitoring" has a definite but different meaning: it connotes direct surveillance and site visits by inspectors, who take samples and collect other hard enforcement data. An associate Enforcement Counsel for Hazardous Waste takes the lead on CERCLA enforcement matters involving both §106 administrative orders and judicial actions handled by the Justice Department. Direct assistance to the regions in gathering the data for enforcement actions is provided by the National Enforcement Investigations Center, a specialized prosecution-minded office located in Denver, Colorado. In the Office of General Counsel, an Associate General Counsel for Solid Waste and Emergency Response oversees compliance of agency initiatives with the statute. CERCLA itself is assigned to a Deputy Associate General Counsel.

148. Flow charts describing the EPA modus operandi have been prepared by Assistant Administrator Lee Thomas. See Thomas presentation, supra note 124.

149. Office of Waste Programs Enforcement, Office of Enforcement Counsel - Waste, CERCLA Notice Letters (May, 1983). This guidance will be revised to cover Fund-financed planned action, RI/FS conduct by responsible parties, party cleanup, party liability in the event of failure to respond, negotiation with the agency, and information requests under RCRA §3007 and CERCLA §104(e). It will provide "generic sample notice letters" for use by the regional offices which

must transmit them. The draft is undergoing revision to reconcile it with the agency's RI/FS policy. Interview, John Cross, Esq., Office of Waste Programs Enforcement, January 10, 1984.

150. See National Contingency Plan 40 CFR §§300.68(f), 300.68(g). Detailed Feasibility Study Guidance is currently scheduled for completion in late March, 1984, and the Remedial Investigation Guidance in June, 1984.

151. Ninety-five RI/FS are intended for completion in fiscal year 1984 and about 115 are planned for completion in 1985. The remaining RI/FS will have to be completed after 1985. RI/FS take from nine months to two years to prepare, depending on terrain, weather, and extent of contamination. William Hedeman, Director, EPA Office of Emergency and Remedial Response, presentation at ALI-ABA Committee on Continuing Professional Education - Environmental Law Institute - Smithsonian Institution Conference on Environmental Law, Washington, D.C., February 23, 1984.

152. Environmental Protection Agency, Report to Appropriations Committee, U.S. House of Representatives, Noevember 1, 1983, at 6-7. This special report is unique in that it attempts to explain how current remedial policy corrects the shortcomings of EPA's earlier approach to negotiating cleanups.

153. Lee M. Thomas, Assistant Administrator for Solid Waste and Emergency Response, and Courtney M. Price, Assistant Administrator for Enforcement and Compliance Monitoring, Participation of Potentially Responsible Parties in Development of Remedial Investigation and Feasibility Studies under CERCLA (March 20, 1984). (Henceforward RI/FS Guidance.)

154. Responsible parties may perform the RI/FS for any NPL site if they agree in advance to design and carry out the remedy specified by the agency (on the theory that the agency can invest extra resources in supervising the RI/FS because it will not have to invest staff resources in negotiating over cleanup design and execution). Likewise, responsible parties may be able to perform the RI/FS for active, recently discovered dioxin-contaminated sites, because the public expectation of quick action may not allow the agency to do these within its more deliberate planning framework. Id. at 6-7.

155. Id. at 3-5. The list of qualified RI/FS will be "made available" and known site users will be sent a notice letter informing them of the possibility of their performing the RI/FS at least 60 days before the Fund-financed RI/FS is scheduled to begin. Id. at 7. See also Office of Waste Programs Enforcement, [Draft Guidance on] CERCLA Notice Letter (February, 1984) (internal draft), at p. 6.

156. Gene A. Lucero, Director, Office of Waste Programs Enforcement, and Kirk Sniff, Associate Enforcement Counsel for Waste, Releasing Identities of Potentially Responsible Parties in Response to FOIA Requests (January 26, 1984).

157. RI/FS Guidance, supra note 153 at 4.

158. Id.

159. Hedeman presentation, supra note 151.

160. NEPA §102(2)(C), 42 U.S.C. §4332(2)(C) (1976).

161. The legislative history of CERCLA indicates that impact statements are not to be prepared on removal actions, but that they may have to be prepared for remedies. "In some such circumstances, formal environmental impact statement requirements may be determined to be applied." S. Rep. No. 96-848, 96th Cong., 2d Sess. 61 (1980).

162. Compare Portland Cement Association v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973) (Leventhal, J.), cert. denied, 417 U.S. 921 (1974).

163. Hedeman presentation, supra note 151. The agency, however, resists judicial review of its remedial decisions as informal adjudication in accordance with Overton Park and Camp v. Pitts with the RI/FS serving as the informal record on review. See Comments of EPA on an earlier draft of this paper accompanying Thomas-Smith correspondence supra note 124.

164. William Hedeman, Director, Office of Emergency and Remedial Response, Community Relations During Enforcement Actions 3 (February 6, 1984) (transmitting to agency personnel draft chapter 6 of Community Relations in Superfund: A Handbook -- Interim Version).

165. Id. at 6-5, 6-6. EPA has agreed to propose NCP amendments to require (1) development of community relations plans for all Fund-financed response measures, (2) public review of Feasibility Studies for

Fund-financed response measures, and (3) comparable public participation for private-party response measures. *See* Consent Decree in Environmental Defense Fund v. EPA, *supra* note 138 (at paragraph 5).

166. *Supra* note 32.

167. Contrast Report to House Appropriations Committee, *supra* note 152 at 15-17, with Lee M. Thomas, Assistant Administrator, EPA Memorandum [to Regional Administrators] Outlining Draft Policy on Compliance of Superfund Law with other Environmental Statutes (January 5, 1984). Guidance manuals for regional use should be avaiable by June, 1984. Hedeman presentation, *supra* note 151.

168. NCP rule making arguably did not have to address this issue; the NCP merely specifies a procedure for site cleanup to ensure that Fund cleanups are cost-effective. *See* 40 CFR §300.68 and NCP Preamble, 47 Fed. Reg. 31180, 31182 (July 16, 1982). Still, EPA now takes the position after settling a challenge to the NCP brought by the Environmental Defense Fund that CERCLA §105(c) requires EPA to adopt substantive cleanup rules. Draft Compliance Policy, *supra* note 167. Interview, John Cross, Esq., Staff Attorney, Office of Waste Programs Enforcement, February 23, 1984. See Consent Decree in Environmental Defense Fund v. EPA, *supra* note 138 (at paragraph 2).

169. Draft Compliance Policy, *supra* note 167. The policy raises other questions: since RCRA exempts such "sites" as tar pits and coal beneficiation, are they exempt from CERCLA? Litigation and EPA guidelines have not yet addressed the issue. Do RCRA *in situ* treatment permit requirements apply to approipriate CERCLA *in situ* remedies? The answer is again unclear. It does seem, however, that removal of waste does require that the remover register under RCRA and obtain a generator number.

170. The EPA policy regarding negotiation was first presented in guidelines under CERCLA §106(c), which required EPA to "establish and publish guidelines for using the imminent hazard, enforcement, and emergency response authorities" of CERCLA and other environmental statutes which EPA administers within six months of CERCLA's enactment. EPA published these guidelines as a general policy statement. 47 Fed. Reg. 20664 (May 13, 1982). "[I]t is Agency policy to seek, whenever possible, cleanup by responsible parties prior to recourse to either the Fund or litigation. To this end EPA may, whenever possible,

provide notice and an opportunity to confer with the Agency in an effort to develop a satisfactory cleanup agreement." Id. at 20665. The Agency stressed, however, that it would use enforcement actions "as an alternative to or complementary with" Fund-financed cleanup, to save the Fund for true orphan sites. But the Agency also repeatedly stated that it would proceed on a case-by-case basis and was not committed to any particular strategy. Hence site users did not have to be given notice, and the first opportunity to act, i.e., notice was not viewed as a condition precedent to agency action. At 20665-20666. The NCP and its preamble are silent on negotiation, remarking only that the NCP did not define §106 "imminent and substantial endangerment," did not implement §106, and did not address enforcement. 47 Fed. Reg. 31180, 31201-31202 (July 16, 1982). The NCP explicitly preserves a case-by-case approach to individual site cleanups. Id. at 31182.

Current settlement policy is contained in Courtney M. Price, Assistant Administrator Designate for Enforcement and Compliance Monitoring, and Lee A. Thomas, Assistant Administrator for Solid Waste and Emergency Response, Interim Hazardous Waste Case Settlement Policy (December 12, 1983) (Hereafter Settlement Policy). This guidance prompted the agency to take the "unusual step" of circulating a draft for public comment because of the "public interest" involved. An agency spokesman further commented that at the time 107 site matters were pending that the policy might affect and that during 1983 the agency had negotiated 27 site cleanup settlements valued at $93 million. 14 Env't Rep. (BNA)--Curr. Dev. 979 (October 10, 1983).

The guidance supplemented and to some extent superseded a thoughtful guidance memorandum prepared by Michael Brown, former EPA Enforcement Counsel. See EPA Pre-Litigation Enforcement Strategy in Hazardous Waste Cases (May 20, 1983), reprinted at 14 Env't Rep. (BNA)--Curr. Dev. 149 (May 27, 1983).

171. Report to House Appropriations Committee, supra note 152 at 40.

172. Lucero, "Constraints on Private Party Cleanup at Superfund Sites" (distributed at an ABA Superfund conference, December 9, 1983, supra note 124.

173. Settlement Policy, supra note 170, at 8.

174. _Id_. at 1, 3, 7.

175. Report to House Appropriations Committee, _supra_ note 152, at 46.

176. If a responsible party can convince other parties in the negotiations to allow credit, EPA has no objection so long as the parties agree collectively to pay the entire cost of the remaining cleanup as estimated in the RI/FS. EPA does not allocate costs among responsible parties; to do so would be burdensome, especially since factors other than volume now may affect a party's negotiated cleanup share. The logical way to proceed would be to adjust the final RI/FS cleanup cost projection upward to include the cost the RI/FS would have produced had the earlier voluntary measure never been undertaken, and require that sum to be gathered proportionately from the responsible parties. The surplus would be subtracted from the early volunteer's share. But to ascertain volunteers' shares, EPA would either have to rely on their estimates or evaluate such measures _post hoc_ itself. Under the former, EPA would be _vulnerable_ to manipulation and might be accused of unfairly skewing the shares of the site users as negotiated _inter se_, while under the latter the agency would _considerably_ increase its administrative burdens. Here the matter stands; an internal draft guidance on credit for voluntary response actions has been overwhelmed by another agency policy development -- the abandonment of a simple volumetric settlement allocation approach in favor a more complex allocation to be worked out by the responsible parties themselves. Yet no credit probably means settlement will be resisted by some site users who feel unfairly dealt with, and voluntary risk reduction measures will be fewer at the large number of sites remaining to be addressed.

177. Settlement Policy, _supra_ note 170, at 6.

178. _Id_. at 2-10. The factors include:

(1) volume of wastes (but not just the known users' limited percentage "fair shares"; those limited percentages will often be used to establish the proportional responsibility for the _entire_ cleanup of each site user);
(2) the toxicity, mobility, or other special adverse characteristics of the users' wastes;
(3) the strength of the evidence linking the users to the site;
(4) the ability of the settling parties to pay;
(5) litigation risks (admissibility and adequacy of evidence, defenses);

(6) "public interest considerations" (whether a settlement would escape the state 10 percent contribution requirement in an instance when the state cannot pay; whether the federal government has the money);
(7) precedential values (trial of a strong case for its precedential value may be preferable to settling);
(8) nature of the case remaining after settlement (piecemeal settlements are discouraged; non-settling parties may have to be sued to recover any balance);
(9) interest value of obtaining a present sum certain;
(10) "inequities and aggravating factors."

All settlements must be approved by the Office of Waste Programs Enforcement, Office of Enforcement and Compliance Monitoring-Waste, and the Assistant Administrator for Enforcement and Compliance Monitoring, upon a "written detailed justification" submitted by the lead legal and technical personnel -- normally a regional attorney and a technical representative. Id. at 9.

179. See note 137 supra.

180. See text above notes 13-32 supra.

181. Subpart F of the NCP, 40 CFR §§300.68(e)-(j), applies the NCP response management system's seven-phase process to cleanups which private parties undertake. See 47 Fed. Reg. 31180, 31182 (July 16, 1982). See also the preamble to the proposed NCP, 47 Fed. Reg. 10972, 10992 (March 12, 1982).

Because §106(c) requires private remedies to be consistent with the NCP to the maximum practicable extent, EPA has inferred that private remedies must also be cost-effective. See 40 C.F.R. 300.68(j, k). Fund-balancing goes beyond cost-effectiveness, to impose an inter-site expenditure optimization requirement on Fund remedies. Thus, EPA may select a less reliable remedy, or none at all, because the funds are needed elsewhere at another site where the return in risk reduction is greater for an equal investment. Hence cleanups of Hudson River PCBs or James River Kepone, both hugely expensive, would not be undertaken because the Fund could be more efficiently employed elsewhere.

182. CERCLA §104(h) authorizes the President to use such "emergency procurement powers" to effect CERCLA purposes. The President is instructed to "promulgate regulations prescribing the circumstances under which such authority shall be used and the procedures

governing the use of such authority." EPA has not promulgated these regulations. Further, CERCLA §105(5) requires the President to include in the national contingency plan a "provision for identification, procurement, maintenance, and storage of response equipment and supplies." Executive Order 12316(e) and (f) delegates authority under §§104(a) and (h) to the Administrator of EPA (and some powers to the Coast Guard, the Secretary of Health and Human Services, and the Director of the Federal Emergency Management Agency). "The exercise of authority under §104(h) of the Act shall be subject to the approval of the Administrator of the Office of Federal Procurement Policy." The NCP does not directly address procurement. But see 40 CFR §300.37 (inventory of equipment that may be used to respond to a release, including private and commercial equipment); 40 CFR 300.61(c) (rely on established technology; encourage the participation and sharing of technology by industry and other experts); 40 CFR §§300.68(h), (j) (remedial actions: three broad criteria should be used in the initial screening: cost, alternatives, acceptable engineering practices). CERCLA §§104(h) and 105(5) appear to require procurement regulations, but none have been promulgated. This contrasts to the rather detailed procurement provisions contained in RCRA and the regulations thereunder 42 U.S.C. §6962; 40 C.F.R. Parts 247 and 249.

All procurement by the EPA pursuant to the National Contingency Plan (as well as all other federal environmental statutes) is governed by 41 CFR Chap. 15. Section 15.-1.001 establishes EPA Procurement Regulations and states their relationship to the general Federal Procurement Regulations. The Federal Procurement Regulation System is applicable to the civilian agencies of the Government. 41 CFR. Chap. 1 (2 vols.). 41 CFR §15.1000 establishes a system of EPA regulations for the codification and publication of policies and procedures which implement and supplement the Federal Procurement Regulations. See §15-1.002 ("uniform policies and procedures related to the procurement of personal property and nonpersonal services (including construction) and real property by lease"). 41 CFR §12-50 covers service contracts.

183. In the summer of 1984, EPA will send to its regional offices an approximately 150-page technical Remedial Investigation Handbook and an approximately 100-page Feasibility Study Handbook. In terms of policy making, there is less to these documents than meets

the eye. The two technical documents will take their place alongside an already weighty comprehensive remedial handbook containing the Superfund office's internal guidance memoranda.

The policy head for the Superfund office visualizes guidance on four tiers: (1) the NCP; (2) RI/FS; (3) specific "how to" documents within the RI/FS guidance, e.g., how to perform an environmental analysis, or how to do project cost estimates; and (4) data compilations, e.g., tables of remedial equipment and services costs by geographic region. Interview, Sylvia Lowrance, Acting Policy Branch Chief, EPA Office of Policy and Program Management, May 15, 1984. Regional personnel occasionally refer to the headquarters guidance materials as cookbooks.

184. Courtney M. Price, Special Counsel for Enforcement, and Lee M. Thomas, Assistant Administrator for Solid Waste and Emergency Response, Guidance on Pursuing Cost Recovery Actions Under CERCLA (August 26, 1983).

185. 42 U.S.C. §9606(a). The order can be enforced by the penalty provisions of §§106 and 107, 42 U.S.C. §§9606(b) and 9607(c)(3), including damages equal to three times the cost of cleanup.

186. See Miller, Defending Superfund and RCRA Imminent Hazard Cases, 15 Nat. Resources Law. 483, 494-95 (1983) (as of mid-1982 EPA had issued only 11 administrative orders under CERCLA §106 and RCRA §§3013 and 7003).

187. Lee Thomas, Acting Assistant Administrator, and Courtney Price, Special Counsel for Enforcement, Guidance Memorandum on Use and Issuance of Administrative Orders under Section 106(a) of CERCLA (September 8, 1983). EPA notes the administrative order is "one of the most potent administrative remedies available to the Agency under any existing environmental statute." Id. at 1. Guidance on use of such orders in removal actions is more recent. Lee Thomas, Assistant Administrator, Guidance Memorandum on the Issuance of Administrative Orders for Immediate Removal Actions, (February 21, 1984). "We estimate that Administrative Orders may be appropriate for a significant percentage of immediate removal situations. Increased resources will be provided to the Regions, and I expect the Regions to devote resources to accomplishing this goal of increased Administrative Orders for removals." Id. at 1.

188. In fiscal year 1983, 23 administrative orders were issued under §106. 14 Env't Rep. (BNA)--Curr. Dev. 951 (October 7, 1983). In one day, EPA issued three administrative orders to force the closure of dioxin-contaminated sites. Facilities were ordered to close their doors and to put up warning signs. See 14 Env't Rep. (BNA)--Curr. Dev. 58-59 (1983). Another site was subject to an order on consent. Id. Last September, EPA ordered eight firms to clean up hazardous waste at the Kin-Buc Landfill in Edison, New Jersey. EPA reminded the parties that noncompliance could result in punitive damages of $15 to $21 million. Id. at 1057. An order issued against Montrose Chemical Corp. to clean up DDT contamination at a New Jersey site. Id. at 104-105.

189. See Dinkins, remarks before the American Bar Association Annual Meeting 16 (Aug. 9, 1982) (EPA uses orders or court decree to incorporate settlement to ensure quick enforcement). See Note, The Role of Injunctive Relief and Settlements in Superfund Enforcement, 68 Cornell L. Rev. 706, 719 (1983).

Recent use of administrative orders in the settlement process include the Oakdale Disposal site, where the Minnesota Pollution Control Agency and EPA issued an administrative order approving a plan by Minnesota Mining and Manufacturing that is expected to cost up to $6 million; the Northern Ordinance site in Fridley, Minnesota, where FMC Corp. agreed to undertake response activities consistent with an interim response order, although FMC was not released from future liability (See 14 Env't Rep. (BNA)--Curr. Dev. 255 (June 16, 1983)); and a dump site in Moreau, New York, where General Electric agreed pursuant to a consent order to take remedial action to clean up about 450 tons of hazardous waste that it dumped between 1958 and 1968. Id. at 1534. EPA reached an administrative agreement with the owner of a site containing millions of burning tires to construct an earthen basin to collect the oily runoff. 14 Env't Rep. (BNA)--Curr. Dev. 1916 (March 2, 1984).

190. General administrative order guidance, supra note 187, at 11-17.

191. Id. at 5-9.

192. Id. at App. 3.

193. 14 Env't Rep. (BNA)--Curr. Dev. 259 (June 17, 1983).

194. Id. at 16.

195. CERCLA's leading House proponent stated:

> Hundreds, possibly thousands, of neglected, leaking disposal sites presently dot the country. . . . Preventive measures are needed immediately to stop further releases. Remedial action is urgently needed at those sites which are presently causing serious problems. . . . [W]e do not believe it is an exaggeration to say it is the number one environmental challenge facing us in this decade.

126 Cong. Rec. H1030 (daily ed. Sept. 19, 1980) (statement of Rep. Florio in support of H.R. 7020).

196. *See* note 124 *supra*.

197. *See* text above notes 128-136 *supra*.

198. Report to the House Appropriations Committee, *supra* note 152, at 5. *See also* 14 Env't Rep. (BNA)--*Curr. Dev.* 803, 804 (September 9, 1983). Three dozen privately negotiated remedies have been completed or are under way (21 of which are at NPL sites). Thomas Fact Sheets, *supra* note 124.

Emergency removals have made a stronger showing. By September 1983, EPA had completed 159 removal actions and had an additional 48 under way. Report to the House Appropriations Committee, *supra* note 152 at 8, 12.

Like data on the number and hazards of the sites themselves, data on CERCLA implementation are in flux. Different sources simply provide different numbers for the same index of performance. Perhaps too much can be made of numbers at this early point in program implementation; one headquarters interviewer dismissed efforts to aggregate data on agency performance as "bean counting" which deflects staff from getting on with the tasks at hand. I sympathize, but the discouraging numbers (I have tried to select reliable ones) do suggest a problem.

199. Through fiscal year 1984 the agency will probably have spent Fund revenues for one purpose or another (removals, study, design, and remedy) at 235 NPL sites. Thomas Fact Sheets, *supra* note 124; *Final FY 1984 Remedial Accomplishments Plan*, *supra* note 142.

200. In 1984, the agency hoped to complete fifteen more remedial actions, 14 Env't Rep. (BNA)--Curr. Dev. 645 (August 19, 1983), and 65 RI/FS. Thomas Fact Sheets, supra note 124. Another 115 RI/FS were scheduled for fiscal year 1985. See note 151 supra.

Overall, the existing Fund may be adequate to complete 100 remedial actions; negotiation may produce another 100 to 170 remedial agreements. Lucero, Constraints, supra note 172 at 1-2. Thus only about half the existing NPL sites can be addressed, leaving roughly 1,125 to 1,925 sites yet to receive attention. Still, the EPA hopes to have taken some type of action by the end of the decade on the sites which will require NCP listing. Telephone interview, Kirk Sniff, March 2, 1984. A former EPA Administrator estimated tht at the current rate of cleanup CERCLA's mission will not be accomplished until the year 2085. Telephone interview with Douglas Costle, EPA Administrator (1977-1980), December 13, 1983. Congress may expand the Fund in the near future, see note 11 supra, but other impediments remain which money alone cannot overcome.

201. Samuel Peltzman maintains that the 1962 safety amendments to the Food, Drug, and Cosmetic Act imposed a net cost on drug consumers by reducing innovation in the drug industry. "[T]he FDA can expect little of the reward for extremely successful innovations, but substantial cost for wrongly certifying an unsafe or ineffectual drug." The Benefits and Costs of New Drug Regulation, in Regulating New Drugs 208 (R. Landau, ed. 1973).

202.

> The cost to the public of sticking to the old is rarely clearly shown and is even more rarely attributable to any individual bureaucrat's willingness to countenance change. Because an error that stems from a decision in favor of innovation can be catastrophic to the decision maker, one would expect that most decisions will be against change. And that is exactly what students of the administrative agencies have suggested happens.

G. Calabresi, A Common Law for the Age of Statutes 47 (1982).(Footnotes omitted).

203. Report to the House Appropriations Committee, supra note 152 at 44.

204. See the text of III.B. The agency's current negotiation policy reflects in part its judgment about

what the public interest in hazard reduction requires. Suggestions that this policy be changed would ordinarily be out of place in a study of this kind. This is essentially a study of processes and procedures applicable in a particular statutory setting. Yet EPA's critical choice among the three basic alternate processes for site cleanup is vitally affected by substantive policy controlling the availability of each. The substantive issues bound up in EPA's current settlement policy must be appraised if, however valid the underlying public interests EPA is attempting to promote, the positions it has taken discourage the adoption of more optimal administrative processes. Perhaps these same substantive interests can be pursued in a different manner which will permit the Fund-litigation-negotiation choice to be made in a more optimal manner. See text in IV.B.4.a *infra*. Thus, policies about substance and processes become inextricably intertwined, a situation not surprising to students of the American administrative process. See Gellhorn and Robinson, *Perspectives on Administrative Law*, 75 Colum. L. Rev. 771, esp. 786-787 (1975). *Compare* Rabin, *Administrative Law in Transition: A Discipline in Search of an Organizing Principle*, 72 Nw. U. L. Rev. 120 (1977); Verkuil, *The Emerging Concept of Administrative Procedure*, 78 Colum. L. Rev. 258 (1978).

205. For example, the Assistant Administrator in charge of EPA's regulatory program under RCRA has pointed out that on the average two years elapse between EPA's learning of groundwater contamination and its cleanup, assigning the blame to EPA procedures. 14 Env't Rep. (BNA)--Curr. Dev. 1436 (December 16, 1983). An attorney for disposers quipped that private attorneys cannot get replies to correspondence from the agency in time to meet the negotiation deadlines. Interview, James W. Moorman, Esq., December 15, 1983.

206. In a sense the interim settlement policy seeks more to establish a strong bargaining position than to invite serious negotiation. It postures in the same way affected interests posture before a matter is ripe for serious negotiation. See text and notes *infra* in Part IV.A. Consequently, the policy is similar to the speeches in which the head of the CERCLA litigation section of the Land and Natural Resources Division of the Department of Justice has repeatedly stated, in an apparent attempt to induce favorable responsible party agreement to clean up sites, that the government's position is that the amount the government in fact spends under §107 is recoverable (regardless,

presumably, of cost, waste, false starts, etc.), that all the legal and technical costs of maintaining the action would be added to the relief requested, and that interest would be charged on the reimbursement request running from the time the demand letter was presented. 14 Env't Rep. (BNA)--Curr. Dev. 1442 (December 16, 1983).

207. Case settlement policy, supra note 170 at 7.

208. Id. at 6.

209 Gene Lucero, Director, Office of Waste Programs Enforcement, and Kirk Sniff, Associate Enforcement Counsel for Waste, Releasing Identities of Potentially Responsible Parties in Response to FOIA Requests (January 26, 1984).

210. Susskind and Weinstein, Towards a Theory of Environmental Dispute Resolution, 9 Env. Aff. 311, 320 (1980).

211. Superfund -- How to Rebuild a Badly Damaged Program? 2 Envtl. F. 17 (June, 1983) (A panel discussion in which the participants were: Colburn T. (Coke) Cherney, EPA Assistant General counsel for Superfund; William Eichbaum, Assistant Secretary for Environmental Programs, Maryland Department of Health and Mental Hygiene; Khristine L. Hall, attorney with the Environmental Defense Fund; James A. Rogers, Skadden, Arps, Slate, Meagher & Flom; Kirk K. Sniff, EPA Acting Associate Enforcement Counsel for Waste Enforcement; and David B. Weinberg, Wald, Harkrader & Ross. Rogers and Weinberg were emphatic that negotiations were in peril, e.g., pp. 19, 22.)

212. Interview, Douglas Costle, Esq., of counsel, Wald, Harkrader, Ross, former Administrator, December 13, 1983. "Imagine a site 90 percent of which is 'orphan.' The ten percent was contributed by a dry cleaners, a small laboratory, and a defunct garage. Is EPA seriously maintaining that it will only negotiate with the laboratory and the dry cleaners if they agree up front to at least 80 percent of the cleanup? Will EPA later try to hold each liable for costs in a court of law?" Id.

213. Cox, Matey, Zoll, and Stoll, Comments of the Chemical Manufacturers Association on EPA's December 13, 1983 Draft Hazardous Waste Case Settlement Policy, 2,7,8,10 (January 12, 1984).

214. The Administrator and Deputy Administrator have indicated this commitment. See *supra* note 137. Of the 419 original NPL sites, 113 were designated enforcement lead only. Report to House Appropriations Committee, *supra* note 152, at 42. Presumably, the remaining 306 were initially destined for Fund lead and, barring successful negotiations, eventual cleanup. If at 95 percent of the sites at least one user has been identified, see *supra* note 8, then at least 70 percent of the original 419 sites have known users who could be sued or with whom negotiations could be conducted. The Associate Enforcement Counsel for Waste, Kirk Sniff, estimates that 90 percent of cleanups will involve Fund expenditures. Interview, February 23, 1984.

215. *See* note 11 *supra*.

216. The Grace Commission report on federal inefficiency seems to confirm popular expectations. Magnuson, *Government is Run Horribly*, Time Magazine, January 23, 1984, at 16. The Grace Commission identified an opportunity for $20.3 billion of cost savings in federal procurement, contracts, and inventory management. President's Private Sector Survey on Cost Control, Report on Procurement/Contracts/ Inventory Management, Approved by the Subcommittee for the Full Executive Committee (Spring-Fall 1983), at p. ii. Senator Proxmire has covered much of the same territory. W. Proxmire, *The Fleecing of America*, 17, 83-84, 94 (1980).

The Grace Commission's volume on EPA, President's Private Sector Survey on Cost Control, Report on the Environmental Protection Agency, Approved by the Subcommittee for the Full Executive Committee (Spring-Fall 1983), opined, "Procedures for awarding contracts [by EPA] are very resource intensive and time consuming" (at p. 32); "EPA's contract award process requires an excessive amount of time to achieve results . . .; it should not take six to nine months or more to select a source and award a contract, as is the agency's current experience" (at p. 33); "private sector experience indicates that the efficiency of [EPA] contracting procedures could be improved by at least 20 percent" (at p. 35); and "streamlined contracting procedures and more effective management of contract program work could reduce program staff time and contract costs and save . . . $62.9 million over a three year period" (at p. 31). EPA's sewerage construction grant program under the Clean Water Act has been repeatedly criticized.

Office of [EPA] Inspector General, Semi-Annual Report 1983 6 (April 1-Sept. 30, 1983) ($400 million wasted because of slow starts and inadequate EPA construction oversight).

The Attorney General of New York has testified that his data show that in 1981-1983, $165.4 million was spent for the Fund for administrative costs but only $67.7 million was spent on responses. Robert Abrams, Testimony before the Subcommittee on Commerce, Transportation, and Tourism of the House Committee on Energy and Commerce, (January 25, 1984), p. 7.

217. Memorandum from Edward L. Fitzmaurice to James J. Florio regarding the Li Pari Landfill Site, Subcommittee on Commerce, Transportation, and Tourism of the House Committee on Energy and Commerce, May 3, 1983, at 3 ($8,000 to consultants who did no work, $165,000 for two chain link fences); Memorandum from Edward L. Fitzmaurice to James J. Florio regarding Problems with the Superfund Program in EPA's Region II, Subcommittee on Commerce, Transportation, and Tourism of the House Committee on Energy and Commerce, August 29, 1983, at 3-4 (no uniform filing system, no centralization of files). "Simple bits of information can take days to be located; exact figures on such things as total remedial costs to date on a site cannot be determined quickly and sometimes not at all." Id. at 1-2.

218. A newsletter published by a company which performs site technical assessments quotes a spokesman for a cleanup company as saying EPA response and assessment work is 30 percent more expensive than privately funded responses of comparable quality. 5 Resources No. 4, at 7 (Fall 1983) (published by Environmental Resource Management, Inc.) In the Enviro-Chem case, the generators' technical committee obtained fixed price cleanup quotations 40 percent below EPA cost estimates for the same work. Bernstein, The Enviro-Chem Settlement: Superfund Problem-Solving, 13 Envtl. L. Rep. (Envtl. L. Inst.) 10402 (Dec. 1983). At the Seymour site, 24 large generators performed surface cleanup for $7.7 million, $7.3 million below EPA estimates. 13 Env't Rep. (BNA)--Curr. Dev. 877 (October 29, 1982). Testimony of Mary Walker, supra note 124 at 8. (Surface cleanup completed November, 1983).

219. New York has filed suit alleging that state and federal governments were overcharged $4-$5 million for the cleanup of Love Canal. Approximately $8 million

was paid out for the cleanup. If New York's allegations are correct, the governments were overcharged between 100 and 167 percent. 14 Env't Rep.(BNA)--Curr. Dev. 1539 (Jan. 6, 1984).

220. EPA Inspector General's Report, supra note 216 at 24-25. The sewerage construction grants program was discussed in a series that ran on the frong pages of the Washington Post on May 10-14, 1981.

221. See note 182 supra (procurement regulation structure).

222. Newsletter, supra note 218 at p. 7 (only 12 U.S. firms can meet "EPA's complex procurement requirements.")

223. See text and note 17-19 supra and CERCLA §104(c)(3).

224. With existing Superfund revenues EPA will be able to provide complete remedies at only 100 NPL sites. See Lucero, Constraints, supra note 172 at 2.

225. See generally Association of State and Territorial Solid Waste Management Officials, State Cleanup Programs for Hazardous Substance Sites and Spills (Dec. 21, 1983).

226. A preliminary working draft entitled EPA/State Relationships in Hazardous Waste Enforcement . . . [under CERCLA] was completed in late January, 1984. It is being discussed and revised but "will take some time to finalize." Interview, John Cross, Esq., Office of Solid Waste--Enforcement, February 23, 1984.

227. Thirty-six states have their own hazardous waste cleanup funds, some of which antedate CERCLA. Environmental Law Institute, State Superfund Statutes 1984 (November, 1983)(a compilation of statutory texts). See also Comment, State Hazardous Waste Superfunds and CERCLA: Conflict or Compliment?, 13 Envtl. L. Rep. (Envtl. L. Inst.) 10348 (November, 1983).

228. Clean Water Act, 33 U.S.C. §§1251-1376; and Clean Air Act, 42 U.S.C. §§7401-7642; Surface Mine Reclamation and Control Act, 30 U.S.C. §§1201-1328; Public Utilities Regulatory Policies Act, 43 U.S.C. §2001 et seq.

229. National League of Cities v. Usery, 426 U.S. 833 (1976). See also, Hodel v. Virginia Surface Min. & Recl. Ass'n, 452 U.S. 764 (1981) (SMCRA); FERC v. Mississippi, 456 U.S. 742 (1982) (PURPA); Brown v. EPA

556 F.2d 665 (9th Cir. 1977) (Clean Air Act); United States v. Ohio Dep't Highway Safety, 635 F.2d 1195 (8th Cir. 1980), *cert. denied*, 451 U.S. 949 (1981). (Clean Air Act).

230. See FERC v. Mississippi, *supra* note 229 at __ (O'Connor, J., dissenting).

231. While a state would appear "free" to undertake its own cleanup without federal involvement, CERCLA §9614(c) prohibits a "double taxation" by a state on oil and chemical products. This does not mean that states are prohibited under the preemption doctrine from taxing the chemical industry to clean up hazardous waste. The New Jersey Tax Court decided that §9614(c) only prohibits taxation to pay for cleanups which are already funded by the federal government; it does allow states to tax chemicals in order to finance remedial action; that CERCLA does not actually cover. Exxon Corp. v. Hunt, 4 N.J. Tax 294, 12 Envtl. L. Rep. (Envtl. L. Inst.) 20734 (N.J. Tax Ct. 1982). *See generally* Anderson, Mandelker, and Tarlock, *Environmental Protection: Law and Policy* 580-81 (1984).

232. A confidential draft guidance memorandum was first circulated in late February, 1984, under the title Procedures for Deleting Sites from the National Priorities List. De-listing requires notice-and-comment rule making. For completed responsible party and Fund remedial actions, the draft contemplates "consultation" with the state. If a remedial investigation (RI) or an "equivalent" EPA-approved state or responsible-party investigation shows no significant threat to health or the environment, the site may also be de-listed.

233. *See* note 225 *supra*.

234. *See* note 142 *supra*.

235. *See* note 181 *supra*.

236. The courts assume part of the transaction costs which EPA and the parties would otherwise assume. "[I]t is always cheaper for the clients to have society rather than the litigants pay the judges." Sander, *Varieties of Dispute Processing*, 70 F.R.D. 79, 126 (1976) (The Pound Conference).

237. R. Fisher and W. Ury, *Getting to Yes* 101 (1981).

238. Telephone interview, Lois Schiffer, Special Litigation Counsel, Department of Justice, February 29, 1984.

239. J. Wilson, Political Organizations 334-335 (1973); Ingram, The Political Rationality of Innovation: The Clean Air Act Amendments of 1970, in Approaches to Controlling Air Pollution 12, 20-23 (A. Friedlaender ed. 1978); A. Wildavsky, Economy and Environmental Protection: Rationality and Ritual, 29 Stan. L. Rev. 183 (1976).

240. Rogers, Three Years of Superfund, 13 Envtl. L. Rep. (Envtl. L. Inst.) 10361, 10363 (November, 1983).

241. See IV.A.2 infra.

242. H. Raiffa, The Art and Science of Negotiation 85 (1982). (The "escalation game.")

243. Cox, Matey, Zoll and Stoll, Comments of the Chemical Manufacturers Association on EPA's December 12, 1983 Draft Hazardous Waste Case Settlement Policy (January 12, 1984), pp. 4-6.

244. See the description of EPA's current policy regarding administrative orders in the text supra notes 185-194.

245. For a more complete analysis of pre-enforced judicial review under CERCLA, see text and footnotes infra in III.D.1.

246. 387 U.S. 136 (1966).

247. 209 U.S. 123 (1908).

248. E.g., North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908) (seizure of food not fit for human use); Ewing v. Mytinger Casselberry, Inc., 339 U.S. 594 (1950) (seizure of mislabeled vitamin product). See additional cases in Goldberg v. Kelly, 397 U.S. 254, 263 n. 10 (1970); Board of Regents of State Colleges v. Roth, 408 U.S. 564, 570 n. 7 (1972). See also Freedman, Summary Action by Administrative Agencies, 40 U. Chi. L. Rev. 1 (1972).

249. Interview, Kirk Sniff, Associate Enforcement Counsel for Hazardous Waste, February 23, 1984. Mr. Sniff worked for six years as an attorney in Region V.

250. Regional confidence has been enhanced by the selection of the former Director of the South Carolina

Department of Public Safety, Lee M. Thomas as Assistant Administrator for Solid Waste and Emergency Response.

251. Sniff interview, *supra* note 249.

252. Brown interview, *supra* note 145. Some resentment is built in and occurs chronically throughout all of EPA's programs, although the attitudes of the regional offices toward headquarters vary from region to region. EPA regional officials have always had a love-hate relationship with headquarters, with a tilt toward dislike. Sniff interview, *supra* note 249. The absence of strong support from Washington in the two critical first years of CERCLA implementation has also contributed by forcing regional staff to make their own accommodations in the web of relationships at each site.

253. Telephone interview, John Hamill, Senior Associate Regional Counsel, Region X, March 27, 1984. Telephone interview, Roger Grines, Assistant Regional Counsel, Region V, March 27, 1984. (Headquarters should define policy in guidance but leave regions wide freedom to apply it.)

254. *See* note 142 *supra*.

255. Interview, Sylvia Lowrance, *supra* note 183.

256. RCRA contains eight subchapters, only one of which deals specifically with hazardous wastes--subchapter III. In addition to dealing with hazardous wastes RCRA (1) established the Office of Solid Waste within EPA (subchapter II, 42 U.S.C. §§6911-6916); (2) "encouraged" states to establish solid waste control plans including provisions for closing open dumps (Subchapter IV, 42 U.S.C. §§6941-6969); and (3) expanded the federal role in research, development, and recycling (Subchapter VIII, 42 U.S.C. §§6981-6987). See generally R.W. Andersen, *The Resource Conservation and Recovery Act of 1976: Closing the Gap*, 1978 Wis. L. Rev. 633 (1978).

257. *See* textual notes 117-119 *supra* including a recapitulation of the EPA organizational wars of 1981-1983. Officials see severe problems with the current structure but are reluctant to suggest the fifth reorganization during this Presidential administration. I noticed that the EPA officials whom I interviewed did not have a printed card or other convenient means of informing me of their

telephone numbers and addresses. They wrote their titles, addresses, and telephone numbers on various scraps of paper. When I finally asked about this, I was told that since these changed every few weeks, printed cards would be wasted.

258.

> A case by the government may sometimes be stopped, directed, or settled on favorable terms by circumventing the agency officials handling the matter to deal with more favorably inclined supervisors or colleagues . . . . Another office within the agency may be convinced that the government's proposed enforcement action is adverse to its interest.

Miller, Defending Superfund and RCRA Imminent Hazard Cases, 15 Nat. Res. Law. 483, 498-499 (1983). These remarks might be more easily dismissed as speculation were the author not Jeffrey G. Miller, a former EPA Assistant Administrator for Enforcement (1977-1980), who came to his post after several years as a high-ranking lawyer in EPA enforcement.

259. *See* note 146 *supra*. The disbanding of the regional enforcement divisions in 1981 has meant that regional lead staff members have a large infrastructure to consult, meet with collectively, and on occasion placate. Some EPA officials believe that reconstituting the enforcement divisions in the regions would help restore to enforcement the focus it needs, although they also point out that the program staff, who resisted the creation of the post of enforcement coordinator, would resist their restoration even more strenuously. Sniff interview, *supra* note 249.

260. Program and enforcement are in an uneasy equilibrium at headquarters. The separate enforcement offices still exist, but in a weakened form. In the Carter Administration some 800 employees (line and support) reported to the Assistant Administrator for Enforcement. Now the number is closer to 100. Interview with Michael Brown, former EPA Enforcement Counsel, January 10, 1984. These include attorneys transferred back from program offices in the Christmas Eve reorganization of 1981. See note 119 *supra*. The staff under the Assistant Administrator for Enforcement and Compliance Monitoring are too numerous to be denied an important CERCLA enforcement role, but too few to take on large responsibilities. Moreover, most of the regional enforcement lawyers who were formerly part of the enforcement divisions

are now located in the regional counsels' offices, which take their guidance from the General Counsel in Washington. Just as regional programs now have their own enforcement branches, so do the program offices at headquarters, a 1981 acquisition the programs will try strenuously to keep. Sniff interview, supra note 249. The struggle of the separate enforcement entity to define a role for itself may mean delays in obtaining CERCLA policy clearances. Michael Brown, former EPA Enforcement Counsel, attributed the one-year delay in obtaining final approval for the agency's first settlement policy in large part to the enforcement-program conflict. Interview, January 10, 1984. A May 20 draft of the Brown memo was published on May 27, 1983, but was not approved until September 28, 1983. 14 Env't Rep. (BNA)--Curr. Dev. 925 (September 30, 1983). Brown mentioned that at least in the recent past the CERCLA program's multiple organizational involvement has exacerbated the bureaucratic tendency to avoid confrontation, to accomodate so that no one need lose over a policy disagreement, and to avoid disrupting working relationships. The problem is likely to worsen as the result of the Administrator's publicly branding the agency's enforcement record as "terrible," thereby providing a stimulus to headquarters enforcement to be more assertive in asking for CERCLA and RCRA cases. 14 Env't Rep. (BNA)--Curr. Dev. 1723-1724, 1727, (February 3, 1984). The Chairman of the House Energy and Commerce Subcommittee on Oversight and Investigations, John Dingell (D-Mich.), has repeated this theme. Id. at 1492, 1724.

261. 47 Fed. Reg. 31185 (July 16, 1983). Compare the similar transformation of the Refuse Act Permit Program, supra note 104.

262. See note 100 supra. Interview, John Wheeler, Esq., Office of Waste Programs Enforcement, November 20, 1983.

263. See text supra notes 128-136.

264. 47 Fed. Reg. 31180, 31185 (July 16, 1983). The agency is ambivalent about whether some of these requirements are imposed by statute. For example, it says NEPA applies to CERCLA cleanups but plans only to prepare the "equivalent" of an impact statement. EPA also plans to apply the substantive standards of the pollution statutes to cleanups, but earlier stated that it lacked authority to do so.

265. Interim Settlement Policy, _supra_ note 170, at 9.

266. Hedeman presentation, _supra_ note 151.

267. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

268. Hedeman presentation, _supra_ note 151.

269. The agency may believe its decision record will satisfy courts that it is the "substantial equivalent" of an environmental impact statement and that therefore a second document meeting the procedural requirements of NEPA and regulations of the Council on Environmental Quality will not be necessary. See Portland Cement Assoc. v. Ruckelshaus, 486 F.2d 375, (D.C. Cir. 1973).

270. Lee M. Thomas, Assistant Administrator, Policy on CERCLA Compliance with other Environmental Laws (January 5, 1984), _reprinted at_ 14 Env't Rep. (BNA)--Curr. Dev. 1591 (January 13, 1984).

271. _Id._ EPA will also require that the equivalent of the public hearing requirements of the regulatory statutes be imposed in site cleanup decision making. _Id._ A former EPA lawyer, now representing site users, believes that applying the regulatory standards to CERCLA is a multi-billion dollar decision and predicts that lawyers and technical consultants will earn large fees developing requests for use in the variance procedure, which will become a forum for proving case-by-case that the blanket policy was wrong. James Rogers, presentation to the ALI-ABA-ELI Smithsonian Conference on Environmental Law, Washington, D.C., January 22, 1984.

272. M. Bernstein, _Regulating Business by Independent Commission_ 95 (1955). _See generally id._ at. 74-102. _But see_ A. Downs, _Inside Bureaucracy_ 96-101 (1967), describing agency reluctance to discard past approaches if they still afford a source of power.

273. "A Provocative Note on the Pitfalls of Comprehensiveness," in F. Anderson, D. Mandelker, and D. Tarlock, _Environmental Protection: Law and Policy_ 596-600 (1984).

274. Novick, _What is Wrong with Superfund?_, 2 Envtl. F. 6, 10 (November, 1983).

275. A Conversation with Superfund Chief Bill Hedeman, 2 Envtl. F. 7, 13 (August, 1983) (concluding remarks).

276. J. Landis, The Administrative Process 75 (1938); A. Downs, Inside Bureaucracy 96-101 (1967).

277. E.g., the Instructional Memoranda (IMs) and Policy and Procedural Memoranda (PPMs) of the Federal Highway Administration, analyzed in Petersen and Kennan, An Analysis of Administration of the Federal-Aid Highway Program, 2 Envtl. L. Rep. (Envtl. L. Inst.) 50001 (1972). The U.S. Forest Service Manual in 50 volumes is available from the Government Printing Office.

278. See A. Downs, Inside Bureaucracy 59-63 (1967); Diver, The Optimal Precision of Administrative Rules, 93 Yale L. J. 65, 76 (1983); Ehrlich and Posner, An Economic Analysis of Legal Rulemaking, 3 J. Legal Stud. 257, 261 (1974) (distinguishing internal rules addressed to personnel charged with enforcement from external rules addressed to the public.) Diver, supra, explains judicial tolerance of "opaque" internal guidance as motivated by confidence that relatively homogencous staff and established agency routines will supply the missing "transparency." at 76-77. If outsiders must consult the guidance, however, judicial deference to opaque roles may not be justified.

279. The Environment Reporter (BNA)($955 per year): Chemical Regulation Reporter ($826 per year); Chemical and Radiation Waste Litigation Reporter ($950 per year); Inside EPA Weekly Report ($535 per year). Full texts are not always provided.

280. See Pedersen, Formal Records and Informal Rulemaking, 85 Yale L. J. 38 (1975) (describes EPA rule making policy and practices).

281. CERCLA itself is silent on the matter. Section 552(a)(1) of the APA states: "Each agency shall separately state and currently publish in the Federal Register for the guidance of the public . . . [(D)] statements of general policy or interpretations of general applicability formulated and adopted by the agency . . . ." EPA CERCLA guidance memoranda arguably are covered by this section. I found no suits directly addressing whether guidance memoranda must be published in the Federal Register, probably because few persons would be solely interested in the publication of a policy document and be able to meet ripeness defenses. There are, however, suits brought by plaintiffs who fit the §552(a)(1) test of being

adversely affected by agency action and who did not have actual notice of the agency policy. Plaintiffs who have met these requirements have been able to have the court prevent the agency from enforcing the policy. See, e.g., PPG Industries, Inc. v. Costle, 659 F.2d 1239, 1250 (D.C. Cir. 1981) (enforcement of sulfur oxide standards). The Attorney General's Manual on the Administrative Procedure Act (1947) suggests publication only if policy statements "are formulated . . . for the guidance of the public." At 22.

Professor Davis notes in analyzing the exemptions from notice-and-comment rule making under §553 that there is nothing in the APA that prohibits courts from requiring notice-and-comment procedures in situations where the APA itself does not explicitly require it. K. Davis, Administrative Law Treatise §6.31 (2d ed. 1968). There are many instances where courts have required notice-and-comment procedures when parties are significantly affected by the agency action. See, e.g., Independent Broker-Dealers Trade Assoc. v. SEC, 442 F.2d 132, 144 (D.C. Cir.), cert. denied 404 U.S. 828 (1971); Curlott v. Hampton, 438 F.Supp. 505, 508-09 (D. Alaska 1977), which likens notice-and-comment procedure to due process requirements. Professor Davis stops short of saying notice-and-comment procedures should be required. "The furthest a court may soundly go [under §553] is to hold that when the APA does not apply, common law requires notice-and-comment procedure for rules having substantial impact." The cases under §552(a)(1) require that the plaintiff be adversely affected.

Even if the memoranda fall short of the §552(a)(1)(D) publication requirement, the APA requires that they still be "ma[d]e available for public inspection and copying" either as general policy statements and interpretative guidelines or as "instructions to staff that affect a member of the public." Id. §552(a)(2). The same section further requires that a "current index" of these materials be maintained and published at least quarterly, unless "unnecessary and impracticable." Without such publication or absent actual notice, an agency cannot rely on such material "as precedent."

282. 14 Env't Rep. (BNA)--Curr. Dev. 979 (October 14, 1983). At least one organization responded. Cox, Matey, Zoll and Stoll, Comments of the Chemical Manufacturers Association on EPA's December 12, 1983 Draft Hazardous Waste Settlement Policy (January 12, 1984).

283. At the time the APA was enacted, Congress encouraged agencies voluntarily to adopt notice-and-comment procedures "where useful to the agency or beneficial to the public." S. Rep. No. 752, 79th Cong., 1st Sess. 13 (1945). Compare the more contemporary endorsement provided by the late Judge Harold Leventhal in Guardian Federal S & L. v. Federal S & L Ins. Corp., 589 F.2d 658, 666 (D.C. Cir. 1978). The choice of procedures rests with the agency. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc. 435 U.S. 519, 524, 546-47 (1978). The Administrative Conference has recommended that pre- or post-adoption notice and comment procedures be employed before or after adoption of a policy statement or interpretive rule if it is likely to have a substantial public impact. *See* Recommendation 76-5, 1976 Report of the Administrative conference of the United States 55-57, and Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 Mich. L. Rev. 520 (1977). In 1982 the Senate adopted an amendment to §553 of the APA requiring notice-and-comment treatment for any general policy statement or interpretive rule which "has general applicability and substantially alters or creates rights or obligations of persons outside the agency." S.1080, 97th Cong., 2d Sess. §3 (amending APA §553(a)(3)), 128 Cong. Rec. S.2713 (March 24, 1982) (daily ed.). *See also* Bonfield, *Some Tentative Thoughts on Public Participation in the Making of Interpretative Rules and General Statements of Policy under the APA*, 23 Admin. L. Rev. 101 (1971); Koch, *Public Procedures for the Promulgation of Interpretative Rules and General Statements of Policy*, 64 Geo. L. J. 1047 (1976); Comment, *A Functional Approach to the Applicability of Section 553 of the Administrative Procedure Act to Agency Statements of Policy*, 43 U. Chi. L. Rev. 430 (1976).

284. RCRA §105 provides numerous rule-making requirements for the National Contingency Plan. Other rule-making requirements in the Act are §102 (designating hazardous substances and reportable quantities of hazardous substances); §103 (prescribing the information owners and operators must give EPA and record keeping requirements); §104 (establishing emergency procurement powers); §107 (establishing private insurance); §108 (determining financial responsibility for motor carriers); §111(f) (designating officials who may spend money in the Fund); §111(g) (giving notice to potential injured parties); §111(h) (assessing damages); §112 (establishing procedures for filing claims). Strictly

applying the doctrine *inclusio unius exclusio alterius*, EPA lacks the authority to make rules instead of issuing the guidance memoranda. However, CERCLA §115 further states that the President not only may delegate his statutory CERCLA powers, it may ". . . promulgate any regulations necessary to carry out the provisions of this title." Hence, while almost any CERCLA policy making could be required to be done by rule, the President would have explicitly to do so (perhaps authorizing EPA to do so), for CERCLA implementation and enforcement policies. Section 115 does afford, however, one convient means of channeling EPA enforcement discretion.

285. 126 Cong. Rec. H.11787 (Dec. 3, 1980 daily ed.) (Congressman Florio)

286. "A general statement of policy . . . does not establish a 'binding norm.' It is not finally determinative of the issues or rights to which it is addressed." Pacific Gas and Electric Co. v. Federal Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974). *See also* Morton v. Ruiz, 415 U.S. 199 (1974); American Bus. Assoc. v. United States, 627 F.2d 525 (D.C. Cir. 1980); Batterton v. Marshall, 648 F.2d 694 (D.C. Cir. 1980); Chamber of Commerce v. OSHA, 636 F.2d 464 (D.C. Cir. 1980).

287. *See*, *e.g.*, Pedersen, supra note 280.

288. Pickus v. Board of Parole, 507 F.2d 1107, 1112 (D.C. Cir. 1974).

289. *Id*. at 1113.

290. "The form of a regulation is obviously not controlling; substance and effect will determine whether a rule is a 'general statement of policy.' If it appears that a so-called policy statement is in purpose or likely effect one that narrowly limits administrative discretion, it will be taken for what it is -- a binding rule of substantive law." Guardian Federal S. & L. v. FSLIC, *supra* note 283 at 666-67 (per Judge Leventhal). (footnote omitted.) *See also* Burroughs Wellcome Co. v. Schweiker, 649 F.2d 221 (4th Cir. 1981); Stoddard Lumber Co. v. Marshall, 627 F.2d 984 (9th Cir. 1980); Brown Express v. United States, 607 F.2d 695 (5th Cir. 1979). EPA's current CERCLA policy-making approach probably would require rule making under the four-part test endorsed in Dow Chemical v. CPSC, 459 F.Supp. 378, *recons. denied* 464 F.Supp. 904 (W.D. La. 1978).

291. Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584, 597-598 (D.C. Cir. 1971).

292. By April, 1984, over 60 active reimbursement and enforcement cases were pending. Chemical Manufacturers Association, Superfund Litigation Update (April, 1984).

293. Judicial review of informal agency action "is still unsettled and developing and probably will be for a long time to come. The diversity of informal governmental action will present generalization, and the complexity of contemporary issues will induce action." Gardner and Greenberger, Judicial Review of Administrative Action and Responsible Government, 63 Geo. L.J. 7, 20 (1974). See Gardner, The Informal Actions of the Federal Government, 26 Am. U. L. Rev. 799 (1977); Davis, Informal Administrative Action: Another View, id. at 836 (a reply to Mr. Gardner); Sofaer, Judicial Control of Informal Discretionary Adjudication and Enforcement, 72 Colum. L. Rev. 1293 (1972); Verkuil, A Study of Informal Adjudication Procedures, 43 U. Chi. L. Rev. 739 (1976).

294. See note 284 supra.

295. CERCLA §115.

296. Environmental Defense Fund v. Gorsuch, 12 Envtl. L. Rep. (Envtl. L. Inst.) 20376 (D.D.C. February 12, 1982), order modif. at 20401 (March 18, 1982).

297. See the Consent Decree in Environmental Defense Fund v. EPA, supra note 138.

298. See text supra notes 284-287 supra.

299. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971), citing Sen. Rep. No. 752, 79th Cong. 1st Sess. 26 (1945) ("If statutes are drawn in such broad terms that in a given case there is no law to apply, courts of course have no statutory question to review.")

300. Courts traditionally do not interfere with an agency's choice of sanctions and enforcement techniques, for a mixture of reasons having to do with agency expertise, justiciability and judicial capacity, the analogy to criminal prosecutorial discretion and sentencing, and history. "[W]here Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy,

'the relation of remedy to policy is particularly a matter of administrative competence.'" Tager v. SEC, 344 F.2d 5, 8-9 (2d Cir. 1965), quoting American Power and Light Co. v. SEC, 329 U.S. 90, 112 (1946). This is true whether it is the severity of the sanction that is attacked, American Powers, supra, (but see Arthur Lipper Corp. v. SEC, 547 F.2d 171 (2d Cir. 1976), its non-use (but see Dunlop v. Bachowski, 421 U.S. 560 (1975), its leniency (but see United Automobile Workers v. NLRB, 455 F.2d 1357 (D.C. Cir. 1971)), or its timing or selective application, FTC v. Universal-Rundle Corp., 387 U.S. 244 (1967).

In CERCLA, the government's position that any or all parties who have disposed of wastes at a site are jointly and severally liable for the complete remedy may be rephrased in terms of prosecutorial or enforcement discretion. In effect, the government is maintaining that it has broad non-reviewable discretion to select whom it pleases to carry out all or any portion of the cleanup. Such "selective enforcement" and "choice of severity of sanction" arguably are beyond judicial review, although some limited exceptions exist as some of the cases above suggest. Nevertheless, the arguments and precedents used to shield agency enforcement discretion cannot be invoked without qualification in the administration of CERCLA. EPA's choice of tactics involves some elements of traditional enforcement decision making, and some elements of program management that clearly, were a court to find law to apply, would be carefully reviewed as informal adjudication under the Overton Park standard. EPA's choices range from contracting with the Fund to complete the remedy itself (similar to contracting for highway construction or stream channelization), to ordering administratively that one, some, or all responsible parties complete the remedy, to requesting and then suing to recoup funds spent, to suing to enforce administrative orders, to negotiating the remedy or reimbursment before any of the preceding are completed. Criminal fines and imprisonment may also be sought. Judicial willingness to intervene increases the closer one moves toward the beginning of the implementation process, and critical opinion favors a stronger reviewing role for the courts. For critical commentary, see 2 K. Davis, Administrative Law Treatise (1979) (ch. 8 and 9). See especially, Note, Judicial Control of Systematic Inadequacies in Federal Administrative Enforcement, 88 Yale L. J. 407 (1978). See generally L. Jaffe, Judicial Control of Administrative Action 266-273 (1965).

301. A smattering of pre-expenditure and pre-enforcement cases await settlement or judicial resolution. Only seven of 70 active CERCLA cases involve pre-expenditure and pre-enforcement review. Chemical Manufacturers Association, Superfund Litigation Update 8-9 (April 1984). The application of legal principles pertaining to standing, finality, ripeness, and equitable declaratory relief in CERCLA implementation consequently has just begun, as the three initial district court rulings discussed in the notes _infra_ reveal.

302. _See_ the Annotation at 42 U.S.C.A. §4332(2)(C). _See also_ S. Taylor, _Making Bureaucracies Think: The Environmental Impact Statement Strategy of Administrative Reform_ (1983).

303. _See_ notes 268-269 _supra_.

304. _See_ note 161 _supra_.

305. _See_ note 104 _supra_.

306. _See, e.g._, the Clean Water Act, §511(c), 33 U.S.C. § 1371, and J. Quarles, _Cleaning Up America_ 113 (1976).

307. _See_ Portland Cement Ass'n v. Ruckelshaus, _supra_ note 269 at ___.

308. In J. V. Peters & Co. v. Ruckelshaus, 20 Envir. Rep. -- Cases 2222 (N.D. Ohio, 1984), plaintiffs, former owners and operators of an industrial waste storage facility, sought to prevent EPA from undertaking a Fund response to clean up their site, alleging that CERCLA and the NCP require EPA to make an assessment of the risks at the site and of the willingness of plaintiffs themselves to clean up the site, neither of which EPA did. The court held that the "great likelihood" that EPA would bring a §107 reimbursement action and that immediate judicial review provided the plaintiffs the only opportunity to challenge the propriety of the EPA response prior to the "potential imposition" of liability, were sufficient to overcome the government's standing, finality, and ripeness objections. The court thus seems to imply that a decision to launch a Fund cleanup is "final agency action," final enough at least to warrant judicial scrutiny of aspects of the EPA decision that might affect a responsible party's §107 liability.

On the other hand, a different district court has held squarely the opposite. D'Imperio v. U.S., 575 F. Supp. 248 (D. N.J. 1983). The court held that plaintiff was not entitled to a pre-expenditure Fund cleanup declaratory judgment regarding its liability to reimburse EPA for its response costs, because the issue was not yet ripe for review. EPA had not yet made a concrete effort to establish the plaintiff's liability. Preliminary site study thus was not final agency action.

309. On the merits, the court in the *Peters* case, *supra* note 308, held for the government because the plaintiffs had failed to allege facts specfic enough to warrant judicial interference with the CERCLA scheme, which contemplates swift federal response to serious environmental threats. The court appeared to have in mind, but failed to cite, the summary seizure cases such as Ewing v. Mytinger & Casselberry, *supra* note 248. The court avoided specifying the type of claims that would permit pre-cleanup review if properly alleged, but seemed to hint that they would have to pose quite serious challenges to EPA action "[I]f the . . . [responsible party] averred that EPA had absolutely no rational basis for undertaking a response action and that no preliminary assessment had been made, a federal court would entertain the claim." [Slip op. at 7.] -- Env't Rep. Cas. (BNA)-- at ___.

310. In Nicolet, Inc. v. Eichler, ___ F. Supp.___, ___ Env't Rep. Cas. (BNA)___ (E.D. Pa. March 26, 1984), the court ruled from the bench that the responsible party plaintiff was entitled to pre-enforcement judicial review of §106 administrative orders directing it to undertake certain measures to control releases of asbestos wastes at its Ambler, Pennsylvania plant and to give EPA access to the site, but that review would be limited to ascertaining whether EPA acted arbitrarily or capriciously or committed an error of law in issuing the orders. Plaintiff had requested *de novo* review; EPA argued that its orders were substantively unreviewable before enforcement. A written opinion will follow. Memorandum from Kirk Sniff, Associate Enforcement Counsel for Waste, to Courtney Price, Assistant Administrator for Enforcement and Compliance Monitoring (March 29, 1984).

311. "The problem of ripeness for pre-enforcement review is best seen in a two-fold aspect, requiring us to evaluate both the fitness of the issues for judicial

decision and the hardship to the parties of withholding court consideration." Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1966). The court asked whether the plaintiff faced a severe dilemma in deciding whether to comply with the order. In Abbott, the dilemma was greatly increased costs of compliance contrasted with "the alternative to compliance . . . [which] may be even more costly. That course would risk serious criminal and civil penalties for the unlawful distribution of misbranded drugs." Id. at 153. The factors stressed in Abbott Laboratories and other decisions for making the ripeness determination are refreshingly non-formalistic, i.e., the courts look past whether agency policy has been expressed as notice-and-comment rule making, general policy statement, informal advisory opinion or letter, or other informal staff communication to whether the issues are legal or factual (i.e., whether a record such as would be developed in an enforcement proceeding would aid in deciding the case), whether the policy is in final form (can the agency easily change the policy? Is the agency head the source of the policy? Has the agency disclaimed finality?), whether immediate compliance imposing a sizeable new economic or similar burden is expected, and whether the statute provides harsh enforcement sanctions which may be sought by the agency in subsequent enforcement proceedings. See, in addition to Abbott Laboratories, Dunlop v. Bachowski, 421 U.S. 560, 567 (1975), Helco Products, Co. v. McNutt, 137 F.2d 681 (D.C. Cir. 1943); National Automatic Laundry and Cleaning Council v. Shultz, 443 F.2d 689 (D.C. Cir. 1971); Bethlehem Steel Corp. v. EPA, 536 F.2d 156 (7th Cir. 1976); Diamond Shamrock Corp. v. Costle, 580 F.2d 670 (D.C. Cir. 1978).

A 76 year old Supreme Court case placing limitations on the extent to which severe sanctions must be risked to test the constitutionality of a state statute is still law, although Abbott Laboratories and offspring have implicitly superseded its narrower test. In Ex Parte Young, 209 U.S. 123 (1908), Minnesota had established severe penalties for railroads which failed to comply with maximum rates established by statute. In invalidating the statute, the Court held that "to impose upon a party . . . the burden of obtaining a judicial decision of such a question . . . only upon the condition that, if unsuccessful, he must suffer imprisonment and pay fines . . . is in effect to close up all approaches to the courts." Id. at 144. See also St. Regis Paper Co. v. United States, 368 U.S. 208 (1961).

When alternate access to the courts exists, Young does not apply. See Lloyd A. Fry Roofing Co. v. EPA, 554 F.2d 885, (8th Cir. 1977); and Union Elec. Co. v. EPA, 593 F.2d 299, (8th Cir. 1979). In Fry Roofing the court held that pre-enforcement review was unnecessary because the issues could be reviewed, inter alia, in state court. In Union Electric, the court held that because civil or criminal penalties were not required by the act since EPA might seek injunctive relief instead, "it cannot be said that confiscatory penalties will necessarily be incurred." 593 F.2d at 306 (emphasis in original). The D.C. Circuit also recently distinguished Ex parte Young, in Duquesne Light Co. v. EPA, 698 F.2d 456, 469-70 n. 14 (D.C. Cir. 1983).

312. See, e.g., A. O. Smith Corp. v. FTC, 530 F.2d 515, 521 (3d Cir. 1976) (order issued on faiure to file certain financial reports with the Commission). The court remarked that the Abbott Laboratories test for ripeness was akin but not identical to the standard of irreparable harm applied in the granting of a preliminary injunction. 530 F.2d at 522. In Smith the court found that the cause was ripe and that the parties would suffer immediate hardship if judicial consideration were withheld but nevertheless held that a preliminary injunction was inappropriate, because the injury must be of a "peculiar nature" -- injury for which money damages cannot atone -- and that lost profits did not suffice. Id. at 525-529.

In Lloyd A. Fry Roofing Co. v. EPA, 554 F.2d 885 (8th Cir. 1977), the plaintiff, an emitter of air pollution, sought an injunction against an EPA order for abatement. The court reaffirmed that a strong presumption favors pre-enforcement judicial review, citing Abbott Laboratories, but held that the Clean Air Act clearly demonstrated a legislative intent to preclude district court review of an EPA abatement order. At 890-891. It also pointed out that other forms of review were possible, e.g., in state courts. At 891. Compare Donner Hanna Coke Corp. v. Costle, 464 F.Supp. 1295 (W.D.N.Y. 1979) (Plaintiff sought pre-enforcement judicial review of an EPA inspection order. The agency counter-claimed for enforcement, and the court treated the case as an enforcement action.)

313. The APA §705 might be involved in aid of judicial review. Under that section a court may stay agency action to prevent irreparable injury to the plaintiff. One possible set of factors to be

considered appears in Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958) (strong showing on the merits, irreparable injury, harm to other parties, the public interest is served by relief). Of course, "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury," Renegotiation Board v. Bannercraft Clothing Co., 415 U.S. 1, 24 (1974), but the harm to potentially responsible CERCLA parties might conceivably lie in the government's destruction (during a remedial action) of physical evidence vital to a responsible party's defense in a reimbursement action, or lack of frugality and inefficiency in the government's choice of a remedy for which the responsible party will in all likelihood be asked to pay. *See also* Charlie's Girls v. Revlon, Inc. 483 F.2d 953, 954 (1973) (a preliminary injunction might issue either on a showing of probable success/irreparable injury "or that serious questions are raised and the balance of harships tips sharply" in plaintiff's favor.)

314. *See* note 312 *supra*.

315. *E.g.*, North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908) (seizure of food not fit for human use); Ewing v. Mytinger Casselberry, Inc., 339 U.S. 594 (1950) (seizure of mislabeled vitamin products.) *See* additional cases cited in Goldberg v. Kelly, 397 U.S. 254, 263-64 note 10 (1970). *See also* Freedman, *Summary Action by Administrative Agencies*, 40 U. Chi. L. Rev. 1 (1972).

316. *See* Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 Harv. L. Rev. 637 (1976).

317. The metaphor was taken from the title of Mnookin and Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L. J. 950 (1979).

318. *See* III.E *infra*.

319. *See* IV.A.2.

320. *See* IV.A.1 *infra*.

321. *See* note 11 *supra*.

321. *See* note 11 *supra*.

322. Instead of refusing to negotiate unless the parties first agree to a complete cleanup, EPA will now negotiate if 80 percent of th cleanup is assured. Instead of refusing to share the names of responsible parties at a site, EPA now will make their names available. Instead of doing virtually all RI/FS itself, EPA now will allow responsible parties to perform them in a wider variety of circumstances.

323. The agency has ample discretion to fashion the CERCLA implementation program of its choice, relatively free of rule-making constraints or pre-expenditure or pre-enforcement judicial review. *See* text above notes 291-315 *supra*. Its choice is in the spirit of Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978). Certainly the EPA has as much or more flexibility to respond to the impasse in CERCLA cleanups as agencies in general have to resolve the crisis of legitimacy arguably facing rule making by employing regulatory negotiation. *See* Harter, *Negotiating Regulations: A Cure for Malaise*, 71 Geo. L.J. 1 (1982).

324. *See* text above notes 128-136 *supra*.

325. *See*, e.g., Cramton, *A Comment on Trial-Type Hearings in Nuclear Power Plant Siting*, 58 Va. L. Rev. 585, 591-593 (1972) (accuracy, efficiency, and acceptability) and Diver, *The Assessment and Litigation of Civil Money Penalties by Federal Administrative Agencies*, 1979 Recommendations and Reports of the Administrative Conference of the United States 203, 283-287 ("substantive effectiveness"). For "criteria for determining the effectiveness of a dispute resolution mechanism," see Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 113 n. 7 (1976) ("cost, speed, accuracy, credibility (to the public and the parties) and workability.") Diver, *supra* at 284 n. 366, points out that the authors who propose criteria for evaluating administrative processes give scant attention to the substantive role of procedures. This may be a shortcoming more of the legal literature than other literature on the implementation of government programs. Three large groupings of analysts of administrative processes may be discerned: (1) Those who focus on the actual economic and social results and impacts of administrative programs. Do programs promote efficiency in the welfare economist's sense? Practitioners include economists, engineers, and some policy analysts. Legislative programs are also critiqued. (2) Those who focus on implementation

efficiency. Are transaction costs low? Is the program well-administered, i.e., does it achieve least-cost solutions to given problems? Practitioners include engineers, students of public administration, agency program evaluation offices, and economists (as a secondary goal). (3) Those who emphasize process values. Is the program fair? Is due process accorded? Practitioners include lawyers and political scientists. *See* E. Bardach, *The Implementation Game* (1977); L. Lynn, *Designing Public Policy* (1971); Bower, Ehler, and Kneese, *Incentives for Managing the Environment*, 11 Env. Science and Technology 250 (1977); Hargrove, *The Missing Link: The Study of the Implementation of Social Policy* (1975) (An Urban Institute Paper); Sabatier, *Regulatory Policy Making: Toward a Framework of Analysis*, 17 Nat. Res. J. 415 (1977); Van Meter and Van Horn, *The Policy Implementation Process: A Conceptual Framework*, 6 Administration and Society 445 (1975).

Welfare economics may afford the best starting-point for developing criteria appropriate for evaluating the negotiation strategy proposed here. Negotiation promotes optimality through its emphasis on plus-sum solutions to conflict and on widening the scope of negotiation to the point bargains -- including "side" bargains -- are possible which improve the positions of all participants. Some of the tenets and techniques of modern negotiation seem expressly designed to keep parties' expressions of their utilities open and accurate and to overcome the problem of high transactions costs in multi-party dispute resolution. Even the problems of negotiation and market bargaining are similar, e.g., the free rider.

In the economist's view, an agency's evironmental program should minimize the sum of damage costs (illness, risk, property damage), abatement costs (pollution controls, site cleanup), avoidance costs (leaving a polluted area, filtering water), and transactions costs (monitoring, administering, adjudicating). U.S. Council on Environmental Quality, Fourth Annual Report 74 (1973). As the text develops, negotiation can reduce, not only the sum of these costs, but each cost separately, in comparison to the strategy currently adopted by EPA.

326. *See, e.g.*, Cox, Matey, Zoll, and Stoll, Comments of the Chemical Manufacturers Association on EPA's December 12, 1983 Draft Hazardous Waste Settlement Policy 3-6 (January 12, 1984).

327. See, e.g., Brown, The Settlement Dilemma (A Tragedy in Two Acts), 5 Haz. Waste Rep. 12 (December 12, 1983); Rogers, Three Years of Superfund, 13 Envtl. L. Rep. (Envtl. L. Inst.) 10361 (1983); Superfund -- How to Rebuild a Badly Damaged Program?, 2 Envtl. F. 17 (June, 1983) (panel discussion); and Costle interview, supra note 200.

328. The imposition of strict, joint, and several liability on anyone who "disposes" at a site substantially assists the government in making its case. The district courts may require a single defendant to bear total responsibility in the initial action, forcing it to seek contribution in lengthy subsequent litigation. See the Appendix. In a reimbursement action, the government will argue that it has only to prove its costs -- not that they were cost-effective. Evidence necessary to build a case against reimbursement will be controlled by the government, may be destroyed in the course of cleanup, and will in any event become stale "paper" evidence by the time a reimbursement action is filed.

329. The expense of cleanup, plus three times cleanup in "treble damages." CERCLA §107(c)(3).

330. Telephone interview, Michael Brown, Esq., May 4, 1984. Mr. Brown, former EPA Enforcement Counsel, represents a variety of responsbile party chemical companies.

331. Pesticide & Toxic Chem. News, November 9, 1983, at 19-20 (Address to 37th semiannual meeting of the Chemical Manufacturers Association (CMA) by Louis Fernandez, board chairman). See also 14 Env't Rep. (BNA)--Curr. Dev. 268-69 (June 17, 1983) (CMA outgoing board chairman William G. Simeral called for industry assumption of the cleanup burden and the creation of an "unimpeachable source" similar to the Federal Center for Disease Control to analyze the health effects of toxic substances, referring to the compensation issue as "growing" and a "potential Pandora's box.")

332. Shabecoff, The Chemical Lobby's "Turnaround", N.Y. Times, November 21, 1983, at A16.

333. Brown interview, supra note 330. Some attorneys expressed a preference for capturing final agreements in consent decrees rather than administrative consent orders, which would mean that at least formally responsible parties would have to be sued. Telephone

interview, James W. Moorman, Esq., April 12, 1984; telephone interview, James Rogers, Esq., April 13, 1984. Of course, a contractual agreement captured neither in a consent decree nor an administrative consent order is preferable to the responsible parties. Id.

334. See note 11 supra and Shabecoff, supra note 332.

335. Fernandez and Simeral, supra note 331.

336. The Monsanto Company plans to spend up to $25 million in 1984 to start cleanup at 30 sites where it discarded wastes. More may be spent in 1985 and 1986. 14 Env't Rep.(BNA)--Curr.Dev. 1443 (December 16, 1983).

337. See note 8 supra.

338. See Shabecoff, supra note 332, and infra IV.B.1.

339. Lee M. Thomas, Assistant Administrator for Solid Waste and Emergency Response, in discussions with the Judicial Review Committee of the Administrative Conference of the United States regarding recommendations based on this paper, May 14, 1984.

340. Telephone interview, Steven Ramsey, Chief, Environmental Enforcement Section, Land and Natural Resources Division, U.S. Department of Justice, May 4, 1984.

341. Telephone interview, Lois Schiffer, Special Litigation Counsel, Department of Justice, February 29, 1984 (lead counsel for the Stringfellow site); Interview, Kirk Sniff, EPA Associate Enforcement Counsel for Waste, February 24, 1984 (Mr. Sniff estimates that 90 percent of NPL sites will be cleaned up eventually with Fund revenues).

342. See, e.g., remarks of Khristine Hall of the Environmental Defense Fund, in Superfund: How to Rebuild a Badly Damaged Program?, 2 Envtl. F. 17 (June, 1983) (panel discussion).

343. Telephone interview, Lois Gibbs, President, Citizens Clearinghouse for Hazardous Wastes, April 9, 1984. Ms. Gibbs, a former Love Canal area resident, stated that the key to citizen acceptance of a site remedy proposed by government or industry is review and approval of the cleanup plan by a technical consultant whom citizens trust, citing experience at the Bruin

Lagoon at Kennerdell, Pennsylvania, the General Electric site at Fort Edwards, New York, and the Stringfellow site at Riverside, California. She added that complete removal does not remain the citizens remedy of choice when this condition is satisfied.

Footnotes to IV

344. The Ford Foundation in particular became active in the field in the mid-1970s. *See* New Approaches To Conflict Resolution: A Ford Foundation Report 62-73 (1978) (explaining the Foundation's rationale). For specific early projects, *see* the Foundation publication, Mediating Social Conflict (1978).

345. *See The Disputing Process -- Law in Ten Societies* 10-11 (L. Nader and H. Todd, eds. 1978)

346. B. Nicholas, *Roman Law* 159 (1962).

347. *See* Wolff, Beyond Tolerance, in *A Critique of Pure Tolerance* 3 (1969) (R. Wolff, B. Moore, H. Marcuse, eds.) *See generally*, R. Dahl, *Polyarchy* (1971); *Political Opposition in Western Democracies* (1969) (R. Dahl ed.); N. Polsby, *Community Power and Political Theory* (2nd ed. 1980).

348. J. Auerbach, *Justice Without Law?* 4-5, *passim* (1983).

349. H. Edwards and J. White, *The Lawyer as a Negotiator* (1977). *Compare* M. Wessel, *The Rule of Reason: A New Approach to Corporate Litigation* (1976).

350. *See infra* IV.A.5 and Harter, *Negotiating Regulations: A Cure for Malaise*, 71 Geo. L. J. 1, 32-38 (1982).

351. The proceedings of the annual meetings of the Society of Professionals in Dispute Resolution cover the spectrum of approaches. *See especially* Neutrals' Response to a Society in Dispute (eigth annual meeting, October 19-22, 1980). *See also* J. Brock, *Bargaining Beyond Impasse* (1982) (recommends a new process for joint resolution of public section labor disputes).

352. R. Fisher and W. Ury, *Getting to Yes* 153 (1981). *See, in review*, White, *The Pros and Cons of "Getting to Yes,"* 34 J. Legal Educ. 115 (1984). Many fundamental concepts defy complete definition: "What then is time? If no one asks me, I know; if I wish to explain it to one that asketh, I know not." St. Augustine, Confessions 224 (1957 ed.) ("Quid est

tempus? Si nemo ex me quaerat scio. Sed quaerenti explicare velim nescio.") A dictionary may be useless: "bargain . . . .[T]o negotiate over the terms of a purchase, agreement, or contract . . . . [T]o come to terms . . . ." Webster's New Collegiate Dictionary (1981); "negotiate . . . . to confer with another so as to arrive at the settlement of some matter . . . . [T]o deal with (some matter that requires ability for its successful handling) . . . . [T]o arrange for or bring about through conference, discussion, and compromise . . . ." Id; "settle . . . . 1: to place so as to stay . . . . 5a: to fix or resolve conclusively . . . ." Id.

353. In discussing conditions or "negotiation principles" favoring regulatory negotiation, Harter concludes:

> Regulatory negotiation is more likely to be successful when no single party can dictate the results without incurring an unacceptable sanction from the other parties. Only a limited number of parties directly interested in the outcome of the regulation should participate in negotiations, and the issues involved in the negotiation should be relatively well-developed and ripe for decision. Moreover, it must be clear to everyone that some form of regulation will be issued in the reasonably near future. The parties must believe that they can each win through negotiation. Issues should not involve fundamental value choices; rather, the parties should be guided by existing criteria reasonably acceptable to the parties. Finally, the parties must have a reasonable expectation that the agency will use the fruits of their labor as the basis of public policy; otherwise, they may view the negotiations as a waste of time.

Harter, supra note 350 at 52-53 (footnotes omitted).

354. Susskind and Weinstein, Towards a Theory of Environmental Dispute Resolution, 9 Envtl. Aff. 311-46 (1980), discusses nine steps they say are tailored to the unique needs of environmental dispute resolution (identify the parties or interest groups with a stake in the outcome; ensure their effective credible representation at the table; expose and deal with fundamental values and assumptions; develop sufficient alternatives or options for a "plus-sum" solution; agree on the scope and time frame over which potential environmental impacts will be considered; get agreements on the techniques for identifying, weighing, and trading off benefits and costs;

determine fair compensation or compensatory actions; ensure that the bargains made are implementable; and hold parties to their commitments.).

355. Cormick, *Intervention and Self-Determination in Environmental Disputes: A Mediator's Perspective*, Winter, 1982 Resolve (Cons. Found.) 2. *Compare* R. Likert and J. Likert, *New Ways of Managing Conflict* (1976).

356. *E.g.*, *Roundtable Justice: Case Studies in Conflict Resolution* (Robert Goldmann, ed. 1980); A. Talbot, *Settling Things: Six Case Studies in Environmental Mediation* (1983).

357. *E.g.*, H. Raiffa, *The Art and Science of Negotiation* (1982); M. Davis, *Game Theory* (1983). Numerous articles in The Journal of Conflict Resolution apply the techniques. Law review articles include Fuller, *Mediation - Its Forms and Functions*, 44 S. Cal. L. Rev. 305 (1971); Eisenberg, *Private Ordering Through Negotiation: Dispute Settlement and Rulemaking*, 89 Harv. L. Rev. 637 (1976); Harter, *supra* note 350. In social psychology, *see* J. Rubin and B. Brown, *The Social Psychology of Bargaining and Negotiation* (1975); J. Pfeffer, *Power in Organizations* (   ). *Compare* P. Wehr, *Conflict Regulation* (1979).

358. Harter, *supra* note 350 at 44.

359. *See* *Trends Toward Corporatist Intermediation* (P. Schmitter and G. Lembruch, eds. 1979); Wilson, *Why Is There No Corporatism in the United States? in Patterns of Corporatist Policy-Making* 218, 220, 225, 231 (G. Lehmbruch & P. Schmitter eds. 1982), R. Wolff, B. Moore, and H. Marcuse, *A Critique of Pure Tolerance* (1969).

360. In a brief exposition of the theory of negotiation that has become a *cri-coeur* of the negotiation movement, one of its leading proponents identified "self-determination" for all parties as the essential attribute of a legitimately mediated dispute. Negotiation through self-determination serves "widely and deeply held values" if three criteria are satisfied: understanding the negotiation process, "relative power or influence," and opportunity for involvement. Power is key: "Parties to a dispute must have an independent source of power and influence. Benevolence, patronage, or charity can never lead to self-determination in its true sense . . . . Successful negotiations require that each party

recognize the right of all other negotiating parties to participate equally in the decision-making process. To achieve such 'recognition' . . . challenging parties will require substantial power." Cormick, Intervention and Self-determination in Environmental Disputes: A Mediator's Perspective, Winter, 1982 Resolve (Cons. Found.) 1, 3, 4 (footnote omitted). A second mediator forcefully asserts that only "cloutful people" matter in negotiation. Bellman, quoted in Amy, The Politics of Environmental Mediation, 11 Ecology L. Q. 1, 7 (1983). For a thoughtful examination of the relation of negotiation to political theory by an advocate of negotiation, see Crowfoot, Negotiations: An Effective Tool for Citizens Organizations Northern Rockies Action Group Papers 22-44 (Fall, 1980) (analyzing the legitimacy of negotiation from consensus, pluralist, and elite dominance views of society).

Harter argues that regulatory negotiation is a cure for a "malaise" or crisis of political legitimacy afflicting the federal administrative process. The political and legislative components of agency rule making have been expanded and highlighted by Congress' delegation of more quasi-legislative authority to agencies in recent years and by the ascendancy of the interest accommodation model of administrative policy making. See, Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1669 (1975). These developments have undermined the traditional rationales underpinning the legitimacy of agency policy making. Thus "[a]gency action no longer gains acceptance from the presumed expertise of its staff, nor because it is simply filling in the gaps left by Congress, nor because it is guided by any widely accepted public philosophy." Harter, Negotiating Regulations: A Cure for the Malaise?, 3 EIA Rev. 75, 79 (1982). To restore legitimacy, Harter urges that affected interests should actually share in the ultimate judgment of the agency through consensual regulatory negotiation. Id. at 79-80. In short, negotiation would implement democratic political theory in the administrative setting. Regulatory negotiation would enable administrative decisions to be made the same way other political decisions are made in the American system. See also J. Mansbridge, Beyond Adversary Democracy (1980).

Yet power-based participation in negotiated solutions presents a challenge to traditional democratic theory which proponents of negotiation have not yet satisfactorily met. Neither this critique nor a defense of negotiation can be fully developed here, but the broad lines of inquiry are not difficult to draw. Bargained solutions may threaten the protection and political equality guaranteed minorities in our system if the poor, weak, absent, unborn, or disorganized who have almost no resources with which to bargain are unable to participate. Bargained solutions may also threaten majority rule if they are not subject to adequate public review, opposition, appraisal, amendment, or veto. *See* Dahl, Epilogue, in *Political Opposition in Western Democracies* 387, 396-397 (R. Dahl, ed. 1966); Rodwin, *Can Bargaining and Negotiation Change the Administrative Process?*, 3 EIA Rev. 373 (1982). It is not what powerful opposed interests agree should be done that is the essence of decision under a public program to correct a legislatively proscribed social wrong, but rather what the agency decides after study, consultation, and review. Statutes legitimate an agency exercise of power which follows a complex process of democratic law making. It may be true that agency policy decisions increasingly lack political credibility in a broad sense because even the interest accommodation model does not adequately provide for political representation. But the "legitimacy" of administrative decisions can hardly be doubted, and power-based negotiation appears capable of frustrating the operation of "legitimate" agency decision making that many feel is better able than is negotiation to protect minority interests while ensuring that majoritarian solutions are effectuated.

Broadly, a response to the democratic critique of negotiated solutions proceeds along the following lines: while on the one hand protection of minority interests within a system of effective majority rule presents a challenge to evolving negotiation strategies, on the other it is not clear that existing governmental decision-making institutions currently are capable of meeting this challenge any more effectively than are consensus-based approaches. Case-by-case experimentation with negotiation to develop detailed processes which are efficacious in protecting democratic values is therefore justified, to provide a crucible in which democratic theory and consensus, power-based negotiation theory might eventually be reconciled. They already lay claim to similar objectives and accomplishments.

The problem of the legitimacy of consensus-based dispute resolution where public rights are involved is similar to the problem of the legitimacy of adjudication of public law questions at the behest of "public interest" groups, and converges with it where, as is often the case, the court encourages the parties to negotiate a solution which is then approved in a consent decree. *See* IV.A.5. *infra*. Responding to Professor Stewart's criticism of the potential inadequacy of interest group representation in public interest litigation, *The Reformation of American Administrative Law*, *supra* at 1684-1688, Professor Chayes attacked the fount of the political legitimacy of administered dispute resolution in these terms: "[T]o retreat to the notion that the legislature itself -- Congress! -- is in some mystical way adequately representative of all the interests at stake, particularly on issues of policy implementation and application, is to impose democratic theory by brute force on observed institutional behavior." Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281, 1311 (1976). *Compare* G. Calabresi, *A Common Law for the Age of Statutes* 46 (1982).

361. American Bar Association Special Committee on Alternative Dispute Resolution, *Consumer Dispute Resolution: Exploring the Alternatives* (1983).

362. *See* IV.A.5.a *infra*.

363. *See* IV.A.4 *infra*.

364. *See* Mediation Quarterly, the Journal of the Academy of Family Mediators.

365. See R. Fisher, *International Conflict for Beginners* (1969) and the Journal of Conflict Resolution, *supra* note 357, the masthead of which bears the running caption, "Research on War and Peace Between and Within Nations").

366. *See The Hudson River Power Plant Settlement* (R. Sandler and D. Schoenbrod, eds.) (materials for a conference at New York University School of Law, December 10, 1981).

367. G. Bingham, *Resolving Environmental Disputes: A Decade of Experience* (1984) (forthcoming, October, 1984). Ms. Bingham included mediated disputes only. Her analysis is based on 165 cases, including 20 failures to reach agreement. *See also* A. Talbot, *Settling Things: Six Case Studies in Environmental Mediation* (1983); *Environmental Mediation: The Search for*

Consensus (Laura Lake, ed. 1980); M. Rivkin, Negotiated Development: A Breakthrough in Environmental Controversies (1977); Susskind, Environmental Mediation and the Accountability Problem, 6 Vt. L. Rev. 1, 18 (1981) (covering three mediated disputes in detail: an agreement providing for flood and growth control in connection with a new dam on the Snohomish River in Washington state, an agreement to help ensure that conversion from oil to coal of the Brayton Point power plant in Somerset, Massachusetts would not aggravate regional air pollution, and an agreement regarding the construction of the Foothills water treatment facility and dam near Denver, Colorado.)

368. Because new hazardous waste facilities belong to the large category of industrial activities which cause focused local amenity and safety losses but diffused economic benefits geographically, see generally M. Olson, The Logic of Collective Action (1965), and J. Seley, The Politics of Public Facility Siting (1983), control over siting them has tended to move up the ladder of governments, to aggregate benefits and dilute intense local opposition. Municipal zoning to exclude hazardous waste facilities has been pre-empted by states under a variety of hazardous waste faclity siting statutes. See Tarlock, Siting New or Expanded TSD Facilities: The Pigs in the Parlor of the 1980s (1984) (draft). State-level attempts to exclude out-of-state wastes will fail, City of Philadelphia v. New Jersey, 437 U.S. 617 (1978), but federal law is otherwise stonily silent on the siting issue and interstate regional conflict over hazardous waste disposal, except for radioactive wastes. See the Low-Level Radioactive Waste Disposal Act and the Nuclear Waste Policy Act. City of Philadelphia, supra, in footnote 4 seems to hold that RCRA does not pre-empt state and local siting controls. See generally D. Morell and C. Magorian, Siting Hazardous Waste Facilities (1982).

Three state siting statutes provide for negotiation between the local community and the site developer. See Mass. Gen. Laws Ann. ch. 21D §12 (Lawyers Coop. Supp. 1984); R. I. Gen. Laws §§ 23-19.7-1 to 23-19.7-15 (1983); Wisc. Stat. Ann. §144.445 (West Supp. 1983-84). The Massachusetts and Rhode Island statutes are quite similar. The Massachusetts approach has attracted scholarly attention. Bacow and Milkey, Overcoming Local Opposition to Hazardous Waste Facilities: The Massachusetts Approach, 6 Harv. Envtl. L. Rev. 265 (1982); Provost, The Massachusetts Hazard *and Waste Facility Siting Act: What Impact or Municipal Power to Exclude and Regulate?*, 10 Brit. Colum. Envt'l Aff. L. Rev. 715 (1983). *See also* M. O'Hare, L. Bacow, and D. Sanderson, *Facility Siting and Public Opposition* (1983). Under the Massachusetts and Rhode Island approaches, approval of a state siting council is required, but the heart of the statutory scheme is a siting agreement to be negotiated between the developer and a site assessment committee composed of local officials and citizens. The statute contemplates that the agreement will include substantial compensation and services to local persons. If impasse occurs, binding arbitration is required. The Wisconsin statute in general parallels this approach. Negotiations are proceeding slowly in Warren, Massachusetts, on the only active site proposed under the three statutes. Bingham and Miller, Prospects for Resolving Hazardous Waste Siting Disputes Through Negotiation, pp. 17-18 (May, 1984 draft).

Negotiation in policy dialogues, see notes in IV.A.4 *infra*, has produced both a joint policy statement on siting that has been endorsed by a group of representatives of diverse affected interests and a recommended siting process. Hazardous Waste Dialogue Group, *Siting Hazardous Waste Management Facilities* (1983); Keystone Center, *Siting Waste Management Facilities in the Galveston Bay Area: A New Approach* (1982). Under the Texas process, recommended by representatives from industry, public interest groups, and government, a citizen review committee negotiates with the developer. Texas' Low-Level Radioactive Waste Disposal Authority is using the process in siting its first facility. *Compare* New England Hazardous Waste Siting Congress, *Toward A Solution* (1983) (sponsored by The New England Council, Boston, Mass.) and McGlennon, *The Alberta Experience . . . Hazardous Wastes? Maybe in My Back Yard*, 1 Envtl. F. 10 (February, 1983).

369. A "poor" bargain, i.e., one in which a party's position is worsened, may be struck because a party attempts to please his opposites at his own expense (although one might argue that giving pleasure is a bargained-for gain).

370. Raiffa, *supra* note 357. Raiffa shows how negotiators too frequently overestimate the value of self-interested bargaining (following a zero-sum strategy), instead of seeking joint returns.

Practitioners of mediation emphasize joint gain. See, e.g., Susskind and Weinstein, supra note 354 at 341.

371. Richman, Mediation in a City-County Annexation Dispute: The Negotiations Process, 4 EIA Rev. 55 (1983). For other examples see Harter, supra note 350 at 48-49.

372. Galbraith used the term in American Capitalism: The Concept of Countervailing Power (1952), to describe the balance of market power between consumers and producers. The term has been fitted to the negotiations context. See e.g., Harter, supra note 350 at 45.

373. Eisenberg, supra note 357.

374. M. O'Hare, L. Bacow, and D. Sanderson, Facility Siting and Public Opposition 120-127 (1983). Some government lawyers are ambivalent at the present time about negotiating hazardous waste cleanups because they believe that the federal district courts are rapidly defining legal norms governing strict, joint, and several liability, contribution, and "imminent substantial endangerment" in order to enable the government to impose its will without compromise. See section III.D.2 infra and the appendix.

375. See, e.g., Rogers, Three Years of Superfund, 13 Envtl. L. Rep. (Envtl. L. Inst.) 10361, 10363 (1983) (providing an inventory of litigable issues which hazardous waste site users may exploit to develop countervailing power). Where environmentalists could at best only delay the issuance of a federal permit for a uranium mine by challenging the adequacy of an environmental impact statement, the mine owner nevertheless agreed to undertake specific impact mitigation measures in return for environmentalists' covenant not to sue. Harter, supra note 350 at 29-30.

376. See M. O'Hare, L. Bacow, and D. Sanderson, supra note 374.

377. Harter ranks this criterion first and gives detailed attention to the necessity of a balance of power between the parties. Supra note 350 at 46. He does not, however, address the problem of the legitimacy of power-based negotiation in a system of democratic pluralism which includes institutional and other legal safeguards for majority control and minority representation.

378. Inducement to negotiate is a critical threshold problem which has received considerable scholarly attention. See Bacharach, Lauber and Shedd, Critique of Bargaining Theory, in S. Bacharach & E. Lauber, Bargaining: Power Tactics and Outcomes 1-40 (1981); Eisenberg, supra note 357 at 675.

379. Fisher and Ury, supra note 352 at 17-40, 55 ("be soft on the people, hard on the problem").

380. Gail Bingham reports that many of the 20 cases of negotiation failures described in her forthcoming book can be explained by unwillingness to negotiate. Supra note 367. See also Harter, supra note 350 at 49.

381. Susskind and Weinstein, supra note 354 at 339-340.

382. D. Straus & D. Greenberg, Data Mediation of Environmental Disputes (1977).

383. For example, the dispute between EPA and some environmentalists over use of air quality "bubbles" centers upon disagreement about the efficacy of the bubble approach in achieving and maintaining existing ambient air quality standards. The environmentalists believe bubbles will be slower and less administratively efficacious; the EPA believes they will be equally or more efficacious, because they allow emitters a wider range of choice of least-cost techniques to achieve the same net emissions levels. These concerns, however, have not been addressed in the judicial opinions on bubbles. See F. Anderson, D. Mandelker, and A. D. Tarlock, Environmental Protection: Law & Policy 263-269 (1984).

384. "[I]f we only strip off the armor of an adversarial hearing, everyone will jump into negotiations with beguiling honesty and openness to reach the optimum solution to the problem at hand." Harter, supra note 350 at 31. "[T]he 'hot tub' thoery is not true: people do not get together to resolve disputes with openness and reasonableness simply because the process is labeled nonadversarial." Id. at 42.

385. See III.A.1.

386. R. Fisher and W. Ury, supra note 352 at 41.

387. Richman, supra note 371. In the Grayrocks Dam controversy, the first option was financial compensation ($15 million) for the water used. When this offer ran afoul of state and environmental

negotiators' fears that this would be perceived as a "sell out" or a bribe, other options surfaced. The solution, enabling agreement, involved a guarantee of a minimum in-stream flow for irrigation and habitat protection, coupled with a halved compensation payment, but to an independent trust which would purchase additional water rights and help maintain whooping crane habitat. M. O'Hare, L. Bacow, and D. Sanderson, supra note 374 at 124-125.

388. Stewart, Regulation, Innovation, and Administrative Law: A Conceptual Framework, 69 Calif. L. Rev. 1256, 1345 n. 266 (1981).

389. Harter, supra note 350 at 46. Some potentially responsible party meetings have been convened by EPA in auditoriums.

390. Susskind and Weinstein, supra note 354 at 337.

391. Id. at 338.

392. Simkin, Mediation and the Dynamics of Collective Bargaining (1971)

393. Harter, supra note 350 at 47.

394. E.g., Metropolitan Water Roundtable negotiation, Denver, Colorado.

395. E.g., Susskind and Weinstein, supra note 354 at 317-321.

396. See note 360, supra.

397. See Thompson, The Role of the Courts, in Federal Environmental Law 193, 219-237 (E. Dolgin and T. Gilbert, eds. 1974).

398. Schuck, Litigation, Bargaining, and Regulation, July/August 1979 Regulation Magazine 26.

399. Self-criticism has a respectable history. See, e.g., Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, 40 Am. L. Rev. 729 (1906), reprinted in 35 F.R.D. 241 (1964). Compare Rifkind, Are we Asking Too Much of Our Courts?, 70 F.R.D. 79, 96 (1976).

400. See R. Fisher and W. Ury, supra note 352 at 58-83.

401. Schuck, supra note 398 at 29.

402. Id. at 31.

403. See note 360 supra.

404. See, e.g., Stewart, supra note 360 at 1772. Boyer, Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues, 71 Mich. L. Rev. 111 (1972).

405. Reich, Warring Critiques of Regulation, January/February 1979 Regulation Magazine 37.

406. Commenting on Reich's thesis, James DeLong observed, "If the only tool you've got is a hammer, then everything looks like a nail." Quoted by Harter, supra note 350 at 21 n. 122. See also id. at 19-22.

407.

> As a lawyer who makes his living in litigation, I hesitate to advocate the mini-trial concept as a substitute for the time-honored concept of the full blown judicial process; however, as a lawyer whose first duty is the interest of his client, I must admit that the judicial process is often a high-stakes roulette game in which, like the house, only lawyers can be sure of winning. With this view in light, I think the mini-trial alternative should always be considered when a potentially complex business dispute arises. Particularly when that dispute is between large and responsible business firms.

Remarks of Charles F. Kazlauskas, in Alternatives to Big Case Litigation 11 (panel discussion at the American Bar Association Annual Meeting, Atlanta, Georgia, August 1, 1983).

408. Of all civil law suits filed in the federal courts, about 7 percent go to trial. 1981 Annual Report of the Director of the Administrative Office of the United States Courts 238 (Table 36). The average cost to the federal court system of litigating a case is around $3,000 ($600 million federal judiciary budget divided by 200,000 litigated cases per year). See id. at 170, 363, 381, 410.

409. In a trade secrets dispute with a competitor who had recently hired two of the Gilette company's knowledgable employees, Gilette hired outside counsel but found itself bogged down in an expensive lawsuit with no end in sight. A company representative explained how the informal negotiated settlement evolved:

> When the suggestion . . . came from me and our management that we . . . should look at some other way of resolving this, we encountered tremendous resistance from our litigator. I received . . . lengthy memos telling me about the purity of the litigation process and how the adversary system was the only way to get to heaven . . .. [S]o we rode with our litigator for a good bit of time . . .. [W]e made up our mind that we didn't want to . . . go the usual route . . . [but] our litigator . . . couldn't believe that we didn't want to have . . . depositions . . . documents and all of the discovery that . . . litigators are used to having.
>
> Well, this time our outside counsel was becoming somewhat like a sick mistress, very expensive and not much use, so we put him on the shelf, and we actually used our inside lawyers . . . [and some others] and managed to resolve that situation.

Remarks of Joseph Mullaney, transcript supra note 407 at 25-26.

410. Burger, 1982 Year-End Report on the Judiciary 8-9.

411. Fisher, What About Negotiation as a Specialty?, 69 A.B.A. J. 1220 (1983). (Recommends a two-track system: one lawyer, expert in negotiation, prepares a recommended settlement, while a litigator prepares for trial. Presumably both would have to be paid.) The law firm of Jenner & Block formed an alternative dispute resolution department, but as of the end of its first nine months of operation, it had attracted no clients. Remarks of Jerold Solovy, in Alternatives to Big-Case Litigation 26-28 (transcript of a panel discussion at the American Bar Association Annual Meeting, Atlanta, Georgia, August 1, 1983).

412. The Judicial Panel, composed of retired judges and attorneys who stand willing to serve variously as fact-finders, mediators, adjudicators, and neutral advisors, is the product of the efforts of the Center for Public Resources of New York and Dean Harry Wellington of Yale Law School. Some 24,000 asbestos injury claims involving as much as $38 billion will probably be made by the end of the century. Sixty-three percent of awards in 3,800 of the first completed were consumed as transactions costs -- defendants' and plaintiffs' expenses and attorneys' fees and insurance costs (excluding the costs of

providing the judicial forum in the 4 percent of cases that went to trial). Rand Institute for Civil Justice, Costs of Asbestos Litigation (1983). The Judicial Panel is seeking ways to resolve contests between the asbestos producers, their insurers, and claimants without formal trials. See transcript, supra note 407 at 44-46 (remarks of James F. Henry)

413. See A. Talbot, supra note 356 at 97.

414. Special Committee on Environmental Law, of the American Bar Association, Industrial Developments and the Environment 4:17, A:12 (1973).

415. Report of the National Coal Policy Project, Where We Agree: Summary and Synthesis 1, 67 (1978). The full report, Where We Agree, was published in two volumes by Westview Press, Boulder, Colo. (1978).

416. E.g., Center for Public Resources, New York, New York; ACCORD, Boulder, Colorado. The author serves on ACCORD's Board of Advisers.

417. Interview with Lois Gibbs, supra note 343. See also Reich, supra note 405.

418. Responding to a Federal Register notice soliciting candidate rules for regulatory negotiation, the Detroit Area Sierra Club chapter commented that it was "vehemently opposed" to regulatory negotiation, because it did not have either the resouces to participate or countervailing power. L. Susskind, D. Fish, and N. Baldwin, The Environmental Protection Agency's Negotiated Rulemaking Demonstrations 36 (draft status report, September 1, 1983). Other environmentalists complained that the same problem existed in traditional rule making as well and were apparently willing to try regulatory negotiation as a means of speeding up the writing of rules, obtaining better representation, addressing technical complexities more adequately, and obtaining better enforcement. Id. at 1.

419. Amy, The Politics of Environmental Mediation, 11 Ecology L. Q. 1, 3 (1983). These criticisms, particularly the second, are consistent with the traditional critique of bargaining based on pluralist democratic theory. See supra note 360.

420. See L. Susskind, D. Fish, and N. Baldwin, supra note 418 at 34.

421. See IV.A.5.b. infra.

422. Sachs, Nationwide Study Identifies Barriers to Negotiation, 3 EIA Rev. 95 (1982). The experiments were performed under the sponsorship of the U.S. Geological Survey and the U.S. Council on Environmental Quality between 1977 and 1982. They were initiated at the suggestion of Donald Strauss, former President of the American Arbitration Association and current Director of its Research Institute.

423. Id. at 97. The major recommendations for changing this state of affairs suggested documenting case histories of successful negotiations involving governmental officials to reduce the novelty of the approach, training officials in conflict management techniques, and soliciting high-level agency authorization and support for collaborative dispute resolution processes. Id. at 99-100.

424. L. Susskind, D. Fish, and N. Baldwin, supra note 418 at 13-14, 31-37, 41-42.

425. Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353, 363 (1978).

426. See, Bellman, Bingham, Brooks, Carpenter, Clark, and Craig, Environmental Conflict Resolution: Practitioners' Perspective of an Emerging Field, Environmental Consensus, Winter, 1981, p. 1. The authors, each from a separate environmental conflict or dispute resolution center, wrote this exploratory analysis of similarities and differences in their techniques at the behest of the Ford Foundation, which after funding diverse conflict resolution centers and approaches was curious to find out if a field of common endeavor underlay their efforts. See also Bingham, Using Negotiation Effectively for Resolving Environmental Disputes (training materials prepared for use at the Conservation Foundation (Spring, 1984) (taxonomy). See also Susskind and Persico, Guide to Consensus Development and Dispute Resolution Techniques for use in Government-Industry Conflicts, prepared for the Conference on Alternative Forms of Conflict Resolution, hosted by the Center for Business and Government, Kennedy School of Government, October 30-31, 1983 (a taxonomy) (author's file).

427. Similar to mediation but less ambitious in that they do not attempt to obtain resolution of disputes where parties clearly disagree and have staked out

reasonably well-defined positions are: *conciliation*, where a neutral outside party endeavors to reduce tensions between disputants and reopen communications so that a dispute resolution process can begin to be identified; *joint* or *collaborative problem solving*, a consensus-building rather than bargaining technique which usually is used to enable the groups that have similar objectives or are interdependent to resolve a dispute before positions harden; and *facilitation*, usually of meetings, an adjunct of joint problem solving in which an independent party assists parties in breaking through their initial resistance to gathering to explore common issues. On meeting facilitation *see* M. Doyle and D. Straus, *How to Make Meetings Work* (1971).

428. *E.g.*, W. Simkin, *Mediation and the Dynamics of Collective Bargaining* (1971).

429. The nonprofit American Arbitration Service, founded in 1926, has organized some 50,000 individuals into panels which arbitrate or mediate disputes typically involving workplace issues: wages, conditions, benefits, hours. The Federal Mediation and Conciliation Service, created as an independent federal agency in 1947, provides mediation assistance to help prevent or help resolve collective bargaining disputes. Its approximately 300 commissioners spread nationwide may affirmatively inquire if assistance in negotiating new contracts is needed but may mediate a dispute only at the request of the parties. *See* Susskind, *supra* note 367 at 4-5 n.9.

430. *See* W. Simkin, *supra* note 428 at 77-98.

431. *Id*. at pp. 98-106. Susskind, *supra* note 367 at 16, 40.

432. Paulson, *Policy Dialogues: A Practical Primer on How to Do Them*, 2 Envir. F. 36 (May, 1983).

433. Where We Agree: Report of the National Coal Policy Project (summary and synthesis) (no date); Joint Hearings Before the Select Comm. on Small Business and the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs on Regulatory Negotiation, 96th Cong., 2d Sess. 7 (1980) (statement of Harrison Loesch). *See* Harter, Negotiating Regulations, *supra* note 350 at pp. 38-40. For an example of the types of documents prepared for use in the task forces, *see* Thompson and Moss, Energy Pricing Policy and Efficient Allocation of Coal (June 20, 1976

draft) (environmentalists' position paper on file with author).

434. *See, e.g.*, Conservation Foundation, *Training Scientists for Future Toxic Substances Problems* (1978), and *Siting Hazardous Waste Management Facilities* (1983).

435. Superfund Section 301(e) Study Group, Injuries and Damages from hazardous Wastes - Analysis and Improvement of Legal Remedies, S. Rep. No. 12, 97th Cong., 2d Sess. (1982).

436. Outen, *Injury from Hazardous Chemicals: Compensating Innocent Bystanders*, 1 Envir. F. 6-13 (February, 1983) (surveys bills introduced in Congress).

437. The author was a member of the Superfund Study Group and is a member of the Keystone policy dialogue group.

438. *See* Green, Marks, and Olson, *Settling Large Case Litigation: An Alternate Approach*, 11 Loyola L.A. L. Rev. 493 (1978); Center for Public Resources, *Dispute Management: A Manual of Innovative Corporate Strategies for the Avoidance and Resolution of Legal Disputes* I-A.1 (1982) (contains Green, *The Mini-trial Approach* to Complex Litigation, which has been published separately by Matthew Bender & Co. (1982)).

439. The number of mini-trials is unknown but probably not large -- perhaps a dozen by 1981, perhaps as many as 100 by 1983. Steele, Minitrials are Cheap and Quick, Inc. Mag., October, 1981 at 149; Jenkins, Ambassador Mag., July, 1983 at 29-30. Unreported mini-trials have almost certainly occurred, protected by the parties' desire to keep them confidential. Steele, *supra*. Some successful mini-trials include: (1) TRW Corp. and Automatic Radio, $2 million settlement, 3 day trial, Irving Younger, advisor/judge (Steele, *supra*); (2) Shell Oil and Intel Corp., patent infringement, cost of mini-trial $10,000, saving an estimated $1.3 million in litigation costs (Steele, *supra*); (3) Borden Co. and Texaco, breach of contract and anti-trust arising out of a natural gas supply contract, "several million dollar" settlement (ABA transcript, *supra* note 407 at pp. 4-11); (4) Gilette Co. and a competitor, trade secret and patent violation, vexation with progress of lawsuit (ABA transcript, *supra* note 407 at pp. 20-26); (5) National Aeronautics and Space Administration and TRW, Inc., $100 million dispute (settlement undisclosed), satellite component contract adjustment, short

mini-trial ended three years of hearings before NASA's Board of Contract Appeals, saving an estimated $1.3 million in legal fees and expenses (Jenkins, supra).

440. M. D. Jacoubovitch & C. Moore, Summary Trials in the Northern district of Ohio (Federal Judicial Center 1982); Lambros and Shunk, The Summary Jury Trial, 29 Clev.-Mar. L. Rev. 43 (1980).

441. Henry, The Accelerating Costs of Litigation, The Corporate Board, November/December 1983 at 22, 26.

442. The forms and limits of discretion continuously occupy the student of administrative processes. Agency exercises of discretion unfold in bewildering array, but in working with post-1970 regulatory programs, one finds that exercises of discretion generally cluster, on the one hand, in the choices an agency makes in implementing programs, and, on the other, in the choices it makes in enforcing programs. Yet I have found it useful to divide agency discretion further into four types.

(a) Traditional agency discretion involves (1) the strictness or levels of regulatory standards, rates, and grants; (2) approvals of private action by license or other permission; and (3) the timing of action (e.g., the preparation of a report or environmental impact statement). Traditional agency discretion is exercised once agency program elements and strategy are in place and has more to do with technical expertise than with program management, law, or procedure. Judicial review of traditional agency discretion more often involves the arbitrary and capricious and substantial evidence standards.

(b) Program discretion is exercised to make general managerial choices in initiating programs. Questions of legislative intent, law, and procedure figure prominently, as agency officials try to fashion a workable implementation strategy. Program discretion became more important in the 1970s as a result both of Congress's attempts to mandate complex implementation strategies and its frequent failure to design measures that matched up well with the realities which agencies faced in the field. The EPA's current attempt to design a CERCLA implementation strategy out of overlapping and ill-defined authority is an exercise of program discretion. The Bumpers Amendment, especially as originally conceived, appeared to be a reaction to the efforts of agencies to stretch their mandates to cover program realities unanticipated by Congress. Judicial review of program design usually involves analysis of statutory intent, with frequent deference to the agency on issues of statutory construction.

(c) *Civil enforcement discretion* differs from prosecutorial discretion, next addressed, as *malum prohibitum* differs from *malum in se*. After the duties and rights of a regulatee or other party are defined, civil administrative and judicial enforcement measures may be invoked that remain largely in the control of program managers rather than passing entirely to lawyers. Enforcement discretion is guided by technical and managerial standards, not the case management criteria of law enforcement officials. In the 1970s, managerial discretion was enhanced by Congress's addition to welfare statutes of civil compliance penalties, administrative orders, and mandatory injunctions. Judicial review of enforcement discretion is generally unavailable, although the reasons therefor are weaker than for prosecutional discretion.

(d) *Prosecutorial discretion* remains for cases of genuine recalcitrance where the force of law counts for more than program management. Justice Department case management is required; criminal penalties, fines, and imprisonment may be sought. Judicial review of exercises of prosecutorial discretion is generally not available.

See also Diver, *A Theory of Regulatory Enforcement*, 28 Pub. Policy 257 (Summer 1980).

443. The consent decree is a negotiated settlement by which the parties to the lawsuit give their consent to abide by a decree that is officially entered as a judgment by a court. *See* Note, *The Consent Judgment as an Instrument of Compromise and Settlement*, 72 Harv. L. Rev. 1314, 1315 (1959) (discussing forms that a consent decree may take). Thus, the consent decree has both contractual and judicial characteristics. United States v. ITT Continental Baking Co., 420 U.S. 223, 236 n. 10 (1975). Although a decree will be interpreted much like a contract, United States v. Armour & Co., 402 U.S. 673 (1971), it is still a judicial act. United States v. Swift & Co., 286 U.S. 106, 115 (1932). Thus in some instances it may be altered unilaterally by a judge in light of changing cirucmstances. *See* Note, *supra* at 1317.

The consent decree is an informal device by which parties attempt to avoid the "time, expense, and inevitable risk of litigation." United States v. Armour & Co., supra at 681-82. The parties who are defendants in actions that are settled do not admit liability for any wrongdoing, and the plaintiff forfeits his cause of action when the decree is issued. Id. The decree itself spells out the rights and duties of the parties. Violations of the decree only create a cause of action on the decree, the original rights of the parties having been waived. See Note, supra at 1318. Because the consent decree so vitally affects the interests of the parties, it cannot be entered without the consent of the parties and the approval of the court. Id. at 1316. Parties could settle their dispute by a private contractual agreement, but a consent decree goes beyond and involves the court in determining the appropriateness of the agreement. As a judicial act, the consent decree offers a wider range of enforcement options than would a private contract. Id. at 1317.

444. Decrees are now monitored by EPA to strengthen CERCLA enforcement. 14 Env't Rep. (BNA)--Curr. Dev. 1615 (1983).

445. The most common use of the consent decree is as an informal procedure by which federal enforcement agencies expedite the resolution of litigation or other administrative action. Although an agency does not require express statutory authority to enter into consent decrees, the decree must be consistent with the statute that the agency is mandated to enforce. See Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117 (D.C. Cir. 1983).

Consent decrees may also be entered into when federal agencies are sued by persons who object to government policies. A significant opportunity thereby exists for agency policy to be modified by a consent decree. The standards for the approval and review of consent decrees should be the same whether the federal agency is plaintiff or defendant in a lawsuit. Compare Citizens for a Better Environment, supra, with United States v. Hooker Chemicals & Plastics Corp., 540 F.Supp. 1067 (W.D.N.Y. 1982). Consent decrees are frequently used to negotiate delayed compliance with environmental standards. They were the primary device by which EPA obtained emissions limitations for steel mills under the Clean Air Act.

446. As many as 80 percent of the cases initiated by the Antitrust Division of the Justice Department may be settled by consent decrees. Antitrust Advisor 537 (C. Hills, ed. 1971). *See also* Wagner, *The Settlement: "Splitting of the Differences,"* 3 Monitor 1 (June 27, 1983) ("settlements are extremely important to the orderly and expeditious conduct of the business, not only of the Commission [FERC], but of all regulatory commissions and courts"). *See also* Zimmer and Sullivan, *Consent Decree Settlements by Administrative Agencies in Antitrust and Employment Discrimination: Optimizing Public and Private Interests*, 76 Duke L. J. 163 (1976).

447. The use of consent decrees in enforcing environmental laws provoked 28 C.F.R. §50.7(1973) requiring 30-day public comment to the Justice Department. Comments must be filed with the court. The use of a consent decree to redirect regulation of hazardous effluents under the Clean Water Act was extensively discussed in Citizens for a Better Environment v. Gorsuch, *supra* note 445, discussed further below. EPA appears ready to use the consent decree as a major tool in its CERCLA implementation strategy. *See* 14 Env't Rep.(BNA)--Curr. Dev. 1615 (1984). The extensive use of consent decrees in antitrust litigation led to enactment of the Antitrust Procedures and Penalties Act, 15 U.S.C. §§1,2,3,16,28, and 29, 47 U.S.C. §401, and 49 U.S.C. §§43-45. The Tunney Amendment, 15 U.S.C. §16, provides elaborate procedures for notification to the public of proposed consent decrees (§§16(b),(c)), requires the Attorney General to consider comments on the decree(§16(d)), and requires the court to determine if the decree is in the public interest (§§16(e),(f)). The decree can be used as prima facie evidence by any other party that the defendant violated the law under which he was charged (§16(a)). *See* L. Sullivan, *Handbook of the Law of Antitrust* 758 (1977). These provisions governed the consent decree under which AT&T was broken up. *See Free Enterprise and Economic Organization: Antitrust* 192-197 (L. Schwartz, J. Flynn & H. First, eds.).

448. Because of the potential for abuse of consent decrees, courts do not merely rubber-stamp negotiated settlements. A trial court must satisfy itself that the terms of the decree are "fair and equitable and not unlawful, unreasonable, or against public policy." United States v. Hooker Chemicals & Plastics Corp., *supra* note 445 at 1072 (W.D.N.Y. 1982). In addition, a court will look to the strength of the plaintiff's case, good faith efforts at negotiation,

and the risks involved if litigation goes forward. *Id.* When the consent decree involves enforcement of a federal law the court must also satisfy itself that the decree adequately protects the public interest and "is in accord with the dictates of Congress." United States v. Ketchikan Pulp Co., 430 F.Supp. 83, 86 (D. Alaska 1977) (citation omitted). The courts may allow interested parties to intervene and may require that public comments be made part of the court record. United States v. Hooker Chemicals & Plastics Corp., *supra* note 445 at 1071 (citizen suit provision of the Clean Water Act conferred right to intervene).

449. Eisenberg, *supra* note 357 at 673-675, distinguishes discussion from negotiation on the ground *inter alia* that discussion implies that one party has unfettered decision-making authority while negotiation implies equality, compromise, and the like. Why then are not almost all exchanges between an agency and regulatees discussions? Because, as Eisenberg points out, a discussion may become a negotiation if a stronger party only insists on the trappings of superiority, e.g., the appearance of unilateral decisional authority, while actually behaving as if his power was limited. *Id.* at n. 111. Sam Gusman takes a wider view: "Dialogue that clarifies and discovers areas of agreement is itself a negotiation, not so much in the classical sense of a bargaining process but more in the sense of discovery and bridge-building." *Quoted in* Negotiation, the Newsletter of the Program on Negotiation of the Harvard Law School, Winter, 1983/84, p. 6. Professor Susskind strenuously objects to loose application of the term "negotiation" to mediation, policy dialogue, or the evolving arsenal of dispute and conflict resolving techniques, which must satisfy certain criteria to deserve their names. "Negotiation is so wide a concept it means nothing." Panel discussion of conference on Environmental Law co-sponsored by the ALI-ABA Committee on Continuing Professiong Education, the Environmental law Institute, and the Smithsonian Institute, February 25, 1984.

450. *Resolving Environmental Regulatory Disputes* 222-256 (L. Susskind, L. Bacow, and M. Wheeler, eds.)(1983).

451. Philip Harter looked closely but found only a half-dozen clear examples, voluntary consensus standards aside. For his list see note 350 *supra* at 32-33 n. 175.

452. See Hamilton, The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health, 56 Tex. L. Rev. 1329 (1978); P. Harter, Regulatory Use of Standards: The Implications for Standards Writers (1979) (Nat. Bur. Standards); ACUS Recommendation 78-4, 1 C.F.R. §305.78-4 (1981). A not particularly successful instance of adoption of some 1,100 private safety standards into federal rules occurred at OSHA soon after it was created. Anderson, supra note 1 at 841-842.

453. "One party talks to the agency and then another and then another and so on." Harter, supra note 350 at 32.

454. In Marketing Assistance Program, Inc. v. Bergland, 562 F.2d 1305 (D.C. Cir. 1977), the Department received a draft proprosal from the dominant milk cooperative in the area to include Mississippi in the New Orleans marketing region. The Department conferred extensively with the cooperative to develop its suggestion into a rule, while other producers were only allowed to correspond and were not permitted to have their counterproposals discussed at the public hearing provided. The negotiating tactic was sustained.

455. 5 U.S.C. §§1-15 (FACA). The Act requires approval by the OMB and the agency head of charters for advisory committees, Federal Register notice of meetings, open meetings (except for good cause), and agency control over schedules and agendas. See Center for Auto Safety v. Cox, 80 F.2d 689 (D.C. Cir. 1978) (a select group became a FACA advisory committee when an agency official obtained its views on a regulatory proposal). See ACUS Recommendation 80-3, 1 C.F.R. §305.80-3 (1981), and Cardozo, The Federal Advisory Committee Act in Operation, 33 Ad. L. Rev. 1 (1981).

456. Home Box Office v. FCC, 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977); United States Lines, Inc. v. FMC, 584 F.2d 519 (D.C. Cir. 1978); National Small Shipments Traffic Conference, Inc. v. ICC, 590 F.2d 345 (D.C. Cir. 1980). But see also Action for Children's Television v. FCC, 564 F.2d 458 (D.C. Cir. 1977); Hercules, Inc. v. EPA, 598 F.2d 91 (D.C. Cir. 1978).

457. For example, EPA continued separate negotiations with interested parties in industry, environmental groups, Congress, and the Executive Office over the type and stringency of its sulfur dioxide and particulate

matter air emissions standards for new fossil-fuel fired electrical generating facilities, forcing the agency to take questionable measures to elude strictures on ex parte contacts. In an analysis of the numerous meetings, contacts, and prophylactic agency measures taken, all of which was embedded in an even more searching analysis of the adoption of the standards themselves, the court somehow managed to approve the procedures used to keep the emissions control policy under evaluation. Negotiation will out. Sierra Club v. Costle, 657 F.2d 298 (D.C. Cir. 1981) (per Wald J.) Philip Harter's definitive study, supra note 350, has become the standard work, but see also the pre-1982 studies and articles cited by him in Harter, Negotiating Regulations: A Cure for the Malaise, 3 EIA Rev. 75, 80 (1982). Regulatory negotiation is a fledgling policy-making process, the future of which is still uncertain, as the text will develop. The success or failure of regulatory negotiation bears upon CERCLA remedial action, but only in terms of the receptivity of EPA and participants to new negotiation techniques in general. Regulatory negotiation and site cleanup negotiation are otherwise quite distinct: the former involves prospective policy-making, the latter individual informal adjudications. The former invokes a national perspective and involves groups nationwide; the latter is focused on concrete local conditions. The former requires legitimation as a law-making function, the latter only as a law-applying function.

458. See IV.A.1 supra. Proponents are beginning to address the array of special issues, first canvassed by Harter, that are associated with regulatory negotiation. See, e.g., Gusman, Selecting Participants for a Regulatory Negotiation, 4 EIA Rev. 495 (1983). The article explores five techniques for assembling stakeholders but appears to endorse use of a neutral convener who through "an iterative and personalized process of contacts" could facilitate "self-selection of negotiators." (Emphasis in original.)

459. 48 Fed. Reg. 21339 (May 12, 1983). The notice identified Nicholas A. Fidandis, the Director of Mediation Services for the Federal Mediation and Conciliation Service, as the convener/mediator, took steps necessary to convene the negotiating group as an advisory committee under the Federal Advisory Committee Act, discussed basic negotiation criteria, surveyed the issues to be negotiated, identified possible participants, and called for additional ones

to come forward. See Lempert, Participants See Value in Reg-Neg's First Flight, Legal Times of Washington, October 10, 1983, at 2.

460. Harter, Regulatory Negotiation: The Experience Thus Far, Resolve, Winter, 1984 at 1, 5-6.

461. Union and Industry: Still Stalking a Benzene Rule, Chemical Week, January 11, 1984, at 35.

462. Industrial Union Dept., AFL-CIO v. American Petroleum Institute, 448 U.S. 607 (1980) (OSHA must show that existing benzene levels posed a "significant" health risk). But see American Textile Mfgrs. Inst. v. Donovan, 452 U.S. 990 (1981) (OSHA nevertheless does not have to balance compliance costs against health benefits). The result of these two rulings apparently is to establish a two-step regulatory scheme. First, OSHA must find that a workplace toxicant clears a "significant risk" threshold. Then, OSHA need only consider the technical and financial burden of the proposed new standard.

463. Panel presentation by Christopher Kirtz, Director, EPA Regulatory Negotiation Project at ALI-ABA Conference on Environmental Law co-sponsored by the ALI-ABA Committee on Continuing Professional Education, the Environmental Law Institute, and the Smithsonian Institute, Washington, D.C., February 25, 1984.

464. 49 Fed. Reg. 17576 (April 24, 1984).

465. See L. Susskind, D. Fish, and N. Baldwin, supra note 418.

466. Inside EPA, March 16, 1984, pp. 7-8. The first two candidates, selected after an arduous canvass, were low-level radioactive waste regulations and Toxic Substance Control Act §6 regulation of the workplace chemical toluenedianiline(TDA), an intermediate used in manufacturing plastics. Radioactive waste seemed too controversial, TDA so noncontroversial that it failed to attract the interest of key groups.

467. Three additional examples from EPA's experience are given here. Harter, supra note 350 at 36-37 nn. 196 and 197, provides additional examples.

(1) Test rules for chloromethane and chlorinated benzenes were proposed in mid-1980 after Natural Resources Defense Council v. Costle, 10 Envtl. L. Rep. (Envtl. L. Inst.) 20274 (S.D.N.Y. 1980), in which EPA

was ordered to initiate rules for the first 18 chemicals which a statutory "Interagency Testing Committee" placed on a priority list required by TSCA. EPA had attempted to remove the 18 chemicals from their priority designation. In defending its failure to act, EPA pleaded manpower and financial difficulties. Subsequent negotiations enabled NRDC to participate in TSCA policy making by negotiating with EPA the schedule for compliance with the court's mandate.

(2) In late 1982 the Environmental Defense Fund brought suit to compel EPA to establish the Agency for Toxic Substances and Disease Registry (ATSDR) required by §104(i) of CERCLA, 42 U.S.C. §9604(i) (Supp. IV 1980). EPA had refused to establish ATSDR because of funding limitations. The Chemical Manufacturers Association intervened as plaintiffs in the suit in order to be involved in settlement negotiations. Stoll, The 104(i) Litigation and the Chemical Industry's Concerns About Recent Compensation Proposals, 14 Envtl. L. Rep.(Envtl. L. Inst.) 10119 (1984). The federal government subsequently agreed to establish ATSDR within the Center for Disease Control. Marzulla, The Government Response to the Environmental Defense Fund/Chemical Manufacturers Association §104(i) Litigation, 14 Envtl. L. Rep. (Envtl. L. Inst.) 10120 (1984). Further negotiations to settle the rest of the suit continue. Stoll, supra at 10119.

(3) An EPA management initiative spanning several regulatory programs was put in a type of judicially-supervised settlement "receivership" when a phalanx of industrial and citizen group plaintiffs challenged certain agency consolidated permit regulations. By virtue of filing suit each significant interest obtained a say in the subsequent management of the EPA program. When EPA promulgated final rules consolidating its permitting procedures under the Safe Drinking Water Act, minor provisions of the Clean Air Act (PSD), the Clean Water Act, and the Resource Conservation and Recovery Act, 45 Fed. Reg. 33290 (May 19, 1980), a number of industrial and environmental plaintiffs brought suits challenging the consolidated permit program in different circuit courts under the various review provisions of the statutes. After a long procedural battle, the actions were consolidated for briefing and argument in the District of Columbia Circuit. The parties -- trade associations representing the chemical, oil, paper, auto, and iron and steel industries, public utilities,

and citizens groups -- began to negotiate toward a settlement. The negotiation process with respect to its Underground Injection Control program aspects is detailed in Walpole, Settlement in Regulatory Litigation: The UIC Example, 15 Natural Resources Law Newsletter 1 (Winter, 1983). The court did not actively promote settlement, although it did quickly agree to motions to consolidate issues and defer briefing. The Chief Staff Counsel for the D.C. Circuit, however, did play a relatively active role in facilitating negotiations. Interview, Alan Eckert, EPA Senior Litigation Counsel, May 15, 1984. From the challengers viewpoint, a long list of hypothetical possible problems motiviated the suit, which contained 54 NPDES issues, 93 underground waste injection issues, and several dozen RCRA issues. Interview, Turner Smith, Esq., May 13, 1984. For many of these potential problems, the risk of running afoul of the agency was not great, but clarification had to be sought before the statutory period for direct substantive challenges to the rules expired. Negotiation was better suited to this clarifying process than litigation. Further, one could never be sure of the outcome of litigation, the agency enjoyed a presumption of regularity and a deferential standard of review, and the decision would be binding. Id.

Government and private lawyers expressed slightly different views about why the earlier notice-and-comment process had failed to provide adequate issue resolution. For the government, litigation imposed a discipline on the process, narrowed issues, reduced the number of interests, and "like hanging, concentrated the mind wonderfully." Eckert interview, supra. For industry, some felt that the lack of an opportunity for exchange of views past one set of comments and one agency response left too many questions about the scope of the agency program unsettled. Also, the agency of course may not have interpreted the law the way desired, some new concerns appeared with the final rules for the first time, and the public hearing was too brief and unfocused, with no give-and-take. Smith interview, supra. Anthony Z. Roisman, a former Justice Department lawyer interviewed in connection with another negotiated settlement of a challenge to rule making, implied that rule making fails to resolve issues because parties take extreme positions in their comments, knowing that they can negotiate settlement of suits they subsequently file and that early extreme positions will give them more bargaining flexibility. Harter, supra note 350 at 37 nn. 197, 199. In sum, the complexity of the issues overwhelmed the capacity of the rule-making process to cope flexibly with the wealth of concerns raised by the parties.

Proposed revisions appeared in late 1982; final revisions are imminent. Further legal challenges of course are possible. Interestingly, the parties agreed that some 17 issues were not yet ripe for review. Thus EPA was able to postpone further refinement of difficult policy issues, while the remaining parties succeeded in creating a subsequent right of appeal that otherwise would lapse by operation of statute. Together the agency and challengers effectively "contracted" and obtained judicial approval for a process for rule making different from that contemplated by the relevant legislation. In a sense, the negotiating parties have institutionalized themselves as an *ad hoc* public and private program policy group for the consolidated permit program. The type of "relief" private parties obtained in the settlement dramatically illustrates the point: explanatory language in the regulatory preamble, guidance documents distributed to regional personnel, exchanges of correspondance, and Regulatory Interpretation Memoranda, as well as substantial changes in the reproposed rules. *See* Walpole, *supra* at 6-9.

468. Natural Resources Defense Council v. Train, 6 Envtl. L. Rep. (Envtl. L. Inst.) 20588 (D. D.C. 1976) (per Flannery, J.)

469. Natural Resources Defense Council v. Costle, 7 Envtl. L. Rep. (Envtl. L. Inst.) 20547 (D.C. Cir. 1977).

470. Natural Resources Defense Council v. Costle, 9 Envtl. L. Rep. (Envtl. L. Inst.) 20176 (D. D.C. 1979), *aff'd. sub. nom.* Environmental Defense Fund v. Costle, 636 F.2d 1229 (D.C. Cir. 1980) (Congress did not intend to supersede the Flannery Decree, and its terms were not rules requiring APA notice-and-comment rule making).

471. Citizens For A Better Environment v. Gorsuch, 718 F.2d 1117, 1127 n. 11 (D.C. Cir. 1983).

472. Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976).

473. A recent example is The Gray Panthers v. Schweiker, 716 F.2d 23 (D.C. Cir. 1983) (District court sought to have inadequate notice form for medicare beneficiaries

redrafted by HHS and plaintiffs through negotiations in what the appeals court calls a classic public law litigation case, i.e., one "designed to affect public policies and procedures on a nationwide basis.")

474. Stewart, The Reformation of American Administrative Law, supra note 360.

475. The phrase is used by Chayes, supra note 472.

476. "[T]he formulation of the decree in public law litigation introduces a good deal of party control over the practical outcome. Indeed, relief by way of order after a determination on the merits tends to converge with relief through a consent decree or voluntary settlement. And this in turn mitigates a major theoretical objection to affirmative relief -- the danger of intruding on an elaborate and organic network of interparty relationships." (Footnote omitted.) Chayes, supra note 472 at 1299.

477. Harter, supra note 350, lists some examples at 36-37. See, in addition to Chayes, supra note 472; Note, Implementation Problems in Institutional Reform Legislation, 91 Harv. L. Rev. 428 (1977); Note, Judicial Control of Systemic Inadequacies in Federal Administrative Enforcement, 88 Yale L. J. 407 (1978); Morgan, Towards a Revised Strategy for Ratemaking, 1978 U. Ill. L. Forum 21; Spitzer, Uses of the Summary Power Rates: An Examination of Federal Regulatory Agency Practices, 120 U. Pa. L. Rev. 39 (1971).

478. Chayes, supra note 472 at 1303-1309, 1313-1316.

479. The APA also expressly contemplates negotiated case settlement in formal proceedings. §554(c).

480. See text above notes 128-136 supra.

481. It is more difficult to explain why the reduced severity of sanctions imposed in illegal broker-dealer transactions correlates highly with the respondent's willingness to make restitution, to consent to a sanction, to reform, to ensure compliance in the future through specific office practice reforms, and to consent to retraining and supervision, without postulating the existence of extensive bargaining with the SEC. Thomforde, Controlling Administrative Sanctions, 74 Mich. L. Rev. 709, 714, 728-729 (1976), while identifying these factors, nevertheless does not examine the role of negotiation as a separate dimension of the problem of fashioning rules and procedures for channeling SEC enforcement discretion.

482. *See* M. Holden, *Pollution Control as a Bargaining Process* (1966) *(Cornell University Water Resources Center)*; W. Hines, *Public Regulation of Water Quality in the United States* 580b-580c (1971) (National Water Commission) ("Public regulation is largely a bargaining process in which considerable freedom of action on the part of the regulating agency is required to obtain desired compliance. To restrict discretion in the pursuit of conciliatory settlements . . . could lead to a reduction in pollution control efficiency."); Environmental Law Institute, *Enforcement of Federal and State Water Pollution Controls* 27-39 (1975) (National Commission on Water Quality) (W. Irwin and E. Selig, project directors).

483. The legislative evolution of the detailed enforcement provisions of the Clean Air Act provides an intriguing case study of the interplay of agency, state, congressional, and judicial roles in selecting an appropriate enforcement strategy for a complex modern welfare statute. CAA §113 channels and restricts discretion to a far greater extent than the traditional model of unreviewable agency enforcement discretion would suggest. *See generally* F. Anderson, D. Mandelker, and A. D. Tarlock, *Environmental Protection: Law and Policy* 313-326 (1984).

484. S. Kelman, *Regulating America, Regulating Sweden: A Comparative Study of Occupational Safety and Health Policy* (1981); Jasanov, *Negotiation or Cost Benefit Analysis: A Middle Road for U.S. Policy?*, 2 Envir. Forum 37 (July, 1983); Air Pollution Control: National and International Perspectives (1980) (papers prepared for the Aspen Berlin Conference, in which regulatory officials attorneys, and scholars compared regulatory styles in air pollution control of the United States, the United Kingdom, the Netherlands, Federal Republic of Germany, France, Sweden, and Norway).

485. For example, EPA has negotiated outcomes in disputes involving pulp-and-paper mill conversion to low sulfur fuel, chemical plant compliance with wastewater treatment standards, power plant air quality impacts on the pristine air quality of Montana, and wastewater treatment construction grants for Jackson, Wyoming, and Denver, Colorado. Resolving Environmental Regulatory Disputes, *supra* note 450. These case studies were culled from a candidate list of 70 disputes in which EPA appeared to rely significantly on negotiation to achieve its objectives. *Id.* at 2.

486. 46 Fed. Reg. 53775 (October 30, 1981); 47 Fed. Reg. 335 (January 5, 1982). For detailed discussion of the program, see EPA Office of Toxic Substances, Guide to the TSCA Section 4 Process (April, 1984).

487. The "rule" takes its name more from the notice-and-comment rule making which TSCA requires than from the nature of the underlying determination. Else, EPA would issue an informal "order," applicable to a particular chemical or group and usually to a particular company. TSCA §4(a), 15 U.S.C. §2603(a), authorizes the Administration to issue testing rules. Testing is the manufacturers'responsibility. See TSCA §4(b)(3), 15 U.S.C. §2603(b)(3). To initiate rule making the Administrator must make a number of specific findings regarding (1) the unreasonable risk which the chemical may present to health or the environment, its likely presence in the environment in substantial quantities, or significant human exposure (§15 U.S.C. §2603(a)(1)); (2) the insufficiency of data regarding the chemical (15 U.S.C. §§ 2603(a)(1)(A)(ii), (B)(ii)); and (3) the necessity of testing (15 U.S.C. §§2603(a)(1)(A)(iii), (B)(iii)). TSCA §4(e), 15 U.S.C. §2603(e), established the Interagency Testing Committee (ITC) -- a name given it by the EPA, not the statute -- to recommend chemicals that should receive consideration for priority testing under 4(a). In addition to this non-binding priority list, ITC can also "designate" chemicals on the list for §4(a) rule making. 15 U.S.C. §2603(e)(1)(A). Once they are designated, the Administrator has a year to initiate testing or publish reasons why not. 15 U.S.C. §2603(e)(1)(B).

488. Natural Resources Defense Council v. EPA, 83 Civ. 8844 (KTD)(S.D.N.Y. 1983/1984?).

489. General Accounting Office, EPA Implementation of Selected Aspects of the Toxic Substances Control Act 2 (1982); Council on Environmental Quality, Twelth Annual Report 123 (1981).

490. H.R. 4304, 98th Cong., 1st Sess. §3 (1983).

491. TSCA §5(e) empowers EPA to issue orders requiring that the manufacture, processing, other use, or disposal of chemicals subject to pre-manufacturing notice (PMN) be limited or restricted in the event they may present an unreasonable risk to health or the environment. "Consent §5(e) orders" are informally negotiated between the manufacturer and the agency. They are attractive to EPA, because they allow it to impose use, packaging, and handling restrictions in lieu of

testing which is administratively more difficult to obtain. The orders enable EPA to monitor and enforce the restrictions the PMN preparer usually intended to observe in any event. Through consent §5(e) orders the agency obtains some of the benefits of the registration-based schemes of the Federal Insecticide, Fungicide and Rodenticide Act and the Food, Drug, and Cosmetic Act. Some testing has been built into a few recent consent orders. Between 30 and 40 consent §5(e) orders are negotiated annually. Interview, Ruth Bell, EPA Associate General Counsel, May 15, 1984. See also EPA Office of Toxic Substances, TSCA Chemicals-in-Progress Bulletin, vol. 5, no. 2, May 1984 at 5-6.

492. See text above notes 128-136 supra.

493. 14 Envir. Rep.(BNA)--Curr. Devts. 1289 (November 11, 1984); Industry Drafts Toxic Waste Move, N.Y. Times, April 3, 1984, p. 11, col. 1.

494. Persons interviewed early in the EPA regulatory negotiation process expressed their strongest agreement about the need for an outside mediator. L. Susskind, D. Fish, and N. Balwin, supra note 418 at 18. The final selection produced something of a hybrid, John McGlennon, a former EPA Region I Administrator with extensive involvement as a private consultant with federal environmental dispute resolution projects.

495. Id. at 26-28.

496. The phrase "impenetrable wall" was used by a leading negotiation specialist in commenting on the development of an EPA regulatory negotiation process:

> It is common wisdom that the mediator/facilitator of a dispute must be neutral. For example, it would be ludicrous in a labor-management contract negotiation for either labor or management to propose seriously that it be both a party to the dispute and also serve as the neutral mediator/facilitator. Yet EPA is, as I understand it, expecting to play a significant role--perhaps the dominant role-- in facilitating negotiations [as of 1982], and also expects to participate as one of the negotiators. The Agency's rationale appears to be that an EPA program office will negotiate the issues while the policy office will be involved in the facilitation. The Agency's approach could conceivably work in the long run if EPA

> demonstrated that it had built an impenetrable wall between the program offices and the policy office, and that the Administrator and senior officials would neither hold the policy office responsible for the outcome of the negotiations nor try to influence the outcome through the policy office. The likelihood of this strains credibility, though it is not necessarily impossible. . . .

Sam Gusman, Regulatory Negotiation, a paper presented at a conference entitled "The Reagan/Gorsuch EPA -- Its Impact on Industry," sponsored by Inside EPA Weekly Report and the Center for Energy and Environmental Management, Washington, D.C. November 8, 1982, at 6-7.

496a. E.g., Sam Gusman and Verne Huser co-mediated an agreement which identifies the particular kinds of port-related development that might be appropriate at specific sites in the Columbia River Estuary. Gusman and Huser, Mediation in the Estuary, 11 Coastal Zone Mgt. J. 273 (1984). John Folk-Williams and Sam Gusman are co-facilitating a policy dialogue on coal development in the San Juan River Basin of New Mexico. Philip Harter and Gerald Cormick co-facilitated the regulatory negotiations over the OSHA benzene workplace exposure standard.

497. Congressmen and Senators have been able to convene parties, act as go-betweens, and keep the parties at the table until an agreement is reached, using their positions somewhat like settlement-minded judges use theirs to pressure litigants into a solution. Governor Richard Lamm was instrumental in launching and mediating the Denver Water Roundtable. Kennedy and Lansford, The Metropolitan Water Roundtable: Allocation Through Conflict Management, 4 EIA Rev. 67 (1983). Congressman Timothy Wirth (D. Colo.) and Congresswoman Patricia Schroeder (D. Colo.) worked successfully to convene the stakeholders in the Denver Foothills water treatment project dispute. Congressman Wirth attended meetings, including the first meeting which he chaired, and pushed the negotiations toward the final agreement. Susskind, supra note 367 at 30, 33-35. Senator Frank Church (D-Idaho) helped mediate the Gospel-Hump Wilderness dispute by bringing together environmentalists, timber, and economic stakeholders. Id. at 44 n.127.

In early 1970, the author was involved as an attorney for the West Virginia Highlands Conservancy in a similar dispute in which Senator Jennings

Randolph convened timber, coal mining, and environmental interests, three local mayors, several members of the state legislature, and officials of the U.S. Forest Service at Blackwater Falls Lodge near Davis, West Virginia, to discuss the future of Otter Creek, a nearby area proposed for logging by the Forest Service, coal mining by the Island Creek Coal Company which owned the mineral rights, and wilderness protection by the Conservancy. The Conservancy had obtained an injunction against prospecting at 25 test holes to be drilled by bringing equipment in by truck on roads cut by a bulldozer. Congress would not put the area in the National Wilderness Preservation System until the depth and value of the coal seams had been ascertained, and the private mineral rights would not be extinguished in any event. At the meeting, the participants discussed helicoptering the equipment in, an alternative which the Senator, who did not chair the meeting, promoted informally as he circulated at the gathering. Subsequently, as the search for a creative solution continued under Sendator Randloph's prodding, a local farmer came forward to propose using his horses to drag the equipment in over existing trails to a reduced number of test sites, at a fraction of the original estimated cost. This plan was accepted, the coal proved too deep to mine economically, and Congress placed Otter Creek in the Wilderness System.

498. For example, attorneys played this constructive role in the successfully-mediated Fredericksburg annexation dispute, see Richman, supra note 371 at p. 62.

499. Susskind, supra note 367 at pp. 39-40. Congressman Wirth mediated the Foothills water project dispute despite his public stance in favor of the project. Id. at 33. Verne Huser of Seattle's Mediation Institute served successfully as mediator of a dispute over recreational boat use permits despite his considerable expertise and strong views as a former river runner. Interview, February 10, 1984.

500. G. Bingham, forthcoming book on environmental dispute mediation, supra note 367, and interview, May 16, 1984. See also Susskind, supra note 367 at 2 n. 6, 18 n. 50, 41 n. 123 (1981).

501. New environmental mediation organizations are periodically listed in a special alternative dispute resolution section of the quarterly Environmental Impact Analysis Review.

502. A. Talbot, supra note 356 at 97.

503. Consider the potential role in settling asbestos injury disputes of the judicial panel described supra at note 441.

504. Susskind, supra note 367 at 4 n. 9.

505. When Bloomingdale's parent company proposed constructing a Bloomingdale's and surrounding shopping area, the White Flint Mall, in suburban Montgomery County, Maryland near Washington, D.C., it agreed to construct a protective berm to shield the surrounding residential neighborhood and to idemnify certain local homeowners in the event their property values dropped. These agreements allowed negotiations with local residents to continue over the design of the mall, and the proposal eventually went unopposed by local citizens. M. Rivkin, Negotiated Devlopment: A Break Through in Environmental Controversies 7-14 (1977).

506. Id.

507. In labor disputes and corporate mini-trials, mediators or other neutral advisors are sometimes perceived as slowing down dispute resolution because they must be informed about the dispute or particular technical matters. See ABA transcript, supra note 407 at 15.

508. Government officials are generally unwilling to chair or for that matter participate in negotiations, because of their "natural reluctance to deviate from the statutory norm." Id. at 17. Legal norms guide and define mediated negotiations, see Eisenberg supra note 357, and will certainly continue to figure prominently in CERCLA negotiations. For this reason the CERCLA legal norms affecting site cleanup negotiations are analyzed in detail in the appendix. Yet statutory norms are only one element in determining the rather complex set of bargained arrangements that will be necessary to bring about site cleanups. Viewing the statute invariably as a constraint on the imaginations of the parties will undercut the attempt to develop opportunities for joint gains.

509. The cost of two experienced mediators (and the associated costs) for the two principal regulatory negotiations so far attempted -- a workplace benzene standard for OSHA and a crew flight hours rule for the FAA -- were approximately $50 thousand each. Interview, Philip Harter, January 3, 1984. The FAA contract is with the FMCS.

510.

> When faced with a complex environmental dispute, judges should consider negotiation or mediation to be a valuable addition to traditional procedures and, at a minimum, support any movement in that direction by the parties. In our view, of course, an even more active judicial role would be welcome; for example, involving the court in the selection and supervision of a mediator.

Susskind and Weinstein, supra note 354 at 349.

511. Judge Robert E. Keeton of the U.S. District Court for the District of Massachusetts encourages early settlement by giving parties a "Memorandum and Draft Settlement Procedures Agreement and Order" (Revised 1/14/80). See also W. D. Wash. Local Rule CR 3911 (provides for mandatory mediation in civil cases). See generally, Craig and Christenson, The Settlement Process, in Report of the Conference of District Court Judges, 59 F.R.D. 203, 252-257 (1973). Settlement approvals may be reviewed for abuse of discretion. Patterson v. Newspaper and Mail Deliverers Union, 514 F.2d 767 (2d Cir. 1975). Administrative Law Judges have been encouraged to promote settlements, some agencies have adopted settlement procedures, and settlement appears to be well-regarded among ALJs. M. Ruhlen, Manual for Administrative Law Judges 11-13 (1982 revised ed.).

512. For discussion see III.A.3. supra.

513. The Advisory Committee Note to Rule 16(c)(7) explains:

> Given the significant changes in federal civil litigation since 1938 that are not reflected in Rule 16, it has been extensively rewritten and expanded to meet the challenges of modern litigation. Empirical studies reveal that when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices . . . .
>
> Clause (7) explicitly recognizes that it has become commonplace to discuss settlement at pretrial conferences. Since it obviously eases crowded court dockets and results in savings to the litigants and the judicial system, settlement

> should be facilitated at as early a stage of the litigation as possible. Although it is not the purpose of Rule 16(b)(7) to impose settlement negotiations on unwilling litigants, it is believed that providing a neutral forum for discussing the subject might foster it. See Moore's Federal Practice ¶16.17; 6 Wright & Miller, Federal Practice and Procedure: Civil §1522 (1971). For instance, a judge to whom a case has been assigned may arrange, on his own motion or at a party's request, to have settlement conferences handled by another member of the court or by a magistrate. . . .
>
> In addition to settlement, Rule 16(c)(7) refers to exploring the use of procedures other than litigation to resolve the dispute . . . .

Supreme Court of the United States, Federal Rules of Civil Procedure, 103 S.Ct. 1905 (yellow pages) (Advising Committee Note at pp. 42, 43-44, 47-48) (April 28, 1983). This language, while not explicitly offering third-party assistance, does endorse broad court discretion to further settlement through all appropriate means.

514. See Franquez v. United States, 604 F.2d 1239, 1244-1245 (9th Cir. 1979); In Re Line of Business Reporting Litigation, 626 F.2d 1022, 1027 (D.C. Cir. 1980); Landis V. North American Co., 299 U.S. 248, 254-255 (1936). See also Fed. R. Civ. P., Rule 83.

515. A proposed change in Rule 68, Fed. R. Civ. P., would provide that if a plaintiff or defendant makes an offer which is not accepted and if the offeree loses or receives a judgment which is less favorable than the settlement offered, then "the offeree must pay the costs, and expenses, including reasonable attorneys' fees, incurred by the offeror after making of the offer . . . [plus interest]." Committee on Rules of Practice and Procedure, Judicial Conference of the United States, Proposed Changes in Federal Rules of Civil Procedure, 98 F.R.D. 337 (1983). (re Rule 68).

516. Gray Panthers v. Schweiker, 716 F.2d 23 (D.C. Cir. 1983)

517. United States v. Hooker Chemicals and Plastics Corp., 540 F. Supp. 1067 (W.D. N.Y. 1982).

518. United States v. Stringfellow, Civ. No. 83-250 (MML) (Mcx.) (C.D. Calif. 1983).

519. Id., Plaintiffs' and Defendants' Joint Status Report re: Settlement (September 9, 1983). Although their position is unclear, defendants do not appear to be arguing that delegation to a settlement judge or mediator of the role of court assister is barred by the Constitution Article III. See Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 50 U.S.L.W. 4892 (June 28, 1982) (U.S. Bankruptcy courts are not article III courts and are therefore unconstitutional).

520. Letter from Special Litigation Counsel Lois J. Schiffer, U.S. Department of Justice to Gerald W. Cormick, President, The Mediation Institute, January 4, 1984.

521. See Cormack, supra note 360.

522. R. Fisher and W. Ury, supra note 352 at 70.

523. Harter, supra note 350 at 54-55.

524. For example, in the Fredericksburg Annexation dispute, see Richman, supra note 371 at 58, the negotiation teams were able to make good progress because they had the authority necessary to commit their respective organizations to an agreement.

525. R. Fisher and W. Ury, supra note 352 at 138, 141, 144, 147.

526. W. Emrich, New Approaches to Managing Environmental Conflict: How Can the Federal Government Use Them? 36 (1980). See also Sachs, Nationwide Study Identifies Barriers to Negotiation, 3 EIA Rev. 95, 99 (1982) (Recommendation three).

527. The initial EPA experience with regulatory negotiation is instructive. From the rather straighforward conclusion that some EPA propsals for negotiation might be appropriate for negotiation soon developed an entire tentative program for regulatory negotiation: an official head office for facilitation, training programs for participants, a consultant to evaluate the process, etc. See Gusman, supra note 496 at 5.

528. See Susskind and Weinstein, supra note 354 at 320.

529. Fed. R. Civ. P., Rule 68; Fed. R. Evid., Rule 468.

530. Harter, supra, note 350 at 85.

531. K. Davis, Administrative Law Treatise §§8, 9(2d ed.) (including 1982 Supp.)

532. The term is used to describe the last increment of capital required to enable a project to move forward, e.g., the last several thousand dollars necessary to produce a film. A provider of "completion funding" may obtain more favorable concessions than his or her co-contributors.

533. Roger Fisher has proposed that two types of counsel be assigned to cases: a lawyer from the firm's negotiation division who counsels the client on settlement and attempts to settle the case, and a lawyer from the litigation division, who works on developing the clients' legal case as its best alternative to a negotiated agreement. *What About Negotiation as a Specialty?*, 69 A.B.A.J. 1221, 1223 (1983). If staff resources are available, his idea might be adapted for use in CERCLA negotiations.

534. *See supra* note 493. *See also* Meier, *Plan to Fund Cleanup of Toxic Waste Sites is Being Developed by Chemical Industry*, Wall Street Journal, February 22, 1984, p. 7, col. 1. *See also* Fox, *Breaking the Regulatory Deadlock*, Harv. Bus. Rev. 97 (1981) (September-October). The tripartite entity would be called the Clean Sites Institute.

535. In an interview, January 6, 1984, Gene Lucero, who heads EPA's CERCLA program enforcement office, stressed the great diversity of viewpoints represented among the site users and the importance of developing incentives to negotiate. While he was not sanguine about coalescing the generators, he also stated that he could see no other way to find a successful solution to the apportionment problem, even if initial negotiations fail and suit must be brought, except by some type of discussions beyond the courthouse. He cannot see how such cases as *Chem Dyne*, in which settling and non-settling parties are back before the court with over a hundred cleanup shares to sort out, can be adjudicated efficiently and promptly.

536. For example, a major controversy erupted over whether the small generators at the Seymour site were unfairly treated as a result of the bargain struck between the government and the larger generators.

537. Comments of the Chemical Manufacturers Association on EPA's December 12, 1983 Draft Hazardous Case Settlement Policy 12 (January 12, 1984).

538. United States v. Chem Dyne Corp., 19 Env't Rep. Cas. (BNA) Cases 1953, 1959 (S.D. Ohio 1983).

539. Rosebrook, *Abandoned Waste Site Cleanup Cost Allocation Model, 7 Chem. & Rad. Waste Litig*. Reporter *398 (Jan. 1984)*.

540. Interview, Michael Brown, Esq., January 10, 1984.

541. Michael Brown, interview, January 10, 1984. *See* also Brown, *The Settlement Dilemma (A Tragedy in Two Acts)*, *5 Hazardous Waste Rep. 12, 14 (December 12, 1983)*.

542. For example, a federally-negotiated consent decree with Homestake Mining Company for supply of clean drinking water to residents near a uranium mill tailings pile near Milan, N.M., was disfavored as a "sweetheart deal" by the state, which apparently pushed for relocation assistance. 14 Envir. Rep.(BNA)--Curr. Dev. 1535 (January 6, 1984).

543. *See* Richman, *supra* note 371.

544. *See* Note, *The Preemptive Scope of the Comprehensive Environmental Response, Compensation Liability Act of 1980: The Necessity for an Active State Role*, 34 U. Fla. L. Rev. 635 (1982).

545. *See* CERCLA §104(c)(3)(A), (B) and (C).

546. *Id*. §104(c)(3).

547. Interview, Sylvia Lowrance, Acting Policy Branch Chief, EPA Office of Emergency and Remedial Response, May 15, 1984.

548. Stricter requirements are not pre-empted under CERCLA. *See* §114(a).

549. §104(c)(2)

550. §106(a)

551. §111(f)

552. *See* note 142 *supra*.

553. *See* Note, *Superfund and California's Implementation: Potential Conflict*, 19 Cal. W.L. Rev. 373 (1983).

554. F. Anderson, D. Mandelker, and A.D. Tarlock, *Environmental Protection: Law and Policy* 326 (1984).

555. Susskind, *supra* note 367, at 38.

556. MacMillan and Miller, "Citizen Suits" would Complicate Waste Cleanups, Legal Times, January 30, 1984, col. 1, p. 11. Bacow and Milkey, Overcoming Opposition to Hazardous Waste Facilities: The Massachusetts Approach, 6 Harv. Env. L. Rev. 265, 267-269 (1982), canvass the costs and benefits of new hazardous waste disposal facilities as perceived by local citizens, concluding that their intense opposition is not counterbalanced by similarly focused gains among the widely dispersed beneficiaries, thus making the siting "largely a problem of managing local opposition." At 269.

557. Schwartz, The Public is Not Hysterical, 2 Envir. F. 40 (January, 1984).

558. Telephone interview with Lois Gibbs, President, Citizens Clearinghouse for Hazardous Wastes, Apri 9, 1984. Where fully informed residents of two communities in Alberta, Canada, voted on siting an integrated hazardous waste facility in their communities, 75 percent of those voting approved. McGlennon, Needed: More Software in Siting (unpublished paper, May 1984). See note 343 supra.

559. Bacow and Milkey, supra note 368, at 277.

560. Rikleen, Negotiating Superfund Settlement Agreements, 10 B.C. Envt'l Aff. L. Rev. 697, n.62 (1982-1983).

561. Id. at 713.

562. Interview, John Ehrmann, Keystone, Colo., January 13, 1984.

563. "Community relations" guidance is under development by an EPA consultant. See Community Relations in Superfund, A Handbook, Interim Version (September, 1983) (Prepared for the EPA Office of Emergency and Remedial Response, Contract no. 68-02-3669). Chapter 6 of this Handbook, "Community Relations During Enforcement Actions," was drafted and circulated by EPA in 1983, 14 Envt. Rep.(BNA)--Curr. Dev. (May 20, 1983), then revised in early 1984 when it was sent as draft guidance to regional offices and appropriate headquarters staff. William N. Hedemann and Gene Lucero, Community Relations During Enforcement Actions (February 6, 1984). Congresswoman Milkuski has introduced an amendment to the Florio Amendments to Superfund to create a special EPA office to handle Superfund-related public affairs.

564. Id., chapter 6 at 5.

565. Id. at 4.

566. Id. at 5.

567. 28 CFR §50.1.

568. H.R. 2867, S. 757, 96th Cong. 2d Sess. (1983). The Senate version does add that intervention can be opposed by the government if it can show that "an applicant's interest is adequately represented by existing parties."

569. See MacMillan and Miller, supra note 556 at 12.

APPENDIX
LITIGATION UNDER CERCLA: BARGAINING IN THE SHADOW OF THE LAW

The EPA's strategy for implementing CERCLA depends critically upon how the courts interpret and apply its cost reimbursement and imminent hazard provisions. These provisions provide, in effect, the agency's best alternative to a negotiated agreement. In a sense, strict liability, joint and several liability, the scope of §107's list of responsible parties, the substantive or jurisdictional nature of §106, and the meaning of its key phrase, "imminent and substantial endangerment," take us afield from administrative law and process. But to understand why EPA does not think it needs to endorse a more efficacious negotiated cleanup strategy requires a close look at the statute and recent litigation under it. If negotiation develops into a more serious CERCLA implementation strategy, it still will do so in the norm-defining shadow of the statute as interpreted by the courts.[1]

A. CERCLA Policy and Strict Liability: New Wine for Old Skins

CERCLA declares that the standard of liability that applies under the Act should be the same as that which applies under section 311 of the Clean Water Act.[2] Although section 311 did not, by express terms, establish a standard of strict liability, it has been so interpreted by the courts.[3] The legislative history of CERCLA reveals that Congress perceived that it was adopting a standard of strict liability for parties that were held responsible under the Act.[4] However, Congress did more than simply codify pre-existing common law theories of tort law in CERCLA; it established a statutory solution to remedy the hazardous waste problem in the United States. That statutory solution is similar to, but also different from, common law theories of strict liability.

The term "strict liability" may refer to a standard of liability or a common law cause of action. As a standard of liability, the term tells us little beyond that responsible parties will be liable for injuries to others regardless of fault.[5] In other words, even though the responsible party acted with the highest degree of care, if its activities resulted in some injury to others, the responsible party is liable. When strict liability is used as a term of liability, it does not address questions of duty, causation, nature of the injury or defenses available. Strict liability is simply another way to say that a responsible party will be held liable without fault.

The term "strict liability" also refers to a common law cause of action against a defendant who engages in ultrahazardous[6] or abnormally dangerous[7] activities. The ultrahazardous or abnormally dangerous nature of the activity is based upon a variety of factors: risk of harm to others; magnitude of harm that will occur; extent to which the activity is not a common one; inability to eliminate the risk of injury by the exercise of reasonable care; appropriateness of the activity to the place where it is performed; and, for abnormally dangerous activities, the value of the activity to the community.[8] In addition to the ultrahazardous or abnormally dangerous activity, a plaintiff would have to prove the existence of a duty, injury, and a causal relationship between the defendant's activities and the injury. A plaintiff may also be subjected to a variety of defenses, including contributory negligence, assumption of the risk, the public duty of the defendant to engage in the activity, the plaintiff's unusual sensitivity, and the intervening acts of others.[9]

The justification for strict liability is that socially beneficial but dangerous activities must "pay their own way."[10] Thus, a defendant will be found liable even though he has not violated any standard of care and even though he is not morally blameworthy.[11] In economic terms, the defendant is forced to internalize the costs of the damages that result from his activities by incorporating those costs into the price of goods or services.[12] In this light, strict liability is not a theory for punishing a wrongdoer, it is a means for determining who will ultimately bear the risks associated with activities that are, in the broader scheme of things, socially desirable.[13]

Congressional reference to strict liability was unnecessary and unfortunate because of the confusion that it has created about the nature of a statutory remedy for the problems posed by hazardous waste.[14] Section 107 of CERCLA does apply a standard of strict liability. It declares that four classes of responsible parties "shall be liable for" the cleanup costs associated with hazardous waste sites and for certain damages to natural resources.[15] Section 107 does not establish any standard of care for responsible parties, nor does it suggest that proof of reasonable care, or even utmost care, would absolve responsible parties for the cost of cleanup. The only defenses that are available to responsible parties -- act of war, act of God, and certain acts or omissions of third parties[16] -- are not typical of the type of defense that would be available if the section 107 plaintiff had to make out a case of negligence.[17]

The term "liability" or "liable" is an unfortunate one because CERCLA, despite its name, is not so much a liability-creating act as it is an act by which Congress adopted a means for allocating the costs of cleaning up hazardous waste sites. There is, however, an analog between CERCLA and a common law cause of action in strict liability. CERCLA did create a duty for responsible parties to reimburse persons who incurred response costs consistent with the National Contingency Plan. It also established that responsible parties would be liable without regard to fault -- either the failure to conform to a prescribed standard of conduct or any moral blameworthiness. In a fashion, CERCLA also defines compensable injury: cost incurred in response activities, and damages to natural resources.

However, there are important differences between a §107 action and a strict liability claim. When Congress determined that responsible parties ultimately should bear the cost of cleaning up hazardous waste sites, it was not obligated to weigh the variety of factors that a court would consider when determining if certain conduct constituted an ultrahazardous or abnormally dangerous activity. Congress needed only to determine if shifting the cost of hazardous waste cleanup to the responsible parties enumerated in §107 was a rational means for dealing with the problem of hazardous waste.[18] Thus, Congress did not create retroactive liability in enacting CERCLA.[19] Industry arguments that it is unfair or unconstitutional to force them to pay for the cost of cleaning up hazardous waste sites because they complied with established standards of conduct is unavailing.[20] CERCLA does not declare that responsible parties are morally blameworthy or that they violated any standard of care. CERCLA, admittedly, is not predicated on the notion that industry did something wrong in the past and is therefore liable today. CERCLA is predicated on the notion that certain hazardous conditions need to be dealt with and that industry should bear the cost of remedying those hazardous conditions. The determination is rational because industry most directly profited from dealing in hazardous waste products and industry can allocate the cost of cleanups to those who benefitted from reduced costs because all necessary precautions were not taken when wastes were originally handled by generators, transporters, and owners and operators of dump sites. Even if such precautions had been taken, however, Congress could still determine that §107 responsible parties, and those to whom they pass on the costs, should bear the financial burden associated with hazardous waste clean up.[21]

CERCLA also differs from common law strict liability on the issue of causality. At common law, one of the most difficult burdens for the plaintiff is proving that the activities of the defendant, who is liable without regard to fault, were the cause in fact of the plaintiff's injury.[22] In contrast, CERCLA does not require a §107 plaintiff to prove that the waste that was generated, transported, or otherwise handled by a responsible party is the very waste which created a hazardous condition necessitating response activities.[23] The only nexus required by CERCLA is that after incurring response costs consistent with the NCP, the §107 plaintiff prove that the defendant is in the class of parties identified in §107(a). CERCLA does not require the plaintiff to prove that the defendant's waste was, for example, leaching into the groundwater, only that the defendant's waste was at the site that was cleaned up.

This difference in causal analysis is justified because Congress had only to determine who would be a reasonable class of persons upon which to visit the cost of cleaning up hazardous waste sites. Thus, CERCLA liability may be more like enterprise[24] or market share[25] liability than it is to traditional strict liability.[26] Perhaps, however, the real explanation for the difference in causal analysis lies in the very nature of CERCLA -- providing a remedy for hazardous conditions, not fixing liability for ultra-hazardous or abnormally dangerous activities.

Although the common law will always form the background by which statutes are understood, the courts must be careful not to force CERCLA into a common law paradigm that effectively undermines the vitality of the remedy that Congress established.

B. Joint and Several Liability: But Must the Agency Sometimes Apportion?

The Department of Justice and EPA have successfully argued that the site users' responsibility under CERCLA for reimbursement of EPA's cleanup costs under §104 and for the direct cleanup of sites by the users themselves under §106 is "joint and several." In the familiar terminology of the common law, the statutory language, legislative history, federal district court opinions, and much of the critical literature support the imposition of "joint and several liability"[27] under both the §107 reimbursement provision and the §106 direct cleanup provision.[28] With one exception, the initial rulings of the federal district courts[29] have been particularly encouraging to the government which appears to believe that those decisions, taken together with the simultaneous imposition of strict liability, virtually assure the success of the government's CERCLA implementation strategy. The exception, a federal district court ruling in the Stringfellow site case, holds that joint and several liability is not imposed by §106.[29]

The several district court rulings do not yet, however, provide a reliable prediction of how the federal courts will ultimately decide specific reimbursement and direct action cases if and when the merits of such cases are actually reached.[30] The cases correctly hold, at the very least, that the government need not sue each site user for its proportionate share of the costs of cleanup responsibility.[31] Yet, whether those cases also mean that the way is open for the government to select the single or the few site users it believes are best positioned to pay for or conduct cleanup without regard to its ability to apportion costs and responsibility and without regard to the complexities of the status of each known user[32] is, for the moment, far less certain. To demonstrate why the uncertainty exists requires a closer look at the common law doctrine of joint and several liability as it has recently been applied to CERCLA and at the detailed provisions of §§ 107 and 106 read in light of CERCLA's purpose and legislative history.

At early common law, joint and several liability applied only when multiple tortfeasors, acting pursuant to a common purpose or scheme, inflicted an indivisible injury on the plaintiff.[33] Joint and several liability was later extended to defendants who were vicariously liable or who had breached a common duty.[34] Eventually, the focus on the relationship of the defendant gave way to a concern for the nature of plaintiff's injury: if the injury were indivisible, the defendants would be held jointly and severally liable.[35] The rationale supporting joint and several liability is that an innocent plaintiff should not be denied recovery because he cannot calculate the degree of injury attributable to each defendant.[36]

The doctrine of contribution developed concurrently with the concept of joint and several liability. The American courts adopted an early English rule that one joint tortfeasor who had been held liable for the plaintiff's injury could not sue another joint tortfeasor to force him to "contribute" to the payment of liability.[37] Thus, in some jurisdictions, joint tortfeasors who acted concurrently could be held jointly and severally liable without a right to contribution. In other jurisdictions, because there was no right to contribution, the courts required the plaintiff to apportion damages when injured by concurrent tortfeasors.[38] In response to the unsatisfactory nature of the common law, the majority of states have enacted statutes creating a right to contribution for joint tortfeasors.[39] Even under those laws, however, the right to contribution is not absolute.[40] Some states now hold that defendants who contributed to an indivisible nuisance are jointly and severally liable; others allow joinder, but not joint and several liability; others will allow joint and several liability only when a special relationship existed between the defendants or they acted in concert; in still other states, the law is simply unclear.[41]

Regardless of the precise rules employed by the courts, the application of joint and several liability is roughly the same. The court must determine case-by-case, on the basis of the nature of the plaintiff's injury and the relationship between and among the defendants, whether the burden of apportioning liability should shift from the plaintiff to the defendants. When the burden is shifted to the defendants because of the policy supporting joint and several liability, it is they who bear the risk of non-persuasion and each other's insolvency. When the court refuses to shift the burden, the plaintiff must prove the proportionate share of each defendant's liability and bear the risk of each defendant's insolvency.

CERCLA adopts a policy patterned on a common law rule of joint and several liability with a right to contribution. First, the statutory language of CERCLA, while far from being explicit, does suggest that joint and several liability was adopted by Congress. Section 107(a) provides a list of four classes of persons who "shall be liable for" the response costs incurred in a hazardous waste site clean-up.[42] The Act does not provide that §107 parties "shall be liable for" the costs associated with their actions only.

CERCLA also provided that the standard of liability under the Act should be the same as that applied under §311 of the Clean Water Act.[43] Thus, courts have held that CERCLA imposes strict liability.[44] The reference to the CWA is not helpful here, however, because joint and several liability is not a "standard of liability." Moreover, at the time that CERCLA was adopted, the CWA had not been interpreted as creating joint and several liability.[45]

The statutory language from which a right to contribution can be argued is also less than crystal clear. Section 107(e)(2) of CERCLA provides that nothing in the Act should bar a cause of action that any person subject to liability under the Act would have "by reason of subrogation or otherwise against any other person."[46] The section preserves causes of action that liable parties would have had against any other person. However, a right to contribution did not exist at common law and it is difficult to argue that §107(e)(2) preserved a right that was not commonly held to exist.[47] In addition, the immediately preceding provision of §107(e) refers to subrogation and indemnification which are different in kind from a right to contribution.

Section 107(a)(4)(B) has also been cited as establishing a right to contribution among liable parties.[48] That section provides that §107 parties shall be liable for all other response costs incurred by any other person consistent with the NCP. Thus, perhaps a defendant who is found jointly and severally liable can sue any other §107 party on the theory that his liability constitutes response costs. To argue that §107 liability is a response cost incurred consistent with the NCP stretches the concept of "response cost" and "consistently" too far. Section 107(a)(4)(B) is designed to permit private persons who undertake response actions consistent with the NCP to recover their costs from §107 parties.[49]

Second, the legislative history regarding joint and several liability and the right to contribution is ambiguous, but supportive of such liability. Although express language that would have created joint and several liability was deleted from the compromise bill that became CERCLA,[50] the legislative history reveals that Congress intended that joint and several liability should apply according to "traditional and evolving principles of common law."[51] The legislative history regarding contribution is discouraging when read in isolation from CERCLA's overall aims and objectives. As with joint and several liability, a statutory right to contribution was deleted from CERCLA.[52] However, the legislative history on joint and several liability can be used to support a finding that contribution should be permitted to the extent that it is consistent with "traditional and evolving principles of common law."

Conceivably, §114(a) could permit a defendant in §107 action to resort to a state created right to contribution.[53] Under general state contribution laws, as well as state hazardous waste cleanup laws, a §107 defendant could maintain that §114(a), which permits states to expand liability for hazardous wastes beyond that imposed by CERCLA, authorizes a federal court to rely on a state-created right to contribution. Resort to state law would, however, be contrary to a uniform rule of federal law.

The federal district courts that have been confronted with the issue of joint and several liability have found, on the basis of CERLA's text, legislative history, and overall purpose, that such liability exists.[54] The courts appear to accept the view that in enacting CERCLA, Congress authorized the creation of a federal common law of joint and several liability.[55] That view will likely prevail in order for the courts to avoid the confusion that might follow if the varying state common law and statutory rules were to guide the courts.

It is hard to see how "joint and several liability" would not apply to CERLA's cost and cleanup responsibility mechanisms. CERCLA's text may be neutral on this issue, and its legislative history might be ambiguous, but Congress' overall purpose in enacting this remedial measure is not similarly afflicted. Congress acted with a sense of urgency when it took the exceptional step of creating a large revolving pollution cleanup fund and authorized direct federal abatement expenditures where the site users who helped create the hazardous conditions would not do so properly. A §107 action for reimbursement provided a means to secure prompt recoupment for the fund.

Both common law joint and several liability and CERCLA's text, legislative history, and dominant policy contemplate that cleanup costs and response actions would be the responsibility of each of a wide variety of site users (see discussion of parties below), without regard to fault and with only a minimal causal nexus between the past or present user's waste and the danger at the waste site. Nevertheless, a court could decide to require the goverment to prove the respective cost or cleanup shares of site users in appropriate cases. Neither the common law nor CERCLA bars this result when the government can reasonably identify and apportion the proportionate responsibility of the various site users.

The primary argument favoring joint and several liability is that it furthers congressional intent regarding the allocation of the cost and responsibility of response activities. Congress intended that the Superfund would be replenished by recoupment actions brought under §107. That replenishment would be frustrated if the federal government were unable to prove relative shares of responsibility or were forced to bear the risk of a given site user's insolvency. On the other hand, traditional justifications for joint and several liability are not altogether applicable in suits brought by the government under CERCLA.[57] First, the government does not stand in the role of the injured and innocent plaintiff who is seeking compensation from multiple tortfeasors. Second, the government is in a stronger position to determine the relative responsibility of each site user and to absorb the risk of a given site user's insolvency. Thus, an equally sensible approach, in view of the statute's purposes, would require the government to apportion responsibility for those users whose contribution to the hazardous situation is adequately documented and understood, while joint and several liability for the balance of the response costs would apply to those defendants whose contribution was not readily ascertainable.

The option to apply joint and several liability also applies under §106, which authorizes the court to award the broad equitable relief that is warranted by the facts of the individual case. Circumstances will arise when the court could conclude that requiring a site user to take responsibility only for the apportioned share of response activities which the government could prove was in the public interest and equitable. For example, if the government had sued only one or a few of several solvent site users whose contributions to the waste site were well known, or if the government had refused to grant site users the opportunity to undertake a voluntary negotiated cleanup, the court in a §106 action could require the government to join all known site users and apportion responsibility among them.

The flexible application of joint and several liability is consistent with the fundamental purposes of CERCLA. Neither the common law of joint and several liability nor particular statutory provisions of CERCLA stand in the way of a court which wants to exercise wide discretion when issuing §107 reimbursement and §106 cleanup orders. Flexibility will serve the broad policy considerations of CERCLA while not prejudicing the government's CERCLA implementation and litigation strategies.

As was true with "strict liability," the use of common law phrases like "joint and several liability" and "federal common law" obscures what Congress accomplished when it enacted CERCLA. Admittedly, such phrases were used by Congress, and the courts and critics have continued to use them when discussing CERCLA. Apparently, "the federal common law of strict joint and several liability" is destined to become the accepted framework for analyzing CERCLA cost and cleanup apportionment. Yet, CERCLA did not on its face, nor by implication, simply adopt the pre-existing body of common law regarding joint and several liability. Nor did Congress amend and extend joint and several liability by neat, surgically precise legislative intervention in the existing fabric of common law as other legislatures have done on occasion -- for example, the modification of the common law of master and servant, contributory negligence, and in the states, contribution. Rather, Congress and the courts have appropriated the phraseology of the common law as an analog to aid in the description of a uniquely federal statutory policy for effective site cleanup, cost recoupment, and (in appropriate cases) direct action to compel responsible parties to clean up sites themselves. Common law doctrines have not been removed from their traditional niches, modified by statute, and re-inserted to be applied, as altered, in deciding common law cases. Instead, common law terminology has been borrowed to describe (and justify) the interlocking components of a new federal risk removal and stabilization program which depends on large infusions of "conscripted" investment from the private sector. Viewed in this light, the role of the courts is to compel such reimbursement and issue such equitable relief as best ensures that the government adopts policies that achieve CERCLA's cleanup goal: the best short and long-term stabilization of the largest number of sites in the shortest possible time at the lowest cost.

CERCLA's jont and several liability policy permits, but does not require, the court to saddle one or a few of the most accessible site users with the complete cleanup costs (§107) or responsibility to clean up (§106). If the court decides to require the government to prove the respective shares of all or some of the site users, a variety of factors might be considered. Under the common law, the condition of the site would guide the determination: waste drums, lagoons, pits and piles, and the composition of the chemicals in them would constitute the data from which a rough-and-ready apportionment to the various generators, transporters, and owners and operators who contributed to the hazardous site. Yet, a statutory approach modeled on the common law might also be more broadly construed to permit a court to take a wider variety of factors into account. Those factors could include EPA's possession of relevant site information gathered as a result of extensive remedial investigation and feasibility studies; the relatively greater ability of the agency to apportion costs as compared to numerous or disorganized site users; the reluctance of the government to share information which might have enabled site users to agree _inter se_ on relative shares so that litigation could have been avoided in the first place; the lower total transaction costs that government apportionment would entail (because one or more protracted contribution suits could be avoided); the greater expertise of the EPA vis-a-vis the court in apportioning costs (especially as EPA officials gather experience from cleanup activities); and the earlier refusal of the government or the site users to settle complex litigation by reasoned compromise.

Some of those factors become more important if it appears that the responsibility for failure to achieve an earlier, fairer, least-cost negotiated solution is more the fault of the government than the site users. The common law policy of shifting the burden of apportionment to the defendant was predicated on an innocent victim and a blameworthy wrongdoer and would be less appropriate when the "equities" do not lie with the government. Joint and several liability at common law did not address the issue of contributory negligence or the non-negligent actor who caused harm. While CERCLA obviously assumes that "responsible" parties should bear the costs of cleanup, it does not assign blame and scrupulously avoids fault-based liability determinations. Congress may have concluded that site users were to blame when sites were mismanaged, but it nevertheless based responsibility for site cleanup on the single criterion of use. At some sites, faultless deep pocket users might bear the brunt of the cost of cleanup even though their particular use of the site cannot be shown to have contributed to the hazardous conditions.[58]

In those circumstances, a court in a §107 cost recoupment action might choose to depart from a rigid adherence to the common law model of strict joint and several liability. A broader, more flexible federal concept of statutory apportionment and contribution can be developed. Even when statutes and the legislative history expressly employ terms with rich common law meanings, courts must construe them in light of the purposes of the underlying statutes.[59] The court can utilize the same flexible relief in a §106 action, relying on the "public interest and the equities of the case" for guidance in fashioning appropriate relief.

C. Parties: Reaching All Links In the Chain of Disposal

The government can recover response costs from a wide array of site users: past and present owners, operators, transporters, generators, or any other person who arranged for waste disposal.[60] The variety of parties who can be sued under §106 to clean up a waste site is unknown, because Congress, somewhat curiously, made absolutely no mention of the site users who were subject to suit under that section. Section 106 merely provides that the government may secure whatever relief is necessary to abate the hazardous condition and that the courts should grant that relief which is justified by the public interest and the equities of the case.[61] On the broadest possible reading, §106 authorizes relief against any person who is capable of complying with a court order, an interpretation that must be narrowed to include only persons that have, at least, a minimum rational nexus with the site. How minimal or close the nexus with the site must be is an issue undergoing rapid evolution.[62] For the moment, most district courts have been content to extend the scope of §106 at least as far as is permitted by §107.[63] Although the theory underlying that choice is not clear, the courts appear to believe that Congress intended that §106, at a minimum, would encompass the same parties subject to recoupment actions.[64] Because §106 authorizes such relief as is in the public interest, and Congress demonstrated that it was in the public interest to subject §107(a) parties to recoupment actions, those same parties seem to come within the scope of §106.[65] The nexus identified in §107 that enables the government to sue site users for reimbursement can also be applied to §106; such relief would still be "equitable."[66] Section 107 itself provides some internal evidence that the parties listed there are also subject to §106 abatement actions. While §107(a) defines the classes of persons under the Act, §107(c)(3)[67] implies that parties who are liable under §107(a) are the same persons who are subject to administrative orders or court ordered injunctive relief under §106.[68]

A narrower interpretation of §106 provides that the abatement provision extends only to present owners and operators because off-site generators and transporters and past site users of all types might not have access to the site to effectuate the equitable in situ remedies contemplated by the provision.[69] This narrower view has merit if §106 is seen as an emergency-type provision.[70] However, when §106 is read in relationship to §104 and §107 such a restricted field of parties cannot be justified. Under §104 the government is authorized to undertake response actions unless it determines that the removal and remedial activities will be performed properly by the owner or operator of the facility or by any other responsible party.[71] Since Congress contemplated that off-site responsible parties would be allowed access to hazardous sites for cleanup under §104, a court might infer that under §106 it could enjoin a present owner or operator to provide off-site parties access to the site.[72]

In sum, §107 enumerates the site users who are responsible for reimbursing the government for its cleanup costs and unless one of the listed defenses in §107(b) is available, there is no exception to such liability. Coupled with strict joint and several liability, §107(a) provides a powerful tool with which the government can compel one or a few site users to reimburse it for its response costs. Those costs may include the expense of all directly procured cleanup services, all technical and legal costs associated with bringing a §107 action, and interest on all sums for which a demand has been made, but for which no monies were paid over to the government.[73] The government can resist any challenge to its cost figures because §107 creates responsibility for the "actual" costs incurred.[74]

The court does retain some flexibility regarding the government's cost figures because it can determine whether the costs are apportionable between or among the site users. That flexibility is especially evident in §106 where the court is to be guided by the public interest and the equities of the case. Although the precise meaning of §106 will only be determined through extensive litigation, the discretion that is inherent in §106 could permit a court to excuse a party from cleanup obligations or cost-sharing responsibilities when the party can convince the court that its contributions to the site were minimal or essentially not hazardous, or that the party had an impeccable waste management policy, or a cooperative attitude, or a recent history of promoting negotiation and voluntary cleanup.

D. The Substantive versus Jurisdictional Nature of Section 106

One of the most debated questions concerning CERCLA is whether §106 establishes a standard for injunctive relief and is therefore substantive, or if it only vests jurisdiction in the federal district courts to grant injunctive relief and is therefore jurisdictional only.[75] That §106 is at least jurisdictional cannot be doubted, based on the express language of the section. However, if §106 is jurisdictional only, it is then unnecessary. The federal district courts already possess a general grant of jurisdiction in all cases commenced by the United States or any officer or agency who is authorized to bring suit on behalf of the federal government.[76] Thus, suits could be brought under CERCLA to enforce rights of the federal government without the jurisdictional grant provided by §106. The section does, however, expressly authorize the Attorney General to secure such relief as is necessary to abate the imminent and substantial endangerment. In addition to the general jurisdiction of the federal district courts to hear suits brought by the United States, §113(b) of CERCLA vests jurisdiction in the federal district courts for all civil actions arising under the Act except when an EPA regulation is being challenged.[77]

Section 106 does more than vest jurisdiction in the federal district courts. It provides the government with a specific right that it would not otherwise have.[78] Without §106, the government would be entitled to sue responsible parties to recoup the costs of response actions.[79] With §106, the government has an express right to secure such relief as is necessary to abate the imminent and substantial endangerment. The use of the term "jurisdiction" in §106 is a poor word choice.[80] The federal district courts have jurisdiction; what §106 adds is the power to grant a specific form of relief.

The right to injunctive relief obtains when an imminent and substantial endangerment is present; thus, the common law standard of imminent and irreparable injury of a substantial nature[81] is replaced by the less stringent "imminent and substantial endangerment." An argument that the Attorney General may bring an abatement action when an imminent and substantial endangerment is present, but that the court cannot issue relief until there is a likelihood of an imminent and irreparable injury of a substantial nature, would not make sense. That interpretation could vest jurisdiction in the court years before injunctive relief could be ordered. Similarly, that interpretation is inconsistent with the availability of administrative orders under §106.[82] From all appearances, the President is authorized to issue orders whenever there is an imminent and substantial endangerment; at least, that was the understanding of Congress.[83] Again, it makes little sense to permit the government to issue administrative orders when an imminent and substantial endangerment is present, but to then permit the court to set aside such an order because the court determined that an imminent and irreparable injury of a substantial nature did not exist.

If §106 were determined to be jurisdictional only, a court would be forced to search for law to apply in determining the appropriate standard of relief. Although the federal district court could look to state common law,[84] it would most likely rely on federal common law. Several commentators[85] have been bewildered by the paradox that while §106 is jurisdictional only, the courts are precluded from resorting to federal common law under Milwaukee v. Illinois ("Milwaukee II")[86] in which the Supreme Court held that a federal common law cause of action for nuisance had been preempted by the comprehensive regulatory scheme embodied in the Federal Water Pollution Control Act Amendments of 1972.[87] The holding of Milwaukee II does not preclude the federal district court from relying on common law to give substance to §106[88] First, CERCLA is not the kind of comprehensive regulatory scheme considered in Milwaukee II. Rather than setting elaborate emissions or effluent standards, something that would not make sense for abandoned dump sites, Congress established two methods for making various parties reponsible for the cleanup of dump sites -- recoupment actions and abatement actions. Second, Milwaukee II held that a federal common law cause of action had been preempted by the FWPCA amendments. A court that was attempting to apply §106, a statutory provision, would only be looking for the appropriate standard of relief. Third, a court is not barred from looking to or creating common law when the clear implication is that Congress intended it to do so.[89] Congress could not have preempted the common law by adopting CERCLA and then provided the courts with a standardless provision for injunctive relief. Finally, the federal courts, even considering Milwaukee II, are not barred from relying on the common law to flesh out the interstitial areas of an ambiguous statute.[90] The common law will always provide the background by which statutes are interpreted.

Assuming that §106 were determined to be jurisdictional only, a court would not need to incorporate the common law standard for injunctive relief -- imminent and substantial injury of a substantial nature. Relying on the language and purpose of CERCLA, as well as the nature of the problem, a court could make a reasoned determination that injunctive relief should issue when there is an imminent and substantial endangerment to the public health, welfare, or the environment.

The precise relief that the court is to grant under §106 is to be based upon "the public interest and the equities of the case." A superficial reading of §106 might suggest that only prohibitory injunctions against on-site responsible parties are available. That narrow reading is inconsistent with the broad language authorizing the Attorney General to secure such relief as is necessary to abate the endangerment. If Congress had meant to limit the court to prohibitory injunctions, it could have done so by express language. The ambiguous language of

§106 will again force the courts to search for law to apply when determining the appropriate relief. The court may look to other provisions of CERCLA, specifically §107, to determine what the public interest and the equities of the case require. In §107 Congress determined that it was equitable and in the public interest to hold four classes of site users responsible for the cost of response actions. Thus, the court should be permitted to establish similar responsibility via the direct cleanup action provided in §106. At least one court has suggested that federal common law may be used in fashioning appropriate relief.[91] That view could lead to a situation where a court could issue injunctive relief once an imminent and substantial endangerment was present, but the relief itself would be shaped by a balancing of interests.[92] Thus, a court could require the government to apportion liability and could consider the good behavior of a responsible party. It is clear that the court is not obligated to issue the relief sought by the government simply because of the presence of an imminent and substantial endangerment.

E. What is an "Imminent and Substantial Endangerment"?

The meaning of an "imminent and substantial endangerment" must be determined whether §106 is held to be substantive or jurisdictional. If §106 is substantive, the meaning of the phrase must be determined to know when injunctive relief may issue. If the section is jurisdictional, its meaning still must be ascertained to determine the government's evidentiary burden for invoking the jurisdiction of the federal court.

Section 106 is one of several imminent hazard provisions that have been included in environmental statutes.[93] The first statute to include the "imminent and substantial endangerment" language was the Air Quality Act of 1967.[94] Congress explained that §108(h) of that Act was intended to cover widespread mortal danger to persons.[95] The imminent hazard provisions of the present air and water quality control legislation[96] took their language from the 1967 Air Quality Act, but their legislative histories add nothing to our understanding of the imminent hazard provisions.[97]

Congress' most explicit attempt to provide meaning for imminent hazard provisions is found in the legislative history of the Safe Drinking Water Act (SDWA).[98] Congress reported that §1431 of the SDWA was a grant of broad administrative authority, but that the section should not be used when other regulatory authority in the law was adequate to protect the public health.[99] In addition, the "emergency authority" was not to be used when the risk of harm was remote in time or completely speculative.[100] It was made clear, however, that an imminent and substantial endangerment meant something less than imminent and irreparable harm of a substantial nature.[101] The weight of authority supports that broad interpretation of modern imminent hazard provisions;[102] thus, the real issue is if §106 is limited to emergency type situations as industry argues, or if §106 can be used interchangably with §§104 and 107 to deal with relatively chronic and recurring conditions as argued by the government. Although earlier congressional use of imminent hazard provisions provides some indication as to the meaning of §106, the meaning of an imminent hazard should not remain static as Congress struggles to deal with new problems requiring new response strategies. Section 106 cannot be separated from the statutory scheme of which it is a part.

The government's view that §106 is nothing more than an alternate response strategy to 104 and 107 is supported by an analysis of the language and the structure of CERCLA. First, the conditions that would permit government initiated cleanup under §104 are virtually identical to those that would permit a §106 abatement action.[103] Both sections adopt the standard of imminent and substantial danger, though the wording of §104 is ambiguous. Second, it is difficult to maintain that §106 is an emergency provision when §104(c)(1) provides emergency authority to the government.[104] That provision allows the government to continue response activities without a contract or cooperative agreement with the affected state if the President determines that response actions are "immediately required to prevent, limit, or mitigate an emergency," that there is an immediate risk to the public health, welfare or environment, and that other assistance is not immediately available.[105] The focus on government initiated cleanup for true emergency situations is appropriate because it is in a better position to respond more quickly to the crisis. An abatement action under §106 would involve the government in a cumbersome and time-consuming litigation process and the need to monitor the activities of the private cleanup activities.[106]

Finally, the language of §106 casts doubt on its being no more than an emergency provision. The cleanup jargon of CERCLA consists of three primary terms: response actions, removal actions and remedial actions. Removal actions refer to the immediate attempts to stabilize a dump site,[107] while remedial actions refer to the more long-term actions that are necessary to neutralize the hazard presented by a site.[108] Response actions encompass both removal and remedial actions.[109] Thus, it is important that §106(c), which concerns the establishment of guidelines for §106(a), uses the terms "response authorities," "response plan" and "response actions."[110] The implication is that §106 is not designed for emergency-type removal actions only, but comprehends both removal and long-term remedial action.[111]

In the final analysis, all of the priority sites for which the government is authorized to undertake cleanup actions under §104 plausibly present an imminent and substantial endangerment that would permit the government to force direct cleanup under §106.[112] To suggest that the conditions at the priority sites present chronic and recurring problems does not deny that they also present an imminent and substantial endangerment that could just as easily be dealt with by a direct cleanup action under §106 without the need to expend limited Superfund revenues.

FOOTNOTES TO APPENDIX

1. Mnookin and Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale L. J. 950 (1979). The author thanks Michael Shultz, J.D. 1984 University of Utah, for his substantial assistance in preparing this appendix.

2. 42 U.S.C. § 9601(32) (Supp. IV 1980) provides:

> "liable" or "liability" under this subchapter shall be construed to be the standard of liability which obtains under section 1321 of Title 33.

3. See, e.g., United States v. Leboef Brothers Towing Co., 621 F.2d 787, 789 (5th Cir. 1980); Steuart Transportation Co. v. Allied Towing Corp., 596 F.2d 609, 613 (4th Cir. 1979).

4. See, e.g., 126 Cong. Rec. S14964 (daily ed. November 24, 1980) (remarks of Senator Randolph); 126 Cong. Rec. H11787 (daily ed. Dec. 3, 1980) (remarks of Congressman Florio).

5. See W. Prosser, Handbook of the Law of Torts §75, at 494 (4th ed. 1971).

6. Restatement of Torts §519 (1938).

7. Restatement (Second) of Torts §519 (1976). The Restatements of Torts are refinements on a doctrine that began with Rylands v. Fletcher, L.R. 3 H.L. 330 (1868). Rylands is generally cited for the proposition that one is strictly liable for the escape of hazardous substances used in the course of making a non-natural use of the defendant's land. See, Note, Strict Liability for Generators, Transporters, and Disposers of Hazardous Wastes, 64 Minn. L. Rev. 949, 969 (1980). Several courts have been unwilling to extend strict liability to the activities that result in pollution-related injury because those activities did not constitute a non-natural use of the land. See, e.g., Fritz v. E. I. DuPont de Nemours & Co., 75 A.2d 256 (Del. 1950); Turner v. Big Lake Oil Co., 96 S.W.2d 221 (Tex. 1936). In contrast is the decision in Cities Service Co. v. State, 312 So. 2d 799 (Fla. Dist. Ct. App. 1975), where the defendant was held strictly liable for damages resulting when a phosphate slime reservoir owned by the defendant broke even though mining activities were common to the area.

8. *See* *Restatement (Second) of Torts* (1976) §520.

9. *See* Note, *supra* note 7, at 976-77.

10. Cities Service Co. v. State, 312 So. 2d 799, 801 (Fla. Dist. Ct. App. 1975).

11. W. Prosser, *supra* note 5.

12. "The doctrine of strict liability at its core reflects the judgment that even if some harm is inevitable, the social value of some enterprises is greater than their costs, but if an enterprise's benefits exceed its costs, fundamental fairness requires at least that profits be net of any harms inflicted." F. Anderson, D. Mandelker, and A. D. Tarlock, *Environmental Protection: Law and Policy* 636-37 (1984).

13. *See* 2. F. James, *The Law of Torts* §14.4 (Supp. 1968):

> "The justification for strict liability . . . is that useful but dangerous activities must pay their own way . . .. There is nothing in this reasoning which would exempt *very* useful activities from the rule . . .." Even strict liability has certain moralistic overtones as society has determined that socially desirable activities should not be permitted to profit at another party's expense. Thus, the injurious activity is required to internalize those costs resulting from damage to others and either subtract them from profit or allocate them to others who purchase and therefore benefit from the injurious product or services.

14. Congress cannot be faulted for looking for a known reference to which it could compare CERCLA. That reference should not obscure the point that remedies under CERCLA §106 and §107 are statutory in nature, not mere codifications of a common law cause of action.

15. 42 U.S.C. §9607(a) (Supp. IV 1980).

16. *Id*. §9607(b).

17. For example, if the standard of liability were negligence, one would expect that contributory negligence or assumption of the risk would constitute defenses. A standard of negligence is involved in §107(b)(3) which provides that an otherwise responsible party shall not be liable when the actual or threatened release is the result of "an act or

omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship . . . with the defendant (except where the sole contractual arrangement [is with] a common carrier by rail), if the defendant establishes . . . that he (a) exercised due care . . . and (b) took precautions against foreseeable acts or omissions . . . ." *Id.* § 9607(b)(3).

18. *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

19. *See, e.g.*, Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16-17 (1976) ("The retrospective aspects of legislation, as well as the prospective aspects must meet the tests of due process, and the justifications for the latter may not suffice for the former").

20. *See, e.g.*, Dore, *The Standard of Civil Liability for Hazardous Waste Disposal Activity: Some Quirks of Superfund* 57 Notre Dame Law. 260, 277 (1981) ("Such retroactive application [of CERCLA] would violate the due process provisions of the fifth amendment because it would inflict a 'manifest injustice' upon certain affected parties") (footnote omitted).

21. By visiting the cost of cleanup on those who profited from the hazardous waste business, Congress has made a rational determination that certain necessary, although dangerous activities, should pay their own way. Although the parties that will be responsible for cleanup costs or responsibilities might not be the same class of persons who used the site, the two groups are close enough in membership to avoid any equal protection argument. *See, e.g.*, Williamson v. Lee Optical Co., *supra* note 18. Those who are presently held responsible for cleanup costs and activities will undoubtedly pass those costs along to others who do business with them or allocate the costs across the industry via insurance.

22. *See* Note, *Superfund: Conscripting Industry Support for Environmental Cleanup*, 9 Ecology L. Q. 524, 533 (1981).

23. *See, e.g.*, United States v. Wade, 546 F. Supp. 785, 793 (E.D. Pa. 1983) (to be liable under §107 a party's wastes only need to have been "dumped" at the site).

24. *See* Hall v. E. I. DuPont de Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972).

25. See Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980).

26. The minimal nexus requirement in CERCLA appears to eliminate the traditional cause in fact element of a tort action -- that defendant's conduct did, in fact, cause the plaintiff's injury. Under CERCLA, a responsible party only had to use a site to become liable for response costs or activities. Perhaps this is because use alone contributes to the hazardous condition without a need of an actual or threatened release of the user's wastes. Or, perhaps it is because Congress sought to impose the ultimate burden of cleanup on the industry which benefits from doing business in hazardous wastes delimited by a requirement that industry members used the site.

27. When liability is joint and several, a plaintiff is entitled to hold one of several tortfeasors liable for his entire injury and is not required to "apportion" this injury between or among the joint tort feasors.

28. However, most discussion in the literature focuses on joint and several liability under §107 as the commentators apparently ignore its application to direct cleanup suits under §106. See, e.g., Miller, Defending Superfund and RCRA Imminent Hazard Cases, 15 Nat. Res. Law. 483 (1983).

29. United States v. Chem-Dyne Corp., Civ. No. C-1-82-840 (S.D. Ohio 1983) (§107); United States v. NEPACCO, 20 Env't Rep. Cas. (BNA) 1401 (W.D. Mo. 1984) (§107); United States v. South Carolina Recycling & Disposal, Inc., Civ. No. 80-1274-6 (D.S.C. Jan. 13, 1984) (granting government's motion for partial summary judgment on §106); United States v. Conservation Chemical Co., No. 82-0983-CU-W-5 (W.D. Mo. Feb. 3, 1984) (burden of proving apportionment is on industry); United States v. Wade, 546 F. Supp. 785, 794 (E.D. Pa. 1983) (joint and several liability applies under §107) (dictum); United States v. A & F Materials Co., No. 83-3123 (S.D. Ill. Jan. 20, 1984). But see the exception, United States v. Stringfellow, 20 Env't Rep. Cases (BNA) 1905 (C.D. Cal. April 5, 1984); and United States v. Price, 688 F.2d 204, (3d Cir. 1982) (denying preliminary injunctive relief under §106 when only several of many potentially responsible parties had been joined.)

30. For example, only the NEPPACO suit actually went to trial with a final bench verdict on §107 liability. In contrast is United States v. Wade, 20 Env't Rep.

Cas. (BNA) 1277, 1285 (E.D. Pa. Dec. 20, 1983), where the court refused to grant the government's motion for partial summary judgment on the issue of §107 liability although the court stated that joint and several liability did apply under that section.

31. See, e.g., United States v. Conservation Chemical Co., No. 82-0983-CU-W-5 (W.D. Mo. Feb. 3, 1984) (holding that government was not obligated to join as defendants 46 other companies that had allegedly contributed waste to the site).

32. The combinations of parties who are subject to suit under §106 or §107 will impact the appropriateness of joint and several liability. Apportionment might be more likely when the defendants are of the same class and performed the same function -- e.g., generators. However, when defendants are of different classes and performed different functions, joint and several liability becomes more appropriate -- e.g., a generator and a transporter. See Note, Joint and Several Liability Under Superfund, 13 Loy. U. Chi. L.J. 489 (1982).

33. F. Anderson, D. Mandelker, and A. D. Tarlock, supra note 12 at 578.

34. Id.

35. M. Rodburg, Apportionment of Damages in Hazardous Waste Litigation, in Hazardous Waste Litigation 1982. (Practicing Law Inst. 1982.)

36. See Note, supra note 22, at 546.

37. M. Rodburg, supra note 35, at 189.
38. Id. at 189-90.

39. See Note, Joint and Several Liability for Hazardous Waste Release Under Superfund, 68 Va. L. Rev. 1157, 1167 n. 36 (1982).

40. See, e.g., Utah Code Ann. (1953) §§78-27-39, -40 (Supp. 1977) (conditions precedent to right of contribution).

41. Environmental Protection, supra note 12, at 579.

42. 42 U.S.C. §9607(a) (Supp. IV 1980).

43. Id. §9601(32).

44. *See* text accompanying notes 2-26 *supra*.

45. *But see* United States v. A & F Materials Co., Civ. No. 83-3123 (S.D. Ill. Jan. 20, 1984) (relying on §311 in determining that CERCLA imposed joint and several liability).

46. 42 U.S.C. §9607(e)(2) (Supp. IV 1980). *See also* Note, *The Role of Injunctive Relief and Settlements in Superfund Enforcement*, 68 Cornell L. Rev. 706, 722-23 nn. 112-116 (1983).

47. Concerning the Supreme Court's refusal to imply a right to contribution in a federal statute, *see* Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) (antitrust laws).

48. 42 U.S.C. §9607(a)(4)(B) (Supp. IV 1980).

49. The section does raise the more interesting question as to whether a responsible party who voluntarily undertakes cleanup activities consistent with the NCP can sue other responsible parties. If so, the section provides a powerful incentive for voluntary cleanup if one fears being otherwise jointly and severally liable.

50. Both §3071(a)(2) of H.R. 7020 and §4(a) of S. 1480 contained express provisions establishing joint and several liability.

51. Although Senator Helms argued that the deletion of the joint and several language from the compromise bill that became CERCLA meant that such liability was not to be applied under the Act, 126 Cong. Rec. S15004 (daily ed. November 24, 1980), the better view is expressed by the sponsors of the bill. Senator Randolph stated that the deletion of express joint and several language meant only that the courts should be guided by "traditional and evolving principles of common law." *Id*. at 14964.

52. *See* §4(f)(2) of S. 1480.

53. 42 U.S.C. §9614(a) (Supp. IV 1980) provides: "Nothing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State."

54. *See* *supra* note 29 and accompanying text.

55. See United States v. Chem-Dyne Corp., Civ. No. C-1-82-840 (S.D. Ohio 1983) (applying a federal common law rule of joint and several liability). The situation under CERCLA is similar to §301 of the Labor Management Relations Act. The Supreme Court has interpreted that section as authorizing the federal courts to develop a federal common law for the interpretation of collective bargaining agreements. See Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448 (1957).

57. See Note, supra note 22, at 547.

58. See United States v. Wade, 546 F. Supp. 785, 793 (E.D. Pa. Dec. 20, 1983) (defendant's waste need not be the same that is released to incur §107 liability).

59. See Note, supra note 39, at 1174-75.

60. Section 107(a) of CERCLA provides that the following persons shall be liable for response costs:

> (1) the owner and operator of a vessel . . . or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance . . .

42 U.S.C. §9607(a)(1) to (4) (Supp. IV 1980).

61. Section 106 directs the Attorney General "to secure such relief as may be necessary to abate such changes

or threat" caused by an actual or threatened release of a hazardous substance. 42 U.S.C. §9606(a) (Supp. IV 1980). The Court is empowered "to grant such relief as the public interest and the equities of the case may require." Id.

62. See supra notes 22-26 and accompanying text discussing the minimal nexus requirement of CERCLA under §107. Due process requirements necessitate that there be some relationship between the parties who are responsible for site cleanup and the site itself. The government could not select a random group of persons who had no link to the site and charge them with the responsibility for cleanup. Cf. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1975) (Black Lung Benefits Act). The nexus established by Congress as a basis for responsibility should only have to be rationally related to the purpose of the statute. See Williamson v. Lee Optical, 348 U.S. 483 (1955).

63. See, e.g., United States v. Price, 523 F. Supp. 1055 (D.N.J. 1981) aff'd 688 F.2d 204 (3rd Cir. 1982); United States v. Outboard Marine Corp., 556 F. Supp. 54 (N.D. Ill. 1982); United States v. Reilly Tar & Chemical Corp., 546 F. Supp. 1100 (D. Minn. 1982).

64. See, e.g., United States v. Outboard Marine Corp., 556 F. Supp. 54, 57 (N.D. Ill. 1982), where the court stated:

> This court is hesitant to rely only on "the public interest and the equities of the case" in determining the reach of Section 106(a). Recourse to the federal common law of nuisance seems to be foreclosed by Milwaukee II. On the other hand, Congress included this imminent hazard authority in its CERCLA design, and it should be given effect. Section 107, the main liability-creating provision of CERCLA, indicates that OMC is well within the class of those whom Congress intended to hold responsible under CERCLA. Whatever the source of the substantive law to be applied in a 106(a) action, it is most probable that those who would be liable under Section 107 were intended to be liable in an action under 106(a) for injunctive relief.

65. See, e.g., United States v. Reilly Tar & Chemical Corp., 546 F. Supp. 1100 (D. Minn. 1982), where the court relied on the "public interest" language of 106(a):

> Section 106(a) of CERCLA contains no limitations on the classes of persons within its reach. Nor does it contain language indicating that it applies only to present owners of waste disposal sites.
>
> In addition . . . section 106(a) empowers the federal courts to grant "such relief as the public interest and the equities of the case may require."

On that basis, the court held that Reilly Tar, a former generator and owner of the waste site, was subject to injunctive relief under 106(a). Id.

66. The Reilly Tar court also stressed the equities of the case: "The equities of this case, as they appear in the complaints, do not suggest that Reilly Tar should escape the statute's reach." 546 F. Supp. at 1113-14.

67. Section 107(c)(3) provides in relevant part:

> If any person who is liable for a release or threat of release of a hazardous substance fails without cause to properly provide removal or remedial action upon order of the President pursuant to section 9604 or 9606 of this title, such person may be liable . . . for punitive damages . . .

42 U.S.C. §9607(c)(3) (Supp. IV 1980).

68. Section 107(c)(3) actually provides evidence that section 106 parties constitute a larger group, at least for administrative orders, than 107. Section 106(b) provides penalties for those who violate an order of the President ($5,000 per day of non-compliance), while 107(c)(3) provides that parties who are "liable for a release or threat of release" are subject to punitive damages for failure to comply with an order. The difference in penalties could be based on the lack of excuse. Section 106(b) penalties apply when the order is "willfully" violated, while the §107(c)(3) penalty applies when the order is violated without sufficient cause.

Two arguments based on the broad structural relationship of §106 and §107 are made which support an incorporation of §107(a) parties into §106. First, §107 establishes the basic "liability" of CERCLA. That section provides a detailed set of provisions regarding the liability of responsible parties. Section 106, on the other hand, merely establishes the right of the government to secure injunctive relief -- a right that it probably would not have but for §106. Thus, it is arguable that §107 provides the substantive law for the court to apply and the like and §106 establishes the right of the government to obtain injunctive relief and the standard for granting such relief. Second, it can be argued that Congress established what constituted the "public interest and the equities of the case" when the government sought reimbursement under §107. Thus, when a court considers what constitutes the "public interest and the equities of the case" under §106, it should be guided by the express congressional determination of the public interest and what was equitable in a §107 action. For example, if a past off-site generator is liable for response costs under §107, why would it be contrary to the public interest or the equities of the case to force the same past off-site generator to undertake direct cleanup responsibility? Congress established in §107 that use of a site was the only nexus necessary to incur liability and the type of relief granted to the government should not alter the required connections between the responsible party and the site.

69. See, e.g., United States v. Wade, 546 F. Supp. 785 (E.D. Pa. 1982), where the court held that a non-negligent past off-site generator was not subject to injunctive relief under §106. The court in United States v. Price, 523 F. Supp. 1055 (D.N.J. 1981), had cautioned against the use of injunctive relief where the effect was to force the responsible party to pay money, thus turning a suit for injunctive relief into an action for damages. Although the judgment of the court was affirmed, its limited view of injunctive relief was critized by the circuit court of appeals. 688 F.2d 204 (3rd Cir. 1982). In the second Price decision, the district court held that a past off-site generator was subject to §106. 19 Env't Rep. Cas. (BNA) 1638 (D.N.J. July 28, 1983).

70. In Wade, the court granted a motion to dismiss a §106 claim against a past off-site generator. The court reasoned that §106 and §107 were designed to effect different purposes and that §106 could only be used to affect those who had immediate control of the site. The court's reasoning was bottomed on the notion that §106 was designed to deal with emergency situations. But see infra notes 93-112 and accompanying text discussing the meaning of the imminent hazard provision.

71. 42 U.S.C. 9604(a)(1) (Supp. IV 1980).

72. Access to the site is not critical to §106 abatement actions. In truth, off-site parties, past or present, will probably not undertake cleanup operations on their own; rather, they would contract to have studies conducted, remedial programs developed, and actual response activities performed. Thus, under § 106, responsible off-site parties could be enjoined to contract and pay for the cost of clean up. The present site owner could be enjoined to share in the cost and to permit those performing the response activities access to the site.

73. *See, e.g.*, United States v. NEPACCO, 20 Env't Rep. Cas. (BNA) 1401 (W.D. Mo. 1984).

74. Section 107(a)(4)(A) provides that responsible parties are liable for "all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan." 42 U.S.C. §9607(a)(4)(A) (Supp. IV 1980). Thus, the only limitation on reimbursable costs is that they were consistent with the NCP and there would seem to be no basis to argue whether they were necessary or if the response activities were the most cost-effective. Section 105 requires that the national contingency plan include a "means for assuring that remedial action measures are cost-effective, *id.* §9605(7), but so long as costs are consistent with the NCP, defendants should not be able to reduce their liability by arguing that more cost-effective measures were available to the government.

75. In relevant part §106 provides:

> . . . when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require.

42 U.S.C. §9606(a) (Supp. IV 1980). Section 106 is similar to §7003 of the Resource Conservation and

Recovery Act (RCRA), 42 U.S.C. §6973 (1976). In United States v. Solvent Recovery Services, Inc., 496 F. Supp. 1127 (D. Conn. 1980), the court held that §7003 was jurisdictional only and applied the federal common law of nuisance. *See also* United States v. Waste Industries, 556 F. Supp. 1301 (E.D.N.C. 1982); United States v. Midwest Solvent Recovery, Inc., 484 F. Supp. 138 (N.D. Ind. 1980) (holding that "imminent and substantial endangerment" establishes an evidentiary burden for invoking the jurisdiction of the court under 28 U.S.C. §1345). *But see* United States v. Diamond Shamrock, No. C80-1857, slip op. at 4 (N.D. Ohio May 29, 1981) (holding that §7003 was both jurisdictional and substantive).

In contrast, no court has expressly held that §106 is jurisdictional only; rather, they have expressly or impliedly held that §106 is substantive. *See* United States v. Price, 19 Env't Rep. Cas. (BNA) 1638 (D.N.J. July 28, 1983) (section 106 is substantive); United States v. Outboard Marine, 556 F. Supp. 54 (N.D. Ill. 1982) (section 106 is substantive); United States v. Reilly Tar & Chemical Corp., 546 F. Supp. 1100 (D. Minn. 1982) (§§7003 and 106 are substantive); United States v. Price, 523 F. Supp. 1055 (D.N.J. 1981) (section 106 establishes standard for prohibitory injunctions, but not mandatory injunctions), *aff'd*, 688 F.2d 204 (3d Cir. 1982). Although the first *Price* decision was affirmed by the circuit court, the circuit stated in dictum that §106 reduced the standard for issuing mandatory injunctions.

The critical literature generally argues that the imminent hazard provisions are jurisdictional only. *See* Dore, *supra* note 20; Hinds, *Liability Under Federal Law for Hazardous Waste Injuries*, 6 Harv. Envtl. L. Rev. 1 (1982); Note, *Using RCRA's Imminent Hazard Provision in Hazardous Waste Emergencies*, 9 Ecology L. Q. 599 (1981).

76. 28 U.S.C. §1345 (1976). That section provides that the federal district courts shall have jurisdiction in all "civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress." *Id.*

77. 42 U.S.C. §9613(b) (Supp. IV 1980). In contrast to §113(b), §106(a) provides that injunctive relief can only be sought in the federal district court for the district in which the release or threat of release occurs. *Id.* §9606(a). Section 113(b) vests jurisdiction in the federal district courts generally, but venue is limited to the "district in which the

release or damages occurred, or in which the defendant resides, may be found, or has his principal office." Id. §9613(b). One problem in limiting jurisdiction for §106 actions to the district where the release or threat of release occurs is that various off-site responsible parties may not be subject to the personal jurisdiction of the court. Moreover, if the limitation to the district in which the release or threat of release occurs is truly jurisdictional and not a venue question, a defendant cannot consent to jurisdiction in any district other than the one prescribed by the statute.

78. Occasionally the courts will imply a right to injunctive relief even though that remedy was not expressly provided by Congress. The Refuse Act of 1899, 33 U.S.C. §407 (1976), is an example of a statute that did not by express terms provide injunctive relief, but the Supreme Court found sufficient language to imply such relief. See United States v. Republic Steel Corp., 362 U.S. 482 (1960) (section 10 of Rivers and Harbors Act).

79. 42 U.S.C. §9607 (Supp. IV. 1980).

80. Section 106 provides that the Attorney General can seek relief in the federal district and then states that the court "shall have jurisdiction to grant such relief as the public interest and the equities of the case may require." 42 U.S.C. §9606(a) (Supp. IV 1980) (emphasis added). The use of the term "jurisdiction" is not appropriate. Jurisdiction vests the court with the power to decide the case before it; a court is authorized to grant various forms of relief to which a party is entitled.

81. See Village of Wilsonville v. SCA Services, 86 Ill. 2d 1, 426 N.E.2d 824 (1981) (applying a standard of imminent irreparable injury for injunctive relief).

82. Section 106(a) provides:

> The President may also, after notice to the affected State . . . issu[e] such orders as may be necessary to protect public health and welfare and the environment.

42 U.S.C. §9606(a) (Supp. IV 1980).

83. See 126 Cong. Rec. S15008 (daily ed. Nov. 24, 1980) (remarks of Sen. Stafford) (the authority of the President to issue administrative orders would depend

on a determination that an imminent and substantial endangerment existed).

84. See Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 525-539 (1954) (discussing role of state law in application of federal statutes).

85. See, e.g., Hinds supra note 75, at 311.

86. 451 U.S. 304 (1981). Milwaukee II was decided nine years after Illinois v. Milwaukee (Milwaukee I), 406 U.S. 91 (1972), in which the Supreme Court had held that a federal common law nuisance action would lie to abate water pollution. Shortly after Milwaukee I, Congress passed the Federal Water Pollution Control Act amendments of 1972.

87. 33 U.S.C. §§1251-1376 (1976 & Supp. IV 1980). In Milwaukee II, the Court stated:

> "The establishment of such a self- consciously comprehensive program by Congress, which certainly did not exist when Illinois v. Milwaukee was decided, strongly suggests that there is no room for courts to attempt to improve on that program with federal common law." 451 U.S. at 319. The Milwaukee II rationale was applied to CERCLA and RCRA in United States v. Price, 523 F. Supp. 1055, 1069 (D.N.J. 1981), aff'd, 688 F.2d 204 (3d Cir. 1982), where the court held that federal common law nuisance claims to remedy the hazards of chemical dumping were preempted.

88. See Note, Hazardous Waste Disposal: Is There Still a Role for the Common Law? 18 Tulsa L. J. 448, 466 nn. 107-08 (1983) (discussing the role of the federal common law).

89. See, e.g., Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448 (1957), where the Court determined that §301 of the Labor Management Relations Act authorized the federal courts to create a federal common law respecting collective bargaining agreements.

90. See Note, supra note 39.

91. United States v. Reilly Tar & Chemical Corp, 546 F. Supp. 1100 (D. Minn. 1982).

92. See, e.g., Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 871 (1970) (balancing equities in a nuisance action).

93. *See* 42 U.S.C. §300i(a) (1976) (Safe Drinking Water Act); 33 U.S.C. §1364(a) (Supp. IV 1980) (Clean Water Act); 42 U.S.C. §7603 (Supp. IV 1980) (Clean Air Act); and 42 U.S.C. §6973(a) (Supp. IV 1980) (Resource Conservation and Recovery Act).

94. 42 U.S.C. §1857(k) (1976) (§108 (k), Air Quality Act of 1967).

95. S. Rep. No. 403, 90th Cong., 1st Sess. 31 (1967).

96. Section 303 of the 1970 Clean Air Act, 42 U.S.C. §7603 (Supp. IV 1980); section 504 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §1364(a) (Supp. IV 1980).

97. *Environmental Protection*, *supra* note 12 at 592.

98. 42 U.S.C. §300i(a) (1976).

99. H. Rep. No. 1185, 93rd Cong., 2d Sess. 35-36 (1974).

100. *Id*.

101. *Id*. The House Report stated that "while the risk of harm must be 'imminent' . . . the harm itself need not be. . . . Among those situations in which the endangerment may be regarded as 'substantial' [is] . . . (3) the threat of substantial or serious harm (such as exposure to carcinogenic agents or other hazardous contaminants). *Id*. at 36.

102. *See*, *e.g.*, United States v. Price, 688 F.2d 204 (3d Cir. 1982) (dictum); United States v. Outboard Marine Corp., 556 F. Supp. 54 (N.D. Ill. 1982); United States v. Reilly Tar & Chemical Corp., 546 F. Supp. 1100 (D. Minn. 1982); *but see* United States v. Hardage, Civ. No. 80-1031-W (W.D. Okla. 1980). Although the courts generally agree that §106 does not require an imminent and irreparable injury of a substantial nature, they do not agree that the section is simply an alternative to §104. *See*, *e.g.*, United States v. Reilly Tar & Chemical Corp., 546 F. Supp. 1100 (D. Minn. 1982); *but see* United States v. Price (*Price II*), 19 Env't. Rep. Cas. (BNA) 1638 (D.N.J. 1983) (holding that §106 is an alternative to government initiated cleanup under §104).

103. Section 104(a) provides that government initiated cleanup is authorized:

> [w]henever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare . . .

42 U.S.C. §9604(a) (Supp. IV 1980) (emphasis added). It is arguable that the "which may present" clause modifies both (A) and (B); thus, the conditions triggering response activities under §§104 and 106 would be virtually identical. If that clause does not modify (A), then the President is authorized to clean up sites that meet the criteria of the National Contingency Plan. See id. §9605(8)(A). Any site that would be included in the priority list based on the NCP criteria would also qualify as an imminent and substantial endangerment. See infra note 112 and accompanying text.

104. 42 U.S.C. §9604(c)(1) (Supp. IV 1980).

105. Id.

106. In at least one CERCLA action, the government has abandoned its §106 claim and undertaken its own response actions, seeking now to recover those response funds under §107. The government dropped its §106 claim in Outboard Marine, supra note 64, one week after an order was issued by the federal district court which heard the case. Defendant's Reply Memorandum in support of Defendant's Joint Motion to Dismiss at 39, U.S. v. A & F Materials Co., Inc., supra note 45.

107. 42 U.S.C. §9601(23) (Supp. IV 1980).

108. Id. §9601(24).

109. Id. §9601(25).

110. Id. §9606(c).

111. Another indication in the language of the statute that an imminent hazard is not equivalent to an emergency is found in §106(c). That section uses the phrases "imminent hazard, enforcement and emergency response authorities of this section [106]," suggesting that imminent hazards and emergencies are not the same. Thus, while an imminent hazard might present an emergency, it need not in order to justify relief under §106.

112. As the imminent hazard language was explained in the legislative history of the Safe Drinking Water Act, see supra note 98, it is probably the case that any hazardous dump site that qualified for the national priority list would constitute an imminent and substantial endangerment. The risk of harm would be imminent, even if the harm itself were not, and there is the threat of substantial or serious harm from hazardous substances as they are defined by CERCLA. 42 U.S.C. §9601(14) (Supp. IV. 1980).

BACKGROUND REPORT FOR RECOMMENDATION 84-5

REGULATION, DEREGULATION, FEDERALISM, AND ADMINISTRATIVE LAW: AGENCY POWER TO PREEMPT STATE REGULATION

Richard J. Pierce, Jr.*

States have the power to regulate almost all forms of conduct. Sometimes, however, states impose regulations that advance state interests at the expense of national interests. While the federal courts and Congress limit state power to harm the national interest, judicial and congressional restraints on state regulation are inadequate, particularly in the important new context of federal deregulation. In this Article, Dean Pierce argues that federal agencies can play a valuable role in checking state regulation that is harmful to the national interest. He suggests a spillover model which provides an analytical framework for resolving federalism disputes and which reflects the advantages and disadvantages of local versus national regulation. Dean Pierce recommends (1) that each federal agency consider the need to preempt harmful state regulation in the areas of regulatory responsibility delegated to that agency by Congress; (2) that when a federal agency foresees the possibility of conflict between a state regulation and the national interest, it engage, when practicable, in informal dialogue with state authorities to avoid such conflicts; and (3) that when a federal agency proposes to act through agency adjudication or rulemaking to preempt a state regulation, it provide all affected states notice and an opportunity to participate in the proceeding. These three recommendations provide a procedural framework for federal agency considerations of actions which preempt a state law or regulation.

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* Dean and Professor of Law, University of Pittsburgh. Lehigh University, B.S. 1965; University of Virginia, J.D. 1972.

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> I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states. For one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end.
>
> Justice Oliver Wendell Holmes[1]

> Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.
>
> Justice Louis Brandeis[2]

These famous statements by two of the finest jurists in American history reflect two of the most important values embodied in the United States Constitution. Justice Brandeis refers to the importance of allowing each state to select its own methods of regulating conduct. Justice Holmes refers to the need for the national government to preclude states from taking regulatory actions that advance parochial interests at the expense of the national interest. This Article begins with the premise that both Justice Holmes and Justice Brandeis identify values too fundamental and enduring to sacrifice in a wholesale manner. Rather, the inquiry in each case must be whether the national interest in adopting a particular regulatory policy is so great and so much in conflict with the interests of a state that the virtues of federalism extolled by Justice Brandeis should be compromised in order to further the national interest that Justice Holmes recognized as paramount.

Conflicts between the values of federalism and the value of the nation as a single economic unit arise in many contexts. This Article will focus on the process most appropriate for the resolution of such conflicts. That process orientation requires inquiry in two areas: identification of the factors that should be evaluated in resolving nation-state regulatory conflicts and identification of the government institutions best suited to resolve such conflicts.

Part I of the Article introduces the problem. Serious conflicts between state and federal regulations are emerging in virtually every important area of conduct today. If these conflicts are not resolved in a careful and principled manner, the nation may discover that it has carelessly and needlessly discarded either the constitutional value heralded by Justice Holmes or the equally important value praised by Justice Brandeis.

Part II is an analysis of the existing legal framework for resolving issues of federalism in regulatory decisionmaking. Both Congress and the courts have the power to limit the ability of each state to further its interests at the expense of the nation. Because of their institutional characteristics, however, neither can be relied upon as a sufficient source of constraints on parochial state regulatory actions that cause significant harm to the nation.

Part III is a discussion of the factors that should be evaluated in the process of identifying and resolving conflicts between national and state regulatory programs. The national interest is served by allowing states to determine and to implement their own regulatory policies whenever those policies do not have substantial spillover effects on other states. States should not be allowed to regulate in a manner that creates substantial interstate spillovers. Thus, the issue of whether regulation should be imposed on a national level or on a state level should be resolved primarily by determining whether, and to what extent, state regulation would create interstate spillovers.

Part IV is an assessment of the advantages and disadvantages of assigning primary responsibility for resolving such conflicts to one of three institutions--Congress, regulatory agencies, and the courts. Federal regulatory agencies have institutional characteristics that give them significant advantages over Congress and the courts as potential sources of limits on state regulation that harms the national interest. Agencies have far more time to devote to consideration of specific preemption issues than Congress. Agencies have available procedures that are far more efficient and effective than the procedures available to courts for purposes of conducting the empirical research that is often essential to the resolution of preemption issues. Moreover, agencies have a comparative advantage over both Congress and the courts because of their better understanding of the effects of state regulations involving their specialized areas of competence and responsibility.

In Part V, the approach derived in Parts III and IV is applied to three representative regulatory conflicts in an effort to determine the manner in which federal agencies should approach preemption controversies. Agencies should be sensitive to the fact that any potential exercise of preemptive power by a federal agency implicates the fundamental values of federalism. Agencies should evidence this heightened sensitivity to the importance of the issue through the procedures they adopt to resolve jurisdictional conflicts and through the substantive approach they take to preemption issues. An agency should provide each state potentially affected by its action notice and an opportunity to participate effectively in any proceeding in which the agency is considering a preemptive action. An agency should not preempt a state regulation unless it finds that the state regulation creates substantial interstate spillovers. Moreover, a federal agency should use informal methods to encourage states to regulate in a manner that minimizes interstate spillovers before the agency considers formal preemption of a state regulation. A finding that a state regulation harms in-state interests should not be sufficient to justify preemption.

Section B of Part V extends the analysis to conflicts between state and national interests created by a federal decision to deregulate an area of conduct and ensuing attempts by states to regulate that conduct. A federal agency with residual regulatory authority in the field should take the same substantive and procedural approach in deciding whether to preempt such state regulations as it takes when the conflict is between a state regulation and a federal regulation.

I. Introduction To The Problem

Federalism issues in regulation arise in many ways. If the federal government decides to regulate an area of conduct, should it permit supplementary state and local regulation of that conduct? If the federal government decides that an area of conduct should be regulated at some level, should the regulation be imposed at the national level or should the federal government instead encourage or acquiesce in state and local regulation? If the federal government decides that some types of conduct should not be regulated, should it also prohibit state and local regulation of that conduct? Federalism issues arise in the context of economic regulation, health and safety regulation, and environmental regulation. Some of the most difficult problems involve conflicts between state regulation based on one rationale and federal regulation based on a different rationale.

In recent years, federalism controversies have begun to dominate many areas of regulation. The Interstate Commerce Commission has preempted all the power of the Texas Railroad Commission to regulate intrastate rail rates.[3] The Occupational Safety and Health Administration has preempted most state authority to determine the information that must be provided to workers concerning the hazards posed by chemicals in the workplace.[4] The Federal Trade Commission is attempting to preempt the power of cities to regulate taxis.[5] Congress has, in effect, preempted state authority to establish the minimum age for purchasing alcoholic beverages.[6]

At the same time, states are struggling to obtain regulatory control over types of conduct that were long believed to be subject to exclusive federal regulation. States have obtained control over the rates charged for some interstate wholesales of electricity,[7] and Congress is considering giving states much greater control over such interstate transactions.[8] States have wrested from the federal government a good measure of its previously exclusive control over nuclear power plants.[9]

In every forum--judicial, legislative, and administrative--battles rage over the allocation of regulatory power between federal and state authorities. The principal focus, in each case, is on the immediate political and economic effects of a resolution of the issue in favor of state or federal authority: which interests will win or lose in the short run as a result of a decision allocating regulatory control to state or federal authorities? Yet, the resolution of each of these intense, specific disputes is likely to affect the fundamental nature of the nation's economy and its system of government for decades. Thus, in resolving each of these specific disputes the focus must shift to the larger question of how to allocate regulatory power in a way that will permit the nation to preserve both the values of a national market and the values of decentralized, government decisionmaking.

The nature of the institution with primary responsibility for resolving a federalism issue varies depending upon the legal context in which the issue arises. If Congress has not acted in the area, the courts must resolve arguable conflicts through application of the commerce clause. Congress has the power, however, to resolve virtually any federalism issue if it chooses to do so. Alternatively, Congress can delegate its authority to resolve a federalism conflict to an administrative agency.

The judiciary always plays some role in resolving a nation-state regulatory conflict. If Congress has not acted in the area, the judiciary must take initial responsibility for resolving the dispute. If Congress has acted, a court must determine the intent and effect of the congressional action. If an administrative agency has acted under authority delegated by Congress, a court must determine whether the agency's action is within the scope of its delegated authority and whether the agency action is otherwise lawful. Since nation-state regulatory conflicts invariably reach the courts through one of these routes, it is useful to begin this Article with a survey of the current judicial treatment of federalism issues that arise in a variety of legal and factual situations.

II. Survey of the Law Concerning Nation-State Regulatory Conflicts

This survey will describe the present judicial method of resolving the four general issues that dominate the law of federalism in the regulatory context. First, under what circumstances will a federal court hold a state regulatory action invalid under the commerce clause when Congress has not acted in the area? Second, under what circumstances will a court hold state regulatory action preempted by a federal statute? Third, under what circumstances will a court hold state regulatory action preempted by an action of a federal agency taken pursuant to authority delegated in a federal statute? Finally, under what circumstances will a court limit Congress' power to determine the allocation of regulatory responsibilities between federal and state authorities?

A. Judicial Invalidation of State Regulatory Actions Under the Commerce Clause

Justice Holmes was not alone in emphasizing the need for federal courts to limit the power of states to interfere with interstate commerce in areas where Congress has not chosen to act. Professor Tribe describes the general attitude of jurists and scholars to this form of judicial intervention in his fine treatise on constitutional law: "Even judges and commentators ordinarily hesitant about federal judicial intervention into legislative choice tend to support a relatively active role for the federal judiciary when the centrifugal, isolating or hostile forces of localism are manifested in state legislation."[10] This general receptivity toward judicial activism in protecting interstate commerce from unwarranted burdens imposed by states is based on three beliefs. First, national economic welfare is maximized by free trade among the states. Second, states frequently perceive their best interests to lie in erection of barriers to free trade in some commodities or by some means. Third, Congress' agenda is too crowded to rely on it as the sole source of limitations on state barriers to interstate commerce.

Courts and commentators also recognize, however, that states sometimes have interests important enough to justify some types of state action that impair interstate trade. In 1949, Justice Jackson described the tensions between state and national interests and the Supreme Court's differing attitudes toward those tensions in language that remains a good summary of the jurisprudence under the commerce clause:

> [The] principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy . . . has as its corollary that the states are not separable economic units . . . .
>
> The material success that has come to inhabitants of the states that make up this federal free trade unit has been the most impressive in the history of commerce, but the established interdependence of the states only emphasizes the necessity of protecting interstate movement of goods against local burdens . . . .[11]
>
> [The] distinction between the power of the state to shelter its people from menaces to their health and safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law.[12]

The traditional distinction alluded to by Justice Jackson persists today. The Court is willing to resolve conflicts between the economic goals of the nation and the economic goals of a state when such conflicts appear in the form of state regulatory actions. If the Court concludes that a state action furthers parochial economic interests at the expense of national economic interests, it will invalidate the state action under the commerce clause. The Court is much more deferential to state actions with a plausible rationale other than protection of local economic interests. Thus, the Court almost invariably upholds any state action based on a plausible need to protect health, safety, or the environment, even if that action imposes a substantial burden on interstate commerce. It is useful to divide the commerce clause cases into three categories that illustrate the distinction drawn by Justice Jackson: (1) cases involving state actions that discriminate against interstate commerce; (2) cases involving state actions that protect local economic interests from outside competition; and, (3) cases involving state actions that further health, safety, or environmental goals with the "incidental" effect of burdening interstate commerce.

1. State Actions that Discriminate Against Interstate Commerce

State actions that discriminate facially against interstate commerce present the easiest case for invalidation by federal courts. If a state action treats interstate commerce in a manner less favorable than intrastate commerce, the Supreme Court almost invariably holds the action unconstitutional.[13] This prohibition on facially discriminatory state action applies in all contexts, including natural resources,[14] taxes,[15] and even environmental protection.[16]

There are two reasons for the Court's prohibition of state actions that discriminate against interstate commerce. First, the existence of discriminatory treatment implicitly contradicts any claim by the state that its action is intended to serve a legitimate state interest, since no valid reason for the state action can have a logical relation to the interstate or intrastate nature of the activity regulated. Thus, for instance, consumers in the state can cause as much "waste" of natural resources as consumers outside the state. Activities in the state can impose the same burden on the state's revenues whether those activities ultimately benefit residents of the state or residents of other states. Or, waste dumped in a state can have the same adverse effect on health and environment in the state whether the waste originates in the state or in another state. A state actions that discriminates against interstate commerce gives rise to the inescapable inference that the state is trying to help its citizens to the detriment of citizens of other states no matter what justification the state relies upon as a basis for its action. Second, there is no political check on state actions that discriminate against out-of-state interests. When a state takes an action that adversely affects the interests of both its residents and residents of other states, the Court assumes that the burden imposed will not be excessive because the adversely affected state residents can be expected to participate in the political process leading to the state action. When a state singles out nonresidents for adverse action, there is no internal, political check on unreasonably burdensome regulation, so the need for judicial protection of the unrepresented, out-of-state interests is apparent.[17]

The Court's prohibition on state actions that discriminate against interstate commerce protects interstate commerce only from the most obvious and least justified state burdens on interstate commerce. Its protection is limited by the difficulty of identifying state actions that effectively single out interstate commerce for particularly burdensome regulation when those state actions do not discriminate facially against interstate commerce. States are adept at imposing facially evenhanded regulatory requirements that purport to serve valid state interests, but whose adverse effects are felt almost entirely by out-of-state interests. The Court attempts to limit state authority to take actions that produce de facto, as well as facial, discrimination against interstate commerce. Thus, it occasionally invalidates a state action that has a clear discriminatory effect even if the stated purpose of the action is not discriminatory.[18] The Court has experienced great difficulty in this effort, however. Two cases illustrate the problems the Court has encountered in its attempts to distinguish between state actions that constitute prohibited, de facto discrimination against interstate commerce and state actions that further valid state interests with only incidental burdens on interstate commerce.

Raymond Motor Transportation, Inc. v. Rice[19] involved a challenge to a Wisconsin statute that barred trucks over fifty feet long and double trailer trucks from Wisconsin highways. The Court considered a massive amount of evidence concerning the amount of burden imposed on interstate commerce and the alleged relationship between the length limits and highway safety. The Court invalidated the state length limits under the commerce clause "because they place a substantial burden on interstate commerce and they cannot be said to make more than the most speculative contribution to highway safety."[20] The Court was influenced in part by inclusion in the statute of a series of facially neutral exemptions that, as applied, seemed to exempt most local users from the length limits.[21] The Court emphasized that its decision was unique to the Wisconsin statute and particularly to Wisconsin's failure to present any credible evidence that its length limits furthered highway safety.[22] The Court's many caveats in Raymond, as well as its decisions in similar cases, suggest that it would have reached a different conclusion in Raymond based on only slight differences in statutory language or in the evidence presented at trial.

South Carolina State Highway Department v. Barnwell Brothers, Inc.[23] involved an unsuccessful challenge to a South Carolina statute remarkably similar to the Wisconsin statute invalidated in Raymond. The statute at issue in Barnwell limited trucks to a width of ninety inches and a weight of ten tons. The Court sustained the statute even though it effectively excluded eighty-five to ninety percent of all interstate trucks from South Carolina highways.[24] The Court based its decision on three factors: (1) the state was able to establish a credible relationship between the statute and highway safety; (2) the statute did not discriminate against interstate commerce, so internal political forces could be relied on to produce a proper balance between benefits and burdens; and (3) Congress has the power to change that balance if it disagrees with the state.[25]

In Raymond, the Court distinguished Barnwell only on the basis of the dearth of evidence presented by Wisconsin to link its statute with highway safety, contrasted with the evidence presented by South Carolina establishing some relationship between its statute and highway safety.[26] The Court in Raymond did not mention at all the second and third stated bases for its holding in Barnwell--for good reason. The third basis--Congress can change the balance between burden and benefits if it disagrees with the state--was equally true in Raymond and, indeed, is true in all cases involving challenges to state actions under the commerce clause.[27] The second basis for the Court's decision in Barnwell--the statute did not discriminate between interstate and intrastate commerce, so internal political forces can be relied upon to produce a proper balance of burdens and benefits, is only partially true. The weakness of the reasoning implicit in that conclusion reveals a major limitation on the efficacy of all the Court's efforts to preclude states from unduly burdening interstate commerce.

Two groups were the major beneficiaries of South Carolina's action--state taxpayers who paid slightly lower taxes because of diminished highway maintenance costs and users of South Carolina highways other than large trucks. All of the first group and most of the second group undoubtedly consisted of state residents in the 1930's when the statute was at issue. Thus, the benefits of the state regulation went almost entirely to state residents. By contrast, almost all the burden was imposed on residents of other states. Truckers trying to transport goods from the industrial Northeast to the agricultural areas of Georgia and Florida or vice versa had a choice of three expensive alternatives: bypass South Carolina, use a much smaller truck than was economically optimal for the entire trip, or shift cargo from truck to truck at the South Carolina borders. Truckers operating only within South Carolina felt very little of the burden of the statute, since the advantages of larger trucks are much greater for long hauls than for short hauls.

While the Court was accurate in its observation that some of the benefits and some of the burdens of the state action were felt by South Carolina interests, its conclusion that the existence of some burden on state residents is sufficient to justify reliance on the internal political process of the state to produce a rational balance of total benefits and burdens is suspect. South Carolina can be expected to regulate in a manner that balances the benefits to its citizens and the burdens to its citizens. Since almost all the benefits of the statute in Barnwell accrued to South Carolina residents and almost all the burdens fell on residents of other states, it is fair to assume that South Carolina adopted width and weight limits that equated the benefits and burdens to its citizens while simultaneously yielding a gross disproportion between the total benefits and burdens of the regulation on a national level. Thus, while the flat prohibition on state actions that discriminate against interstate commerce allows the Court to invalidate a few, particularly clumsy state barriers to interstate trade, it leaves considerable room for states to erect more subtle but substantial barriers.

2. State Actions That Further Economic Interests

A second class of disputes involves state actions that are expressly designed to further state economic interests at the expense of national economic interests. If the Court concludes that a state action fits this description, it almost invariably invalidates the state action under the commerce clause. States have the power, concurrent with that of the federal government, to regulate commerce,[28] but they cannot exercise that power in a manner that favors local economic interests over national economic interests. Two classic Supreme Court decisions illustrate this principle.

Baldwin v. G.A.F. Seelig, Inc.[29] involved a challenge to a New York statute prohibiting retail milk dealers from purchasing milk from out-of-state sources at prices below the minimum price applicable to milk produced in New York. The purpose of the statute was to protect New York milk producers, who were precluded by another regulatory statute from selling milk below a specified minimum price, from losing markets to out-of-state milk producers.[30] The Court invalidated the statute under the commerce clause, holding that a state cannot obstruct interstate commerce "when the avowed purpose of the obstruction, as well its necessary tendency, is to suppress or mitigate the consequences of competition between the states."[31]

H. P. Hood & Sons, Inc. v. Du Mond[32] involved a challenge to another New York action affecting milk. A New York statute authorized a state agency to grant or deny an application for a license to operate a milk distribution facility. H. P. Hood applied for a license to operate a facility to purchase and process New York milk for ultimate consumption in other states. The state agency denied the license on the bases that there were adequate milk distribution facilities in the region and that the proposed new facility would harm New York consumers by allowing New York milk to be diverted to consumers in other states.[33] Again, the Court had no difficulty holding the New York action invalid under the commerce clause as an impermissible attempt to obstruct interstate trade in order to protect state economic interests from out-of-state competition.[34]

Baldwin and H. P. Hood stand for the salutory proposition that states cannot erect barriers to nationally advantageous free trade when the sole justification for the state action is to protect internal economic interests from external competition. As with the prohibition on facially discriminatory state actions, however, this rule filters out only the most blatant and clumsy state efforts to impair interstate commerce. If a state provides a plausible rationale for its action independent of economic protectionism, the Court must attempt to determine the true purpose and dominant effect of the state action. If the Court concludes that the state action furthers a valid state interest in health or safety, for instance, it is much more likely to defer to the state's judgment and to uphold the state action.[35]

The Court experiences considerable difficulty determining the primary purpose and effect of the many state actions that have multiple purposes and effects. Dean Milk Co. v. City of Madison[36] illustrates this recurrent problem. Madison passed an ordinance prohibiting the sale of milk that was pasteurized more than five miles from the city on the basis that the city's milk inspectors could not practically inspect pasteurization plants greater than five miles away.[37] The ordinance had the effect of precluding Illinois milk producers, who previously supplied a high proportion of the milk purchased in Madison, from serving the Madison market.[38] A six Justice majority of the Court held the Madison ordinance invalid under the commerce clause.[39] The majority recognized that Madison had a legitimate, health-related reason for enacting its ordinance,[40] but found the ordinance invalid because: (1) it imposed a substantial burden on interstate commerce; and (2) Madison could easily have furthered its public health purpose without imposing such a burden simply by charging remote pasteurization facilities for the cost of inspections.[41]

The Dean basis for invalidating state actions remains a useful tool for striking down a state action putatively based on a health and safety rationale when the state action obviously is a poorly disguised attempt to benefit the state's citizens at the expense of the general welfare of the nation. Many parochial state actions are veiled by more credible claims of health and safety than the action at issue in Dean, however, and three Justices voted to uphold even the obviously protectionist ordinance in Dean.[42]

In many cases, the Court finds it impossible to determine the dominant motivation and effect of a multipurpose state action. In such cases, it simply accepts the state's characterization of the rationale for its action.[43] As a result, two state actions with precisely the same effect can produce opposite judicial reactions when they are challenged under the commerce clause. In Buck v. Kuykendall,[44] for instance, the Court invalidated a state agency's order refusing to permit an interstate trucking company to operate on a route because the order was based on the need to protect state economic interests.[45] In C.A. Bradley v. Public Utility Commission,[46] by contrast, the Court upheld an identical state agency order because the agency denied permission on the stated basis that the interstate trucking company's operations would impair highway safety by producing traffic congestion. It is impossible to determine even today the actual reason for the state agency's order in Bradley. It is fair to speculate, however, that the state agency read the Court's decision in Buck and decided to achieve the protectionist result it sought by characterizing the basis for its action in a disengenuous way that caused the Court to defer to the state agency. In any event, the important point is that the Court has limited ability to determine the reasons for a state action. As a result, if the state action has a plausible relationship to health, safety, or the environment, the Court usually acquiesces in the state's characterization of the rationale for its action.

3. State Actions That Further Health, Safety, or Environmental Interests

Most modern conflicts between state and federal interests resolved under the commerce clause involve state actions that putatively further state interests in health, safety, or the environment. To some extent, this is attributable to the fact that states have acute interests in these areas, and almost any state action in these areas is likely to impose some burden on interstate commerce. To some extent, however, this phenomenon undoubtedly is linked to recognition by state authorities that the same state action has a much better chance of withstanding constitutional attack if it is based on a health or safety rationale than if it is based on an economic rationale.

In considering a challenge to a state action under the commerce clause, the Court most frequently refers to the general standard announced in Pike v. Bruce Church, Inc.: "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[47] The cases interpreting and applying this standard to state actions that putatively further health or safety interests emphasize two features of the standard. First, any state action that does not clearly discriminate against interstate commerce and that has a plausible relationship to a health or safety goal will be characterized as an "evenhanded" exercise of state authority with only "incidental" effects on interstate commerce.[48] Once so characterized, its validity is determined by balancing the state's putative interest against the national interest in unobstructed interstate trade.[49] Second, this balancing test is tilted heavily toward the state's interest.[50] Indeed, this tilt is so extreme that it seems inaccurate to characterize the test as one involving balancing at all. The Court defers to the state's balance of its health or safety goals against the nation's economic goals unless the resulting burden on national economic goals is "clearly excessive."[51] Thus, the term "incidental" used to modify burden does not refer only to slight burdens on interstate commerce. Rather, "incidental" means that the burden on interstate commerce occurs without the explicit intent of the state to impose such a burden. A state action putatively based on a health or safety rationale can impose a substantial burden on interstate commerce that still fits the Court's definition of "incidental" and, therefore, is permissible unless it is "clearly excessive." Three landmark decisions illustrate that the Court is willing to use a balancing test to invalidate state health or safety rules only when the national burden of such rules is demonstrable and substantial and the state benefits are virtually nonexistent.

Southern Pacific Co. v. Arizona ex rel. Sullivan[52] involved a challenge to a statute limiting train lengths to fourteen cars. The Arizona Superior Court conducted a trial in which it received massive evidentiary submissions concerning the economic burden of the statute on interstate commerce and the relationship of the statute to the state's interest in safety.[53] The state trial court found that the statute imposed a serious burden on interstate commerce. Specifically, it found that: (1) ninety-three to ninety-five percent of all rail traffic through Arizona is interstate; (2) the statute requires thirty percent more trains through the state to haul the same amount of freight and passengers; and (3) the statute forces trains to stop at the borders of the state to break up and to remake long trains.[54] By contrast, the trial court found that the statute did not further the state's interest in safety at all. Indeed, it found that the Arizona law made train operation more dangerous.[55] Based on these extremely strong findings of fact, the Court held the Arizona law invalid under the commerce clause.[56] Even in these circumstances, one Justice dissented on the basis that the Court was improperly interfering with policy decisions that should be the exclusive domain of legislatures.[57]

Bibb v. Navajo Freight Lines[58] involved a challenge to an Illinois law requiring all trucks to have "contour" mud flaps. As in Southern Pacific, a trial court had conducted an extensive evidentiary hearing and had found that the law imposed a substantial burden on interstate commerce while it did not further the state's interest in safety at all.[59] The Court accepted these findings, but declined to make them the basis for a holding of invalidity.[60] Indeed, it stated in dicta that it "would have to sustain the law" if it were faced only with a decision to sustain or overturn based on a showing of a substantial burden on interstate commerce resulting from a state law with a poorly documented relationship to safety.[61]

The Court invalidated the Illinois law on another basis, however. It found the Illinois law hopelessly in conflict with an Arkansas law requiring "straight" mud flaps. Since it was physically impossible for an interstate truck to comply with the mudflap laws of both states, the Court felt justified in overturning the idiosyncratic and empirically unsupported Illinois law.[62] The conflict between state laws that formed the basis for the holding in Bibb can arise in the case of any state law that affects interstate commerce. The Court has made it clear, however, that the potential for conflicting state regulation of interstate commerce is not sufficient to invalidate a state law; rather, the Court will overturn a state law burdening interstate commerce only when it finds an actual, present conflict between that law and the law of another state that affects the same instrumentalities of commerce.[63]

In Raymond Motor Transportation, Inc. v. Rice,[64] the Court again overturned a state safety regulation because of its adverse impact on interstate commerce. Raymond involved a challenge to a Wisconsin statute limiting truck lengths to fifty-five feet. The Court found, based on massive uncontradicted evidence presented by the parties challenging the law, that the law substantially increased the cost of moving goods in interstate commerce while it made absolutely no contribution to safety.[65] Both the majority opinion of five Justices and the concurring opinion of four Justices emphasized, however, the unusual features of the case. The majority characterized Wisconsin as having "virtually defaulted in its defense of the regulations as a safety measure."[66] Thus, the majority stated that the holding did not even extend to identical laws of other states if such other states presented evidence on the safety issue less "overwhelmingly one-sided."[67] The five Justices who joined in the majority opinion indicated their willingness to balance state safety purposes against burdens on interstate commerce, but they described their attitude toward this balancing process as one of extreme deference to the judgment of state officials. Thus, they stated that they were "most reluctant to invalidate" state safety regulation.[68] According to the majority, the opponents of a state safety rule must "overcome a 'strong presumption of . . . validity.'"[69] The four concurring Justices expressed an attitude of even greater deference to state authorities. They characterized the safety interests underlying the Wisconsin regulation as "illusory," and stated that "if safety justifications are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce."[70]

South Carolina State Highway Department v. Barnwell Brothers, Inc.[71] illustrates the extreme limits of the Court's deference to state authorities when health and safety interests are at stake. In Barnwell, the Court upheld a South Carolina law prohibiting trucks wider than ninety inches and heavier than ten tons because the statute had a credible relationship to safety, even though the effect of the law was to exclude from South Carolina's highways between eighty-five and ninety percent of all interstate trucks.[72] Barnwell was decided over forty years ago, but the Court continues to refer to it as a viable precedent in its modern decisions applying the commerce clause.[73]

Courts have had only a few occasions to date to consider challenges to state environmental regulations under the commerce clause. The relative dearth of case law in this area probably is attributable to a combination of the fact that most states have recognized the importance of environmental interests only in the past two decades and the fact that most arguable conflicts between state environmental interests and federal economic issues arise in areas that are subject to extensive federal regulation and, therefore, are resolved under the supremacy clause rather than the commerce clause. The few environmental cases decided so far indicate that the courts will give at least as much deference to state legislative or administrative efforts to balance state environmental interests against national economic interests as they do when the balance is between state health and safety interests and national economic interests.

The two major Supreme Court decisions involving commerce clause challenges to state environmental regulation seem precisely analogous to the decisions involving state health and safety regulation. In City of Philadelphia v. New Jersey,[74] the Court held invalid a New Jersey statute that prohibited all in-state disposal of waste with an out-of-state source. The only mildly surprising feature of the decision was the fact that two Justices dissented from this seemingly routine application of the prohibition against state actions that discriminate facially against interstate commerce.[75] Huron Portland Cement Co. v. City of Detroit,[76] by contrast, is analogous to nondiscriminatory safety regulation cases like Barnwell. Detroit passed an ordinance establishing air quality standards applicable to ships in Detroit harbor.[77] The Court upheld the standards even though they imposed a substantial burden on interstate commerce by requiring many ships to make structural modifications to their boilers.[78]

The most interesting case involving a conflict between state environmental interests and national economic interests never reached the federal courts. The opinion of the Oregon Court of Appeals in American Can Co. v. Oregon Liquor Control Commission,[79] is particularly helpful both as an indication of the dominant judicial approach to conflicts between state environmental interests and national economic interests and as an explication of the judicial deference accorded to all state actions that credibly further interests in health, safety, or the environment.

The Oregon court was presented with a commerce clause challenge to an Oregon statute requiring soft drinks to be sold in reusable containers. The statute was justified as a means of reducing environmental harm created by littering. The court upheld the statute despite its finding that the state action burdened interstate commerce by forcing substantial changes in the entire national distribution system for beverages.[80] The court interpreted the United States Supreme Court decisions under the commerce clause to require judicial balancing of state and national interests where the interests are "comparable" (i.e., state economic interests versus national economic interests) but to prohibit judicial balancing of interests where the interests are "incomparable" (i.e., national economic interests versus state interests in health, safety, or the environment).[81] The Oregon court may have overstated slightly the degree of judicial deference accorded to state actions that purport to further health, safety, and environmental interests. The Court has invalidated such actions if they discriminate facially against interstate commerce,[82] if they amount to poorly disguised attempts to protect state economic interests from outside competition,[83] or if the state presents no evidence whatsoever that they actually further interests in health, safety, or the environment.[84] The Oregon court's analysis of the cases seems reasonably accurate, however, since the Supreme Court seems to accord total deference to any nondiscriminatory state action that has any credible factual link to state interests in health, safety, or the environment. The Oregon court made explicit the reasons for the extreme judicial deference to state legislatures in these areas--courts are reluctant to make the policy decisions implicit in balancing "incomparables."

4. Summary of Commerce Clause Jurisprudence

This analysis of the limits on state regulatory authority created by judicial application of the commerce clause can end where it began, with the distinction drawn by Justice Jackson in H. P. Hood.[85] The Court will invalidate a state action under the commerce clause that clearly favors state economic interests over national economic interests, but it will not invalidate a facially neutral state regulation with a credible link to state interests in health, safety, or the environment no matter how much burden that regulation imposes on interstate commerce.[86] The Court will defer to state legislative judgments concerning the proper balance between such state interests and the national interest for two reasons. First, the Court does not feel it is the appropriate institution to balance objectively incomparable values like economic costs versus safety benefits. Second, when a state regulation applies both to residents and to nonresidents of the state, the Court assumes that it can rely on the state's own political processes to produce an appropriate balance of regulatory costs and benefits.

As the previous analysis of the impact of the statute at issue in Barnwell illustrates,[87] this judicial assumption that internal political forces can be relied upon to produce a proper balance when state regulation applies evenhandedly is unwarranted in many circumstances. Nondiscriminatory state regulations often produce benefits that accrue primarily to in-state interests and burdens felt primarily by out-of-state interests. In addition, states frequently disguise regulations designed to protect local economic interests at the expense of national interests by basing those regulations on superficially plausible health, safety, or environmental rationales. Thus, judicial application of the commerce clause can be relied upon to filter out only the most crude state attempts to elevate parochial interests over national interests.

B. Congressional Invalidation of State Regulatory Actions Under the Supremacy Clause

Most arguable conflicts between state regulation and national interests arise today in areas in which Congress has acted in some manner. As a result, most modern cases require judicial application of the supremacy clause as well as the commerce clause. The Court frequently can choose which constitutional provision to use as the principal basis for its decision upholding or invalidating a state action. In such circumstances, the Court usually bases its decision on the supremacy clause because: (1) a decision based on the supremacy clause involves less apparent conflict between the Court and states; and (2) a decision based on the supremacy clause sends a clear message to Congress that it has the power to reallocate regulatory power between federal and state authorities if the Court misinterprets the intent of Congress.[88]

Under the supremacy clause, if the federal government and the states have concurrent power to regulate a subject and both exercise that power, the state exercise is void if it "collides" with the federal exercise.[89] Thus, the question raised by preemption analysis is always one of statutory interpretation. Unfortunately, Congress rarely addresses issues of preemption of state law explicitly or in detail, so the Court usually must determine congressional intent based on its analysis of the general purposes of the federal statute and the relationship between those general purposes and the state action at issue.[90] The Court has explained its approach to preemption issues using many different formulations, not all of them consistent. The formulations most frequently cited today appeared first in Rice v. Santa Fe Elevator Corp.:[91]

> The question in each case is what the purpose of Congress was.
>
> . . . Such a purpose may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the State to supplement it. Or the Act of Congress may touch a field in which the federal system will be assumed to preclude enforcement of state laws on the same subject. [Or] the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. Or the state policy may produce a result inconsistent with the objective of the federal statute.[92]

In its recent decisions, the Court has divided the many complicated strands of preemption analysis into three categories--federal occupation of the field, direct conflicts, and obstacles to accomplishment of congressional goals.[93]

Congress can occupy an entire field of regulation to the exclusion of all state regulation, but the Court will not conclude that Congress has done so unless it finds either an explicit intent to preempt all state authority or a federal regulatory scheme so pervasive that it demonstrates an implicit congressional intent to occupy the field.[94]

Direct conflicts between federal and state regulatory requirements present the easiest case for preemption. A conflict sufficient to invalidate a state regulatory requirement can exist in either of two cases: (1) when it is impossible to comply with both federal and state law; or (2) when the objectives of state and federal requirements conflict.[95]

Finally, the most difficult class of cases involves claims that a state regulatory action frustrates policies underlying federal regulation. In these cases, the Court must consider carefully the purposes of federal regulation and the degree of impact of the state regulation on the federal government's ability to further those purposes. Sometimes, for instance, a major purpose of federal regulation is to achieve uniform regulation that is not possible if states can supplement federal regulation.[96]

Three recent Supreme Court decisions resolving preemption controversies illustrate two important points. First, the Court seems increasingly reluctant to hold state regulation preempted by federal law. Second, absent explicit indications of congressional intent to preempt all state regulatory power over a subject matter, the Court's approach to preemption issues provides states considerable latitude to impose regulatory requirements in areas involving extensive federal regulation even when the state regulation conflicts with the goals of federal regulation.

Arkansas Electric Power Cooperative Corp. v. Arkansas Public Service Commission[97] involved a challenge to Arkansas' attempt to regulate wholesales of electric power by rural electric cooperatives financed by the Rural Electrification Association (REA). Arkansas' action arguably was preempted by the Federal Power Act, which gives the Federal Energy Regulatory Commission (FERC) power to regulate wholesales of electricity, and the REA Act, which authorizes REA to finance rural electric cooperatives. Prior to the Court's decision in Arkansas Electric, its decisions under both the commerce clause and the supremacy clause suggested strongly that it would have held impermissible any state regulation of wholesales of electric power.[98]

The seven Justice majority in Arkansas Electric recognized that the wholesale rates charged by AECC would be subject to exclusive regulation by FERC if AECC were not a cooperative.[99] FERC had earlier held, however, that it had no jurisdiction over such sales because, as among federal agencies, Congress had given all power over cooperatives to REA.[100]

The majority then considered the government's argument that state regulation of cooperatives was preempted by the REA Act. The majority recognized that state regulation of wholesale rates charged by cooperatives financed by REA has the potential to conflict with REA's interests as a lender to cooperatives.[101] It found no inherent conflict in the present case, however, and cited statements in the legislative history of the REA Act suggesting that Congress was willing to tolerate the potential for conflicts between state rate regulation and federal financing.[102] As the two dissenting Justices pointed out, however, those statements in the legislative history did not and could not have referred to state regulation of wholesale rates, because Congress was well aware of the Court's prior holdings prohibiting all state regulation of wholesale rates when it passed both the Federal Power Act and the REA Act.[103]

Thus, in Arkansas Electric the Court held that the federal government did not "occupy the field" to the exclusion of all state regulatory authority despite the extensive involvement of two federal agencies. It also did not find a fatal conflict between federal and state regulation despite its recognition that such a conflict could arise at any time once federal and state agencies are free to regulate the conduct of cooperatives. In addition, it interpreted ambiguous statements of congressional intent in a manner that permitted state regulation of conduct Congress believed to be beyond the reach of state power when it passed the statutes in question.

Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission[104] involved a challenge under the supremacy clause to a California statute prohibiting construction of nuclear power plants until a state agency determines that the federal government has resolved the problem of nuclear waste disposal. Pacific Gas and Electric Company (PG&E) argued that the California statute was preempted by the Atomic Energy Act based on each of the three recognized approaches to preemption analysis.

The Court first rejected PG&E's argument that Congress had occupied the field of regulation of nuclear power. Based on the language and legislative history of the Act, the Court concluded that Congress intended to create a dual regulatory structure--while it had "occupied the field" of nuclear safety, it had permitted the states to continue to regulate nuclear power plants for economic purposes.[105] Thus, the Court distinguished between a prohibited state moratorium based on safety concerns and a permissible state moratorium based on economic concerns.[106] The Court concluded that the California statute was valid if it had any relationship to the state's economic interests. Because failure to solve the nuclear waste disposal problem could lead to soaring electric rates resulting from idled nuclear plants, the Court found a sufficient economic rationale to support the state moratorium.[107]

The Court then rejected PG&E's argument that the state moratorium based on the state agency's failure to find the existence of a solution to the nuclear waste disposal problem conflicted with Nuclear Regulatory Commission (NRC) findings that the nuclear waste disposal problem was not an impediment to construction of nuclear plants. The state and federal rulings did not conflict because: "The NRC's imprimatur . . . indicates only that it is safe to proceed with such plants, not that it is economically wise to do so."[108]

PG&E's final argument was that the California moratorium frustrated Congress' stated purpose to develop the commercial use of nuclear power. The Court rejected this argument because, even though Congress intended to further that purpose, it did not intend to do so "at all costs."[109] Thus, despite the congressional purpose to develop nuclear power, states remain free to slow or even stop that development "for economic reasons."[110]

Pacific Gas & Electric is a well-reasoned decision that seems to represent a prudent resolution of a difficult regulatory conflict. Still, the Court's approach highlights two significant limitations of preemption analysis. First, it is relatively easy in many cases for a state to base a regulation on a plausible rationale different from the state's dominant reason for regulating the conduct at issue and different from the federal government's regulatory rationale and thereby to avoid a holding of preemption. It is not a well-kept secret that California's moratorium on nuclear plants was based primarily on nuclear safety concerns, even though it obviously relates to economic issues as well. A regulatory requirement putatively based on a permissible rationale has exactly the same effect as would a requirement based on an impermissible rationale. Thus, Pacific Gas & Electric illustrates the potential for states to avoid preemption through clever characterization of the reason for imposing a regulation that has several effects.

Second, Pacific Gas & Electric shows the weakness of the "frustration of federal purpose" branch of preemption analysis. When Congress enacts a statute to further a purpose, it rarely indicates an intent to further that purpose "at all costs." Yet, Pacific Gas & Electric seems to permit state actions that stand as a complete bar to accomplishment of a federal purpose unless Congress has indicated such an intent.

The Court's dictum in Pacific Gas & Electric that the federal government had "occupied the entire field of nuclear safety concerns"[111] proved accurate for less than a year. The Court qualified that statement significantly in Silkwood v. Kerr-McGee Corp.[112] Silkwood involved the validity under the supremacy clause of an award of $5,000 in compensatory damages and $10,000,000 in punitive damages authorized by Oklahoma law. The punitive damages award was based on a jury finding that Kerr-McGee was "grossly negligent, reckless and wilful" in allowing plutonium to escape from its facility.[113] By contrast, NRC investigated the Silkwood incident and found that Kerr-McGee had complied with all federal regulations except for a relatively minor lapse in maintaining Ms. Silkwood's medical records.[114]

Kerr-McGee argued that the award of punitive damages under state law was preempted based on each of the three branches of preemption analysis--the federal government had occupied the field, the state action conflicted with federal regulation, and the state action frustrated congressional purposes. As in Pacific Gas & Electric, the Court rejected all three bases for application of the supremacy clause.

The five Justice majority began by qualifying the Court's previous statement that "the federal government has occupied the entire field of nuclear safety concerns" by holding that the federal occupation did not extend to preemption of state tort law.[115] It recognized that: "Congress' decision to prohibit the states from regulating the safety aspects of nuclear development was premised on the belief that the Commission was more qualified to determine what type of safety standards should be enacted in this complex area."[116] Yet, it declined to hold state regulation through awards of punitive damages preempted because Congress was silent concerning the preemptive effect of the Atomic Energy Act on traditional state tort law.[117]

The Court then rejected the argument of Kerr-McGee and the government that state awards of punitive damages conflict with NRC's exclusive power to regulate nuclear safety and its remedial scheme of penalties much more modest than the $10,000,000 award granted in Silkwood. The Court recognized that: "No doubt there is tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a state may nevertheless award damages based on its own law of liability."[118] The Court concluded that Congress through its silence concerning traditional state tort law had indicated its acquiescence in this tension, however.[119] It found no fatal conflict because: "Paying both federal fines and state-imposed punitive damages . . . would not appear to be physically impossible."[120]

Finally, the Court rejected the argument that state awards of punitive damages would frustrate the congressional purpose to further commercial development of nuclear power on the same basis relied upon in Pacific Gas & Electric--Congress did not intend to further that purpose "at all costs."[121]

The four dissenting Justices emphasized two points. First, as the majority recognized, Congress intended to preempt all state regulation of nuclear hazards. Second, the sole purpose and effect of punitive damages is to regulate conduct.[122] It follows that Congress' arguable acquiescence in the continued availability of compensatory damages is of no consequence to the determination of whether Congress intended to preempt punitive damages.

Taken together, the Court's decisions in Arkansas Electric, Pacific Gas & Electric, and Silkwood indicate a growing reluctance by the Court to hold state regulation preempted by federal law using each of the three principal methods of analysis under the supremacy clause. Arkansas Electric suggests that pervasive federal involvement in the regulated conduct and the clear potential for future conflicts between federal and state agencies no longer are sufficient to support a holding that state regulation is preempted. Pacific Gas & Electric illustrates the ability of states to impose regulations that frustrate completely efforts to further a federal purpose as long as the stated basis for the state regulation differs from the basis for federal involvement. Silkwood demonstrates that the Court will not hold a state regulatory action preempted even in an area "occupied by" the federal government if the state regulation is accomplished through a method traditionally available to states, absent an explicit indication of Congress' intent to forbid that specific method of regulation. Silkwood also suggests that the Court is reluctant to hold a state regulatory action preempted as in conflict with a federal regulatory scheme unless the conflict involves a literal impossibility of compliance with both regulatory requirements.

The rapidly changing state of the law of preemption seems to permit states increasing flexibility to regulate in ways that conflict with national goals even in areas of conduct with extensive federal involvement. Unless Congress has explicitly preempted the particular form of state regulatory action at issue or the state regulatory requirement conflicts literally with a federal regulatory requirement, the Court will uphold the state action. Thus, while judicial application of the supremacy clause provides an alternative to the commerce clause as a mechanism for restraining states from furthering parochial interests at the expense of national interests, its efficacy for that purpose depends on the existence of a clear indication of congressional intent to preempt. In the many cases in which Congress has not explicitly preempted the specific type of state action challenged, the Court is likely to uphold the action even if it harms national interests.

C. Federal Agency Invalidation of State Regulatory Actions Under the Supremacy Clause

Congress can preempt state regulatory action itself or it can delegate that power to a federal agency. Ray v. Atlantic Richfield Co.[123] illustrates the second option. Washington passed a statute imposing a variety of regulatory requirements on tankers traversing Puget Sound.[124] Congress passed a statute authorizing the Secretary of Transportation to regulate all tanker traffic in United States waters.[125] Congress stated that one of the purposes of federal regulation of tankers was to obtain uniformity,[126] so there was little doubt that any state regulatory requirement different from a requirement imposed by the Secretary was preempted. The Court analyzed each of the regulatory requirements imposed by the Washington statute separately to determine whether it was preempted either by the federal statute itself or by regulatory actions taken under that statute.[127]

The Court held invalid Washington's exclusion of all tankers over 125,000 DWT from Puget Sound on the basis that such a total prohibition was inconsistent with the Secretary's regulation that limited the size of tankers operating in the Sound only in certain locations and conditions. The Court reasoned that:

> "[W]here failure of . . . federal officials to affirmatively exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute," States are not permitted to use their police power to enact such a regulation. We think that in this case the Secretary's failure to promulgate a ban on the operations of oil tankers in excess of 125,000 DWT in Puget Sound takes on such a character.[128]

By contrast, the Court upheld Washington's requirement that tankers use tugs in certain circumstances because, while the Secretary had the power to regulate the use of tugs, he had not yet exercised that power.[129] The Court emphasized that Washington's regulation of tug assistance for tankers also would be preempted if and when the Secretary exercises his power to require tugs or concludes "that no such requirement should be imposed at all."[130]

The Court has long recognized federal agency power to preempt state regulatory requirements.[131] In some circumstances, that power clearly provides advantages to the nation. The famous dispute in the early part of the century that resulted in the Court's decision in The Shreveport Rate Case[132] is a good illustration of the potential national benefits that can result from federal agency preemption of state regulatory power.

Dallas, Houston, and Shreveport competed as rail terminals serving the needs of Texas communities in the triangle formed by the three cities. The

Texas Railroad Commission set rates for traffic between Dallas, Houston, and the Texas communities near Shreveport much lower than the rates established by the Interstate Commerce Commission (ICC) for traffic between Shreveport and those communities. The effect of the Railroad Commission's action was to funnel all rail service to north Texas communities through Dallas and Houston even though the actual cost of providing service to many such communities was less through Shreveport. ICC investigated the situation and found the rate relationships resulting from the Railroad Commission's orders unduly discriminatory. It ordered the railroads to adjust their rate relationships to eliminate the undue discrimination against Shreveport.[133] The Texas Railroad Commission challenged the portion of the ICC order requiring an increase in some rail rates for routes within Texas on the basis that ICC did not have authority to regulate intrastate rates.[134] The Court held that ICC had the power to adjust intrastate rates when that action was necessary to eliminate undue discrimination.[135] It concluded that: "Interstate trade was not left to be destroyed or impeded by the rivalries of local governments."[136] Professor Black has characterized the action of the ICC in The Shreveport Rate Case as an ideal governmental response to problems of parochialism that threaten national interests.[137]

Agencies have only those powers granted by Congress, and it is not always clear that an agency has the power to preempt state regulation. In the late 1970's, for instance, there was considerable debate concerning the Federal Trade Commission's (FTC) power to preempt state regulation. Dean Verkuil argued that FTC has such power.[138] He referred to studies by Professors Stigler and Benham[139] demonstrating that FTC preemption of a few state regulatory barriers to competition could save the national economy billions of dollars.[140] He recognized that some federal statutes, like the Sherman Act, are so broad that giving them preemptive effect could have two undesirable consequences: (1) significant potential erosion of the values of the federal system; and (2) potential active judicial review of substantive economic decisions of states akin to the Court's troublesome attempts to limit state economic regulation under the due process clause.[141] He argued, however, that the statutes administered by FTC do not pose these serious problems if FTC uses self-restraint in exercising its power to preempt state laws and courts review carefully all preemptive actions taken by FTC.[142] He suggested that FTC should decide whether to preempt a state regulation through use of a standard similar to the Supreme Court's standard for reviewing state regulation under the commerce clause.[143] In reviewing preemptive action by FTC, courts should "consider closely the rationality of the rule in terms of the appropriateness of preemption."[144] With these two important safeguards, Dean Verkuil argued that FTC power to preempt state regulations that interfere with the pursuit of national economic goals has the potential to provide considerable benefit without undue sacrifice of the values of federalism and state autonomy.

Despite expressions of contrary views by some state officials,[145] the courts seem to have adopted Dean Verkuil's suggested approach. In Katherine Gibbs School, Inc. v. FTC,[146] the Second Circuit was confronted with a challenge to the validity of an FTC rule that purported to preempt state law. FTC prohibited "abusive practices" engaged in by vocational and home study schools and preempted broadly any state regulation "'which is inconsistent with or otherwise frustrates the purpose of . . . this . . . rule.'"[147] The Second Circuit held the FTC rule invalid because it prohibited vaguely defined practices and its preemptive effect was similarly broad and vague.[148] The court recognized in dicta, however, the power of FTC to preempt state regulations through more specific rules with correspondingly more narrow preemptive effect.[149]

There is reason to believe that the Supreme Court is increasingly receptive to federal agency actions preempting state regulations when the preemptive effect of the agency action is narrow and the benefits of preemption are well documented. In its recent cases applying the supremacy clause, the Court seems to have combined an increasingly conservative approach to finding that Congress intended broadly to preempt state regulation with an implicit invitation to federal agencies to determine whether specific state regulations so conflict with federal policy that they should be invalidated.

In Arkansas Electric,[150] for instance, the Court refused to find that Congress intended to preempt state regulation of wholesales by rural electric cooperatives through passage of either the Federal Power Act or The Rural Electrification Act. The Court emphasized, however, that its holding said nothing about the power of either of the federal agencies potentially affected by such state regulation to preempt that regulation in whole or in part. Thus, the Court acknowledged that it "would obviously be faced with a very different pre-emption question" if FERC were to reverse its earlier holding that it did not have jurisdiction to regulate wholesales by rural electric cooperatives.[151] Similarly, it recognized REA's continuing authority to preempt a particular state regulatory requirement imposed on a REA-financed cooperative by enacting a valid rule supported by evidence of a conflict between REA's interests and the state regulation.

Preemption of state regulations by federal agencies has the potential to supplement the increasingly ineffective checks on state regulations that harm national interests available through judicial application of the commerce clause and through judicial interpretation of typically ambiguous congressional expressions of intent concerning preemption.

D. Limits on Congressional Power to Affect the Permissible Scope of State and Federal Regulation

The final step in this survey of the legal environment in which arguable conflicts between state and federal regulation are resolved is to determine the extent to which Congress is limited in its power to resolve such conflicts unilaterally. The short answer is that Congress has almost total discretion to allocate regulatory responsibilities between state and federal agencies.

The commerce clause presents no impediment to congressional allocation of regulatory power between state and national governments. Even if the Court has drawn an initial line allocating federal and state regulatory power over an activity through judicial application of the commerce clause, it will defer to any congressional reallocation of that power.[152]

Similarly, the supremacy clause is a grant of power to Congress rather than a restriction on congressional power. Indeed, the supremacy clause empowers Congress to preempt state regulation of an area of conduct completely or to delegate to an agency its preemptive power without imposing any federal regulation on that area of conduct.[153] Such an action reflects a decision by

Congress or by a federal agency that the national interest is best served by permitting the conduct to take place in an environment free of regulation imposed at any level of government.

The only potential constraint on congressional power in this context is the tenth amendment's reservation of some powers to the states. The Court's holding in National League of Cities v. Usery[154] initially was interpreted by some commentators as a broad limitation on federal power to regulate conduct where states traditionally had exercised a dominant regulatory role.[155] The post Usery cases indicate, however, that the tenth amendment limits federal power only when the federal government purports to regulate under the commerce clause state conduct that is inextricably linked to the concept of state sovereignty.[156] In particular, Federal Energy Regulatory Commission v. Mississippi[157] suggests that the tenth amendment does not limit Congress' flexibility to allocate regulatory control over private conduct to any meaningful degree.

FERC v. Mississippi involved a challenge under the tenth amendment to certain provisions of the Public Utility Regulatory Policies Act of 1978 (PURPA). That Act required each state's utility commission to "consider" adoption of each of several standards for regulating electric utilities and to use specified procedures in considering the adoption of such standards. Thus, PURPA established a mandatory agenda for each state commission and the procedural framework within which each item on that agenda was to be considered. Mississippi challenged these provisions of PURPA on the basis that they interfered with the state's sovereignty in violation of the tenth amendment as interpreted in Usery.

By votes of five to four and six to three, the Court upheld all challenged provisions of PURPA. Since the federal government can preempt state regulation of utilities completely[158] and since state tribunals can be compelled to apply federal law,[159] the majority reasoned that the federal government can condition each state's exercise of its power to regulate utilities on the state's willingness to consider federal standards using procedures mandated by the federal government.[160] In short, the federal government can "use state regulatory machinery to advance federal goals."[161]

FERC v. Mississippi stands for two propositions important to this Article. First, unless it is attempting to regulate the conduct of a state in its capacity as a sovereign, Congress can reallocate regulatory power between state and federal governments without concern for constitutional limitations. Second, Congress is not limited to a choice between allocating all power to regulate an area of conduct to state or federal agencies. It can combine federal and state regulatory power through any form of cooperative or creative federalism it finds appropriate to a particular field of regulation.

E. Summary of Legal Framework for Resolving Issues of Federalism in Regulatory Decisionmaking

If Congress has not acted with respect to an area of regulation, the courts must determine initially whether state regulation interferes with national goals to such an extent that it conflicts with the commerce clause. Courts accomplish this task by enforcing an almost complete prohibition on state regulation that disciminates facially against interstate commerce and on state regulation that is clearly designed to protect state economic interests from outside competition. With respect to other forms of state regulation, courts purport to balance a state's interests in a regulation against the national interest in unobstructed trade between the states. In fact, courts defer almost completely to state governments when an evenhanded state regulation has any credible relationship to state interests in health, safety, or the environment even if that regulation imposes a substantial burden on interstate commerce. The extreme judicial deference accorded state officials in these circumstances is premised on two strongly held views. First, the judiciary should avoid making policy decisions that require it to balance "incomparables" such as safety benefits versus economic burdens. Second, internal political checks can be relied upon as means of assuring a reasonable balance between regulatory burdens and benefits when a state regulation applies evenhandedly to in-state and out-of-state interests.

Because of this judicial deference to each state's pursuit of its interests in health, safety, and the environment, judicial application of the commerce clause can be relied upon only to invalidate the most crude and blatant efforts to further state interests at national expense. States remain free to interfere with national goals through two types of actions. First, states can impose regulatory requirements putatively based on credible health, safety, or environmental goals but which actually further parochial or protectionist economic interests. Courts attempt to detect and invalidate such measures, but they are understandably reluctant to second guess a state's stated reasons for imposing a regulatory requirement that furthers several purposes simultaneously. Second, states can impose putatively evenhanded regulations whose benefits accrue principally to in-state interests and whose burdens are felt primarily by out-of-state interests. Internal political forces are unlikely to produce a reasonable balance of regulatory benefits and burdens in this situation.

If an arguable conflict between state regulation and national goals arises in an area in which Congress has acted, the Court usually resolves the conflict through application of the supremacy clause rather than the commerce clause. This requires the Court to determine whether Congress intended to preempt the state regulation at issue. Congress rarely addresses preemption issues explicitly, and even more rarely does it address those issues in detail. As a result, the Court usually must make an educated guess at congressional intent by determining the general scope and purpose of the federal statute and the effect that the state action at issue has on the federal government's efforts to further the general purposes underlying the congressional enactment. The Court will invalidate a state regulation if: (1) federal involvement in the field is so pervasive that the federal government has occupied the field; (2) state and federal regulations conflict either literally or in their purposes; or, (3) state regulation poses an obstacle to accomplishment of congressional goals. The Court's recent decisions applying preemption analysis indicate a continued trend to tolerate state regulation of conduct that is heavily regulated by the federal government unless Congress has explicitly preempted the particular form of state regulation at issue or it is literally impossible for a regulatee to comply with federal and state requirements. Since both explicit preemption of all forms of state regulation and literal conflict between state and federal regulatory requirements are rare, states have considerable power consistent with the supremacy clause to impose regulations that frustrate national goals identified by Congress.

Congress can delegate to a federal agency its power to preempt state regulation. Any agency attempt to exercise preemptive power raises two questions. Did Congress delegate preemptive power to the agency? Has the agency lawfully exercised that power? Courts are reluctant to affirm broad agency preemptions of state regulation because of judicial concern that exercise of broad preemptive power by federal agencies could undermine the values of the federal system. Courts generally affirm narrow agency exercises of preemptive power where the agency has tailored its preemption to a demonstrable national goal the pursuit of which has been delegated to the agency. Some of the Court's recent decisions under the supremacy clause seem to combine an increasing reluctance to hold a state regulation preempted by bare enactment of federal legislation with an implicit invitation to federal agencies to exercise their power to preempt those state regulations they find inconsistent with the regulatory goals Congress assigned them.

Finally, Congress has virtually unlimited power to allocate regulatory power between state and federal agencies. It can reallocate power initially allocated through judicial interpretation of the commerce clause. It can preempt state authority under the supremacy clause, and it can authorize federal agencies to preempt state authority. It also can blend state and federal regulatory authority into virtually any combination of cooperative or creative federalism, as long as it does not attempt to regulate a state's own conduct in its capacity as a sovereign.

III. Determining the Appropriate Relationship Between Regulation and Federalism

A. National versus Local Regulation

Many of the advantages and disadvantages of federal versus state regulation were identified in the opening quotations from Justice Holmes and Justice Brandeis. Over the past two centuries of the American political experiment, many distinguished jurists, political scientists, philosophers, and economists have contributed to the rich literature on federalism.[162] Boyden Gray recently summarized the relative advantages of placing regulatory decisions in state or federal hands.[163] His summary provides a convenient starting point for analysis.

Gray identified as the major disadvantage of federal regulation the fact that it is implemented by a massive, inefficient bureaucracy remote from the needs of the people in each locality.[164] By contrast, he argued that state and local regulation provides three significant advantages: (1) it produces programs tailored to local needs with correspondingly greater ability to respond promptly to changes in local needs; (2) it permits experimentation with a variety of approaches to regulation; and (3) it provides for greater political accountability and legitimacy.[165] Gray recognized, however, that federal regulation sometimes can provide benefits that more than offset the advantages of permitting regulatory power to be exercised primarily at the state and local level. Specifically, he argued that federal regulation sometimes is superior to state regulation for one of four reasons: (1) federal regulation can prevent burdens on interstate commerce; (2) some socially beneficial programs are easier to adopt as a political matter on the federal level; (3) states may compete on the stringency of regulation to the detriment of the nation; and (4) the federal government usually has greater access to sources of the relatively scarce expertise essential to some types of regulatory programs.[166]

B. A Model for Resolving Federalism Disputes

I will attempt to construct an analytical framework for resolving federalism disputes that reflects the advantages and disadvantages identified by Holmes, Brandeis, and Gray. The model is based on a combination of the prisoner's dilemma familiar to students of economics[167] and the political science reasoning that underlies the Supreme Court's dichotomous attitude toward "evenhanded" state regulation versus state regulation that discriminates on its face against out-of-state interests.[168] The model ignores entirely a variety of serious imperfections in the political and regulatory process that exist at all levels of government.[169] These imperfections often produce regulation that departs substantially from any normative standard of welfare economics. The model ignores these problems not because they are trivial, but because there is no reason to believe that they produce regulation more distorted on one level of government than another. Compare, for instance, the decisions of many states to restrict advertising of prescription glasses when such regulation costs the citizens of those states hundreds of millions of dollars annually[170] with the decision of the federal government to regulate natural gas producer prices when that decision costs the citizens of the nation billions of dollars annually.[171]

1. Geographic Spillover

The Supreme Court prohibits virtually all state regulation that discriminates against out-of-state interests and upholds the bulk of state regulation that treats interstate and intrastate interests in the same manner. It assumes that it can rely upon a state's internal political process to assure a reasonable balance of regulatory benefits and burdens in the latter case but not in the former. As long as the Court compels the state to regulate evenhandedly, the in-state interests benefited by the regulation and the in-state interests burdened by the regulation have no choice but to represent similarly situated out-of-state interests in the political process leading to imposition of the state's regulation. It follows from this theory that the state's political process will produce a reasonable balance of regulatory benefits and burdens from a national perspective if, but only if, there is at least a rough equivalence between the proportion of total benefits that accrue to in-state interests and the proportion of total burdens that are imposed on in-state interests.

Assume, for instance, that three hypothetical regulations are under consideration by a state. The proportion of benefits and burdens within the state resulting from imposition of each regulation under consideration is shown in the following table.

	Regulations		
	A	B	C
In-state benefits as a percentage of total benefits	80	80	20
In-state burdens as a percentage of total burdens	80	20	80

Now assume that the total benefits of each regulation are $10,000,000. A rational state would impose each regulation if, but only if, the benefits to state interests equal or exceed the burden on state interests. Thus, the state would impose regulation A if but only if its total burden is $10,000,000 or less,[172] the "reasonable" result. It would impose regulation B if its total burden is $40,000,000 or less,[173] a situation in which the risk of irrational overregulation is clear. It would impose regulation C only if its total burden is $2,500,000 or less,[174] a situation in which irrational underregulation is inevitable.

Using the same three sets of assumptions, it follows that the state considering the regulations and one or more other states are in a prisoner's dilemma. Purely for simplicity, assume that the out-of-state interests affected by the state's regulatory decisions all exist in a single other state. Label the state considering the regulations state Y and the other state affected by the regulations state Z. Assume further that state Y regulates each of the areas under consideration at exactly the level that equates regulatory burdens and benefits within state Y. The resulting benefits to and burdens on the interests of states Y and Z are shown in the following table.

	Benefits to Y	Benefits to Z	Total Benefits	Burdens to Y	Burdens to Z	Total Burdens
A	8,000,000	2,000,000	10,000,000	8,000,000	2,000,000	10,000,000
B	8,000,000	2,000,000	10,000,000	8,000,000	32,000,000	40,000,000
C	2,000,000	8,000,000	10,000,000	2,000,000	500,000	2,500,000

In each case, state Y has achieved "reasonable" regulation from its perspective, but only in case A is that regulatory result also reasonable either from the perspective of state Z or from the perspective of the states' joint interests. In case B, the net welfare of both state Z alone and the two states together would be increased by $30,000,000 if state Y relaxed its regulation. In case C, the net welfare of both state Z alone and the two states together would be increased by $7,500,000 if state Y increased its regulation. In the language of economics, state Y's decision to impose strict regulation of B imposes spillover costs on state Z of $30,000,000, and state Y's decision to forego strict regulation of C imposes spillover costs on state Z of $7,500,000. To complete the illustration, assume that state Z is confronted with regulatory decisions D, E, and F that are precisely analogous to state Y's decisions concerning A, B, and C, respectively. If each state makes its regulatory decisions independently, each will impose spillover costs on the other of $37,500,000, with a resulting loss of social welfare of $75,000,000.

Based on the facts assumed, states Y and Z are highly likely to realize that their joint welfare is maximized by decreasing regulation of B and E and increasing regulation of C and F. As a result, if they were private parties, they almost certainly would agree contractually to decrease regulation of B and E and increase regulation of C and F.[175]

In the real world of relationships between states, however, most geographic spillover problems are not likely to be resolved through agreements between states for two reasons. First, the Constitution prohibits states from entering into compacts with other states without first obtaining Congress' consent.[176] Secondly, and more importantly, the transaction costs of mutually beneficial agreements between states are prohibitive in the case of most actual geographic spillovers. In almost all cases, the spillover occurs in several states, and the amount of the spillover effect in each state is subject to considerable uncertainty. Bargaining between the affected states is not likely to prove effective in these circumstances.

Regulation of areas A and D at the state level will produce satisfactory results from the perspective of both the state and the nation. Regulation of areas B, C, E, and F at the state level will produce highly unsatisfactory results for the nation. It follows that B, C, E, and F should be subject to regulation only at the federal level. Notice that states should not have the power either to impose less stringent regulation or more stringent regulation in these areas, since either state action will impose substantial spillover costs on other states.

At this point, it may be helpful to translate the abstract regulatory decisions described in the hypothetical into more concrete examples that roughly correspond to the abstractions in the hypothetical in terms of the extent of their spillover costs. Regulatory decisions A and D are the most difficult to correlate with a clear concrete example, simply because almost any regulation creates some geographic spillovers, and it is difficult to identify a regulation with positive spillover precisely equal on a percentage basis to its negative spillover. Indeed, some areas of regulation involve benefits and burdens that are difficult to assign geographically. It is easy to imagine, for instance, a lively debate over the question of whether loss of caribou in Alaska costs only Alaskans or instead costs the citizens of all states. The following illustrations will focus on regulatory contexts in which the existence of spillovers is less debatable.

To illustrate cases A and E, assume that the manufacture of a particular product unavoidably produces a form of liquid waste that destroys all fish of a particular common species in any body of water in which the waste is disposed. Assume that the product can be manufactured at about the same cost at any of thousands of sites around the nation. Assume further that *federal* law prohibits disposal of the waste in question in any body of water except isolated ponds and lakes within the state. The only regulatory decision presented to any state in these circumstances is whether to allow disposal of the liquid waste in a lake or pond solely within the boundaries of the state, thereby permitting the product to be manufactured in the state, or to prohibit such disposal, thereby precluding manufacture of the product in the state.

This is close to a zero geographic spillover case. States should be free to make this type of regulatory decision. As long as a state's regulatory decision has no potential to produce positive or negative geographic spillovers, states should be free, in effect, to compete with other states for activities, including industrial plants, by adjusting their regulatory requirements to the level necessary to make them attractive to those activities. If, for instance, California decides to prohibit disposal of the liquid waste by-product, that decision reflects an implicit judgment by the citizens of California that they place a greater value on retaining in all lakes and ponds of the state the fish population that would be eliminated by the liquid waste by-product than they do on the benefits, in the form of tax payments and jobs, that the manufacturing facilities would provide the state. If Mississippi, for instance, decided to permit disposal of the liquid waste by-product in some of its lakes or ponds, that decision would reflect implicitly a judgment by its citizens that they place a greater value on the jobs and tax benefits resulting from allowing the new plants to locate in the state than on the fish populations that would be eliminated in some lakes and ponds as a result of disposal of the by-product.

The divergence in the assumed value judgments of the people of California and Mississippi could be based on differences in the relative availability of jobs or tax base in the two states, differences in the abundance of the fish population in the two states, differences in the subjective values of the citizens of the two states, or any combination of these three factors. As long as all the costs and benefits of a regulatory decision fall within the states that have the power to make the decision, these are the only three factors that can explain a divergence in regulatory decisions between the states. In a large, pluralistic country like the United States, considerable divergence in state regulatory decisions can be expected solely as a result of differences in the relative scarcity of "goods" like jobs, tax base, and fish populations, and differences in tastes. No matter what combination of differences of this type explains the hypothetical divergent decisions of California and Mississippi in this situation, it is fair to assume that Mississippi's decision is best for its citizens and California's decision is best for its citizens. As long as each state's decision has no potential to create spillovers into other states, each state's decision necessarily also increases national social welfare.[177]

A state's decision whether to permit a permanent nuclear waste storage facility to be located in the state provides a good illustration of situations B and E. Without attempting to engage in precise quantification, it seems apparent that most of the burdens of a decision to permit such a facility to be located in a state would fall on state residents, while most of the benefits would accrue to out-of-state residents. The national benefits of locating a permanent nuclear waste storage site in some state quite obviously are enormous. Such a facility would reduce the present risks attributable to temporary on-site storage, reduce the much greater future risks associated with continued reliance on temporary on-site storage, and avoid the economic risk that inadequate future storage may require shutdown of present nuclear power plants. Yet, the benefits to any particular state are modest, since no single state contains a significant proportion of nuclear waste in temporary storage or of nuclear generating capacity. By contrast, the burdens of placing a permanent storage facility in any state will fall disproportionately on the citizens of that state because of their geographic proximity to the nuclear waste.

The decision to locate a permanent nuclear waste storage facility in a state is a classic example of a regulatory decision with the potential for very large positive spillover to other states. If states are allowed to make this decision, there is a high probability that no state will choose to permit such a facility. The result would be loss of the positive spillover to other states and a very large resulting loss of total social welfare to the nation.[178] States should not be permitted to make regulatory decisions when those decisions have the potential to create or to eliminate large positive spillover to other states.

Situations C and F can be illustrated reasonably well by reference to regulatory decisions concerning some types of air pollution controls. Sulfur dioxide causes environmental damage both directly and indirectly. The indirect harm caused by sulfur dioxide emissions is greater than the direct harm. The indirect harm occurs as a result of the combination of sulfur dioxide with elements in the atmosphere, such as hydrogen, to form sulfates. The sulfates then precipitate in the form of acid rain, which causes considerable damage to vegetation and water bodies by changing the Ph of soil and water.[179]

Sulfur dioxide concentrations can be controlled in several ways. One basic regulatory decision is between tall stacks and stack scrubbers on fossil fuel burning plants. Stack scrubbers reduce the amount of sulfur dioxide emitted from a plant, but scrubbers are very expensive and produce solid waste that must be disposed of at or near the plant site. Tall stacks, by contrast, reduce the concentration of sulfur dioxide in the atmosphere proximate to the plant by allowing a high percentage of the sulfur dioxide to disperse in upper air currents.

It is relatively safe to predict that most, or perhaps all, states would choose tall stacks over stack scrubbers if each was given the power to make this decision. Since sulfur dioxide is highly transportable in upper air currents, tall stacks permit a state to transform most of its burden of sulfur dioxide into a negative spillover imposed on downwind states at very little cost to in-state interests. If a state chose stack scrubbers instead of tall stacks, it would increase the burden of sulfur dioxide control on in-state interests substantially in two ways--dramatically increased production costs to in-state manufacturers and increased solid waste disposal problems in the state. Yet, stack scrubbers almost certainly provide greater net benefits to the nation than tall stacks.

This is an example of the kind of state regulatory competition for industries that formed the basis for passage of most of the federal pollution control legislation.[180] The effect of permitting this kind of regulatory competition between states is dramatically different from the effect of permitting regulatory competition between states when there is no potential for geographic spillover. States should not be allowed to make regulatory decisions when those decisions have the potential to impose substantial negative spillovers on other states.

Up to this point, the decisionmaking model is conceptually simple--states should be allowed to make regulatory decisions with no geographic spillover (or with negative spillover equal in percentage to positive spillover), but they should not be allowed to make regulatory decisions with either positive or negative geographic spillover (or, more accurately, with disproportionate positive or negative spillover). It is necessary at this point to introduce two important qualifications--(1) spillovers are not the only factor that should be evaluated in deciding whether to allow regulation on the state or federal level and (2) spillovers are difficult to measure.

If federalism/regulation controversies were resolved solely on the basis of the presence or absence of any potential interstate spillover effects, almost all such controversies would be resolved summarily in favor of regulation imposed at the national level. In a physically and economically integrated country, there probably is not a single regulatory decision that affects only interests in one state. If the mere existence of any spillover were sufficient to require uniform, preemptive federal regulation, states probably could not even decide whether to place a stop sign at an intersection. No one would be pleased with that result and for good reason. Uniform, exclusive federal regulation of all conduct would eliminate the potential for state and local governments to tailor regulation to local conditions and local tastes. In addition, this monolithic approach would eliminate the potential for decentralized regulatory experimentation applauded by Justice Brandeis and would spread into all areas of regulation the problem of federal bureaucratic rigidity identified by Boyden Gray.

The task in all such cases cannot be merely to determine whether state regulation has the potential to create spillovers--virtually any state regulation will have that effect. Rather, the critical inquiry is whether state regulation has so much interstate spillover potential that preemptive federal regulation is justified despite the disadvantages of federal regulation. The next logical question is: How much spillover potential is too much to tolerate state regulation? The answer depends in part on the strengths or weaknesses of the other advantages and disadvantages of federal regulation previously identified but not captured in the spillover model.

2. Additional Factors: Expertise, Bureaucracy, and Experimentation

The spillover model reflects all but three of the tradeoffs between state and federal regulation identified by Holmes, Brandeis, and Gray. The unaccounted for factors can be summarized as superior access to expertise, inefficient bureaucracy, and restriction of regulatory experimentation. Initially, it is tempting to say that the spillover model also fails to incorporate the most important advantage of state and local regulation--ability to reflect local conditions and tastes. The model automatically reflects that value, however, since the national welfare will be enhanced by permitting state regulatory autonomy only to the extent that state regulatory actions affect in-state interests. To the extent that state actions affect out-of-state interests, state autonomy does not further national social welfare, since the preferences of out-of-state interests are not reflected in a state's internal political process leading to a regulatory decision. Thus, the values underlying state regulatory autonomy are sacrificed in inverse relation to the amount of spillover effect. If the only tradeoffs were between the value of permitting states to reflect local conditions and tastes and the value of precluding states from creating negative interstate spillover, the balance could be struck in each case solely through use of the spillover model. The decisional rule could be stated as: States should have the power to regulate conduct unless such regulation has the potential to create substantial disproportionate positive or negative interstate spillovers.

Of the three decisional factors not captured by the spillover model, one--superior access to expertise--tilts the balance in favor of federal regulation. The importance of this factor depends on the nature of regulatory decisionmaking and the relative scarcity of the talent necessary to make the regulatory decisions at issue. The federal government obviously has an enormous comparative advantage with respect to the expertise required to make technologically complex regulatory decisions, such as standard setting for nuclear power plants and for air and water quality. Few states have sufficient resources and need for access to relevant expertise to justify employment of the many scientists and engineers required to perform these regulatory tasks.

The federal government's comparative advantage is much less in more traditional, less technologically complex areas such as utility regulation. Even in these areas, however, the extent of the federal government's advantage depends critically on the state with which it is compared. States like New York, California, and Wisconsin have employed highly skilled economists, rate analysts, accountants, engineers, and utility law specialists whose aggregate expertise may equal that of the federal government. Many smaller states, however, do not have access to sources of expertise sufficient even to attain minimal competence in traditional areas like utility regulation. Louisiana, for instance, has no economists, one lawyer, one auditor, and part-time commissioners whose full-time jobs include running a large chain of supermarkets and who meet in the same city only one or two days a month. Thus, in any area of regulation, the federal government is likely to have some comparative advantage in access to expertise vis a vis smaller states. As the technological complexity of regulatory decisions increases, the federal government's comparative advantage in access to expertise increases in comparison with both large and small states.

The inefficient bureaucracy factor tilts federalism controversies away from national regulation. It is difficult to generalize about bureaucratic inefficiency, but most observers of the regulatory process would accept Boyden Gray's assertion that federal agencies tend to require more time to make regulatory decisions than state agencies.[181] This phenomenon probably is attributable to some combination of bureaucratic diseconomies of scale, crowded agendas, and the increased number and nature of parties affected when a regulatory decision is made on a national level. The tendency of federal agencies to take longer than state agencies to make regulatory decisions increases the social costs of regulation by creating long periods of uncertainty in which parties affected by regulatory decisions have no basis for making related decisions.[182] While this cost can be great in a particular context, it cannot be characterized accurately through any generalization because it depends critically on the nature of the regulatory issue and the difference in the amount of time required for a state agency or federal agency to resolve that issue.

Measuring bureacratic efficiency simply by reference to time required to make regulatory decisions is problematic in any event. The greater amount of time required for decisionmaking by federal agencies in some circumstances has no relationship to the superior bureacratic efficiency of state agencies. In some circumstances, state agencies make regulatory decisions promptly because they have little choice but to approve a proposal before them without time-consuming analysis, since they lack the expertise necessary to evaluate the merits of various alternative resolutions of an issue. Such regulation without analysis can create social costs as great or greater than the social costs of regulatory delay. Thus, it is hazardous to generalize about the net social costs associated with the arguable bureaucratic inefficiency of federal regulation versus state regulation.

The final factor that mitigates in favor of local regulation is Justice Brandeis' famous reference to the benefits of permitting experimentation by states. There is less substance to this point than initially appears for two reasons. First, it is possible to experiment within the context of a regulatory scheme that is entirely federal. Indeed, limited-scope experimentation by federal regulatory agencies has become common. One of the many current examples is the two-year experimental program initiated by FERC on December 30, 1983, that authorizes six electric utilities in the Southwest to sell or exchange bulk power free of price regulation.[183] Federal regulation is not inconsistent with regulatory experimentation; it is inconsistent only with regulatory experimentation initiated on a decentralized basis by states. Still, decentralized regulatory experimentation probably does have advantages, simply because regulatory wisdom does not reside exclusively in federal agencies. At any time, state agencies may be led by more innovative officials than the federal agency with analogous regulatory authority. Thus, there is some merit to Justice Brandeis' point.

In an important sense, however, Justice Brandeis' famous statement extolling the virtues of allowing state experimentation leads back to the spillover model. He referred to the value of allowing states to "try novel social and economic experiments without risk to the rest of the country."[184] To the extent that a state regulation has the potential for interstate spillover, a state's decision to experiment with that regulation imposes risks on the rest of the country.

It is necessary to qualify the spillover model slightly to incorporate each of the three factors it does not reflect--superior expertise, relative bureaucratic inefficiency, and advantages of experimentation. In a given case, careful evaluation of one or more of these factors might make enough difference to decide a close case in favor of either state or federal regulation. In most situations, however, no one of these factors should play a major part in resolving a federalism/regulation controversy. Even less frequently should the combination of all three considerations be dispositive of the outcome of such a controversy, since one usually produces a preference for federal regulation and the other two produce a preference for state regulation.

3. Refining the Spillover Model

The spillover model can be supplemented by some evaluation of comparative expertise, comparative efficiency, and potential benefits of decentralized experimentation, but analysis of potential spillover effects of state regulation should dominate the determination of controversies over state versus federal regulation. Thus, the standard suggested earlier remains viable even after consideration of all factors identified by Holmes, Brandeis, and Gray: States should have the power to regulate conduct unless such regulation has the potential to create substantial disproportionate positive or negative interstate spillover.

This standard requires a two-part inquiry. First, the decisionmaker must identify and quantify the potential interstate spillover in some form, for example, millions of dollars of costs or foregone economic benefits to other states, or costs to other states in the form of additional cases of emphysema, loss of fisheries resources, or loss of vegetation. This can be an extremely challenging empirical exercise that requires many hours of effort by a team of scientists, engineers, and economists. Even with those resources, the attempt to quantify spillovers is likely to produce only a rough estimate.

Second, the potential interstate spillovers must be compared with the internal benefits to the state if it were allowed to impose the regulation in order to determine whether the spillover effects are so substantial that they justify federal preemption. In some cases, this second part of the analysis also is entirely empirical, for example, five million dollars in internal economic benefits does not justify ten million dollars in interstate spillover costs. In many cases, however, the second step is only partially empirical. If, for instance, the internal benefits appear in one form, say reduced economic costs, and the interstate spillover appears in another form, say loss of vegetation, the decisionmaker must place values on each that permit comparison. This is a difficult evaluative process. Congress and regulatory agencies must perform this type of task at least implicitly in making regulatory decisions today.[185] Indeed, executive branch agencies are required to compare costs and benefits of different types explicitly when they consider major regulatory actions involving health, safety, or the environment.[186]

Professor Foote argues that regulations can be divided into five classifications for purposes of determining whether they should be imposed on a national or state level.[187] She includes in the first classification product design and performance standards. These Stage One regulatory controls should be imposed through preemptive federal regulation because state standards at variance with national standards would force manufacturers either to forego economies of scale or to impose higher and more expensive standards on unwilling states. Stage Two regulation involves control of the production process (e.g., pollution and worker safety). Professor Foote argues that federal regulation should exist in this area but that states should remain free to impose higher standards where the impact of a particular production control is limited to the plant site. Thus, states should have little role in establishing pollution controls, but states should be permitted to supplement federal regulation in the area of workplace safety. Her third classification encompasses regulation of the process of exchange (i.e., information requirements). In this area (Stage Three), Professor Foote distinguishes between information requirements that affect product packaging, which should be imposed exclusively on a national level in order to permit free flow of packaged goods in interstate commerce, and information requirements that do not affect product packaging, where states should remain free to supplement federal regulation. Stage Four regulation involves conditions of sale, such as licensing requirements and restrictions on the sale of goods like fireworks and alcohol. Professor Foote argues that states should be the exclusive source of Stage Four regulations because their impacts are entirely in-state. Finally, Stage Five regulations determine permissible conditions of use. Since regulations of this type have only in-state impacts, they too should be imposed only by state authorities.

Professor Foote's five stage approach provides a useful starting point for analyzing regulations to determine the extent of the interstate spillovers they create. As she recognizes, however, each of the five broad categories contains such a wide variety of regulatory controls that operate in such differing factual contexts that her generalizations cannot be used as a substitute for careful analysis of the effect of each specific regulatory requirement.

The danger inherent in truncating the analysis of the geographic impact of a regulation by relying solely on a general categorization of regulatory controls is apparent from consideration of a single, current regulatory controversy--the issue of whether the federal government should coerce all states into establishing a uniform minimum age for purchasing alcoholic beverages. This regulatory control falls squarely in Professor Foote's Stage Four, as a regulation affecting condition of sale that should be imposed solely by states. This particular condition of sale has significant interstate spillovers, however. Anyone who has lived near the border of two states with different minimum ages for purchasing alcoholic beverages is familiar with the common practice of young people driving from their home state to the neighboring state with a lower drinking age to consume large quantities of spirits, and then returning home by car, sometimes a hundred miles or more, in an intoxicated state. The tragic carnage that frequently results from such ventures is not confined solely to the state with the lower drinking age. Indeed, upon close analysis, establishment of a minimum drinking age is an ideal candidate for uniform national preemptive regulation. Variations among state drinking laws have an enormous adverse impact on residents of neighboring states. Just to take one example, the combination of New York's minimum age of eighteen and Pennsylvania's minimum age of twenty-one has accounted for a large number of traffic fatalities involving Pennsylvania residents and on Pennsylvania highways every year for decades.

Up to this point, the analysis has been premised on the assumption that some federal institution must choose between state and federal regulation of an area of conduct. Regulatory authority over a field rarely is, or should be, allocated in this manner. Congress has the power to combine state and federal regulation in virtually any manner it chooses.[188]

It is often possible to divide specific regulatory powers and responsibilities between federal and state agencies based on an evaluation of the respective comparative advantages of federal and state agencies in exercising those powers and fulfilling those obligations. For instance, both the Clean Air Act[189] and Title I of the Natural Gas Policy Act[190] allocate most policymaking to a federal agency, but they allocate a high proportion of implementation and fact finding to state agencies. This type of creative or cooperative federalism can produce results superior to total federal regulation or total state regulation. A federal agency may have comparative advantages in expertise and national perspective, yet state agencies may have comparative advantages in the form of superior knowledge of local situations and ability to resolve factual controversies rapidly. This combination characteristic can make a division of authority desirable.

Because the goals of regulatory schemes vary greatly, it is not possible to generalize about the mixture of federal and state power most appropriate for a system of regulation accomplished through cooperative federalism. The best mixture can be determined only by analyzing the goals of the specific program and then allocating each element of regulatory power with considerable care to further those goals. Two principles should guide an effort of this type. First, states should not be assigned a regulatory role that permits them to make decisions that have the potential for substantial interstate spillover. This important principle limits considerably the nature of the roles that can be assigned state agencies. Enforcement, for instance, appears superficially to be a role suitable for assignment to states. Assigning the enforcement role exclusively to states can cause significant spillovers, however, since a state may find it desirable not to enforce a regulation if the effect of its failure to enforce is to lower the costs of compliance to its citizens and to impose burdens on out-of-state interests. Apparently, delegation to states of federal authority to enforce industrial discharge rules is having this effect at present. If a state does not enforce the rules, its industries have no compliance costs. Yet, the primary adverse affects of the illegal discharges fall on states downstream from the state that declines to enforce the rules.[191]

Second, particular interrelationships between state and federal authority in a system of mixed state and federal power can produce unfortunate results. For instance, the present interface between federal and state regulatory control over electric utilities has placed in jeopardy one of the most promising ways of reducing electricity costs--generating plants designed to serve several different states. The solution may be to reallocate state and federal authority in that area of regulation in a way that creates different relationships between state and federal regulatory agencies.[192] Federal and state regulatory authority must be merged carefully with particular attention to the potential for the interaction between state and federal agencies to distort the decisions of the regulated industry.

IV. Choosing the Institution Best Suited to Resolve Conflicts Between State and Federal Regulation

The goal of this section is to determine which of the three federal institutions--courts, Congress, or agencies--should have primary responsibility to resolve different types of federalism controversies. Courts have primary responsibility when they apply the commerce clause. In all other circumstances, courts assume the more limited role of determining congressional intent and reviewing agency actions, with Congress or an agency undertaking primary responsibility for resolving the conflict.

A. The Federal Courts

In resolving federal-state disputes under the commerce clause, courts consistently invalidate state regulations that clearly further state economic interests and undermine national economic interests. Courts almost invariably decline to invalidate state regulations that further state interests in health, safety, or the environment, even if those regulations cause great harm to national interests. As a result, the judiciary invalidates only a few, blatantly parochial discriminatory or protectionist state actions. It upholds many state regulations with substantial interstate spillovers.

The Supreme Court has chosen to limit the primary role of the judiciary in this area for very good reasons. Courts are institutionally ill suited to the task of balancing state interests of one type against national interests of another. The spillover model that should dominate resolution of federalism disputes involving conflicts between "incomparables," like safety and economics, requires a two-step decisionmaking process.

First, the decisionmaker must conduct extensive empirical research to determine the extent of potential in-state and out-of-state impact of a state regulation. Courts do not have the expertise in science, engineering, and economics necessary to conduct empirical research of this demanding nature. The only process available to courts to obtain access to the required expertise is a formal evidentiary hearing. Formal hearings have proven to be ineffective, time-consuming, and expensive mechanisms for assembling and evaluating complicated data.[193]

The second step in the decisionmaking process is to balance benefits of one type (e.g., environmental) with costs of another (e.g., economic). This is the type of balancing the Court prudently has refused to perform, characterizing it as "political." Nonconstitutional value judgments should be made by the most politically accountable branch of government, not the least.[194]

B. The Congress

Congress can determine the proper allocation of regulatory power by preempting or declining to preempt state power to regulate. Theoretically, Congress is the ideal institution to perform that task. It has virtually unlimited access to the expertise required to perform the necessary empirical studies, and its procedures are sufficiently flexible to take advantage of that expertise in a timely and cost-effective manner. As the most politically accountable federal institution, Congress also is best suited to make the value judgments implicit in balancing benefits of one type against costs of another type. Whenever possible, Congress should decide how to allocate regulatory power between state and federal agencies, and other institutions should continue to defer completely to such congressional decisions. Congress may resolve many federalism controversies wrongly, but its institutional characteristics give it the highest probability of resolving such issues in a manner that maximizes the social welfare of the nation as perceived by the people.

Congress is subject to substantial practical limits on its ability to resolve federalism issues in regulation, however. Its agenda is so crowded that it often must delegate to agencies many of the fundamental policy decisions inherent in formulating and implementing regulatory schemes. It rarely has time to focus on preemption issues, and even when it does, it almost never addresses those issues in detail. Thus, at most, Congress can be expected only to indicate some general attitude toward state regulation of a field that is subject to federal regulation. It cannot be expected to address every form of state regulation and every type of potential tension between state and federal regulatory goals. As a result, it is inevitable that Congress will not explicitly ban many forms of state regulation that substantially compromise important national goals, including many state regulatory actions that it would prohibit if it had the time and the foresight necessary to anticipate those actions and to evaluate their relationship to national goals. Congress cannot be relied upon as a sufficient source of constraints on state regulatory actions with substantial interstate spillovers. The need for a supplemental source of contraints on such state actions is particularly acute today because of the Court's increasing tendency to hold state regulation preempted only when congressional intent to do so is clear and explicit.

C. Federal Agencies

Federal agencies have the potential to play an essential supplementary role to the judiciary and Congress in invalidating state regulations that create substantial interstate spillovers. The Court has affirmed many federal agency actions that preempt state regulations, and its recent decisions seem to invite increased vigilance by agencies in determining whether state regulations so conflict with national goals that agency preemption is justified.

Dean Verkuil and Professor Black have identified several characteristics of federal agencies that make them well suited to the task of allocating regulatory responsibility between themselves and state agencies when Congress has not explicitly allocated that responsibility by statute.[195] As long as the agency action is undertaken through informal rulemaking procedures subject to a relatively demanding standard of judicial review, federal agencies should have the power to preempt state regulations that affect their areas of regulatory responsibility based on a finding that the state regulation has the potential to create substantial, disproportionate interstate spillovers.

First, any federal agency has access to the in-house expertise required to perform the empirical analysis essential to determine whether a state regulation that affects its areas of regulatory responsibility has the potential to create substantial interstate spillover. Federal agencies also have available informal rulemaking procedures that are well suited to gathering and evaluating data from external sources.[196]

Second, while agencies are not as politically accountable as Congress, their political and constitutional legitimacy is sufficiently well established that they should be permitted to make the value judgments necessary to determine whether an interstate spillover of one type is so great that it outweighs an in-state benefit of another type. Indeed, they are entrusted to make similar value judgments regularly in the course of implementing the broad standards that usually accompany congressional delegations of regulatory power. Agencies are not directly accountable to the electorate, but agencies are indirectly accountable to the electorate because their actions are subject to regular review by both elected branches of government.[197]

Third, the procedural safeguards of informal rulemaking give states an ample opportunity to be heard when any federal agency considers a rule with preemptive effect. Each state should have notice of the proposed preemptive rule and an opportunity to present evidence that the in-state benefits of the state regulation at issue are so great and its interstate spillovers so modest that it should not be preempted.[198] Moreover, a federal agency can and should encourage state agencies through informal communications to adopt regulatory approaches that minimize interstate spillovers before it initiates formal proceedings to consider preemption of a state regulation.

Finally, federal agency power to preempt does not present a serious threat to the values of federalism. A federal agency is likely to exercise considerable self-restraint in preempting state regulations, and any preemptive rule issued by a federal agency is subject to review in a federal court. Because of the importance of the values of federalism at stake, courts should exercise heightened vigilance in reviewing preemptive agency rules to ensure (1) that the agency uses procedures that afford affected states adequate notice and opportunity to be heard; (2) that the preemptive effect of the rule is no broader than necessary; and (3) that the agency's conclusion that the state regulation has the potential to create substantial disproportionate interstate spillovers is supported by substantial evidence and an adequate statement of reasons.[199]

V. Application of the Spillover Model

A. Three Regulatory Disputes

A federal agency should approach a controversy involving the potential for federal agency preemption of state regulation with particular sensitivity to the important values of federalism raised by all such controversies. This heightened sensitivity to the legitimate interests of affected states should manifest itself in two ways. First, the agency should be particularly careful to adopt procedures that permit affected states to participate effectively in the procedures leading to the resolution of the controversy. Second, the federal agency should not preempt the state regulation unless it finds that the state regulation creates substantial spillovers in other states. An analysis of three current federalism/regulation controversies will help to illustrate the nature of the procedural and substantive approach that federal agencies should take in resolving all such controversies.[200]

1. Chemical Labeling Standards

The first illustrative example is the Occupational Safety and Health Administration's (OSHA) rule establishing national standards for chemical labeling and purporting to preempt all state regulations that vary from the federal rule.[201] OSHA took this preemptive action through use of informal rulemaking procedures. Since informal rulemaking provides affected states ample notice and opportunity to participate effectively in the controversy, the agency's action fulfills the requirement that federal agencies provide affected states sufficient procedural safeguards when they resolve a controversy that implicates the values of federalism.

The OSHA rule indicates, however, that the agency paid little attention to the need for careful substantive evaluation of the need for federal preemption of state regulatory authority over chemical labeling. OSHA established uniform preemptive standards in three different areas: (1) package labeling of chemical products, (2) contents of signs in plants warning workers concerning the characteristics of chemicals used in the plant, and (3) requirements for training employees to handle chemicals safely. The first of these, product labeling, involves substantial interstate spillovers. An inconsistent state regulation concerning the labels that must be affixed to products that are marketed nationally inevitably would affect adversely the cost of chemicals in other states. Thus, this area of conduct is a good candidate for preemptive federal regulation.

The other two areas of conduct covered by the OSHA rule have no apparent spillover effects in other states. If a state imposes particularly stringent requirements for in-plant warning signs or employee training programs, the burdens of its regulations will fall exclusively on in-state interests. The state rule may be foolish, in the sense that it imposes burdens on manufacturers in the state greater than the benefits derived by employees in the state, but a state's unwise decisions should be of no concern to the federal government unless those decisions have a significant adverse effect on out-of-state interests.

2. Intrastate Rail Rates

The second example is the Interstate Commerce Commission's (ICC) recent decision preempting the Texas Railroad Commission's (TRC) authority to regulate intrastate rail rates.[202] ICC found many of TRC's procedures and substantive standards for regulating intrastate rail rates inconsistent with the standards mandated by the Rail Act of 1980.[203] In many respects, TRC was impairing the ability of railroads to obtain adequate revenues and to respond rapidly to changes in market forces with flexible rate structures and special contract rates.

ICC's preemption of TRC's authority over intrastate rates is clearly justified substantively by application of the interstate spillover model. The principal reason Congress passed the Rail Act of 1980 was to permit railroads to begin earning revenues adequate to allow them to remain a viable factor in the nation's transportation policy. Congress specifically found that state regulatory policies of the type that TRC was continuing to pursue adversely affected the entire nation's rail system by denying railroads access to revenues sufficient to permit them to invest in modern equipment and to maintain their existing equipment and roadbeds.

Whether ICC was sufficiently sensitive to Texas' procedural rights presents a closer question. ICC established some of the regulatory standards that it applied against TRC in rulemaking proceedings. There can be no serious question that Texas had adequate notice and opportunity to participate in the proceedings that led to the adoption of these standards. ICC established other standards that it applied to TRC through adjudications concerning the practices of other states, however. Texas had no opportunity to participate in these proceedings.

An agency can apply a "rule" resulting from an adjudication to another party in a subsequent adjudication if that "rule" is purely a product of agency policymaking independent of any factual findings.[204] An agency cannot apply a "rule" resulting from an adjudication to a person who was not a party to that adjudication, however, if the validity of the rule depends on a specific set of facts.[205] Thus, it is not at all clear whether ICC provided TRC adequate notice and opportunity to participate in the proceedings that led to the establishment of some of the standards that had the ultimate effect of preempting TRC's regulatory authority. Federal agencies should indicate their sensitivity to the values of federalism implicated in preemption controversies both in their substantive approach to preemption issues and in the procedures they select to resolve those issues. ICC may have been remiss in failing to provide Texas an opportunity to participate in all of the proceedings in which ICC determined that TRC's regulatory practices failed to meet federal standards.

3. Municipal Taxi Service

The third illustrative example is the Federal Trade Commission's (FTC) recent effort to ban the arguably anticompetitive methods of regulating taxis used by New Orleans and Minneapolis.[206] Because FTC is proceeding against each city through adjudication, it has provided each adequate notice and an opportunity to participate in the proceedings leading to resolution of the controversy. It seems highly unlikely, however, that FTC will be able to establish a substantive need to preempt the regulatory controls imposed by the two cities. FTC should have little difficulty showing that restricting the number of taxis that can operate in a city harms the city's consumers of taxi service. That finding alone should not be sufficient to support federal preemption, however. FTC should be required to prove that the regulatory controls imposed by New Orleans and Minneapolis produce substantial interstate spillovers. The federal government has no legitimate stake in a state or locality's decision to adopt a regulatory policy that harms its own residents. A city's decision to limit the number of taxis it permits on its streets has no apparent interstate impact sufficient to justify federal preemption.

B. Federal Deregulation

The federal government has begun a process of reducing the extent of federal regulation of a wide variety of conduct. In particular, the federal government gradually is permitting market forces to displace pervasive federal regulation of competitive relationships in important sectors of the economy (e.g., energy, telecommunications, and transportation). This process of federal deregulation is being accomplished in each sector through a combination of legislative action directly eliminating some regulatory powers previously exercised by federal agencies[207] and administrative action declining to exercise other regulatory powers previously delegated to federal agencies on a discretionary basis.[208]

A decision to eliminate federal regulation of an aspect of conduct can be motivated by either of two considerations--an intent to leave that aspect of conduct entirely free of regulatory control from any source or an intent to shift regulatory control of that aspect of conduct from federal to state agencies. The first basis for a federal deregulation decision suggests that Congress or the agency, through its decision to remove a federal regulatory control, intended simultaneously to preclude state and local agencies from exercising similar controls. The Supreme Court drew this inference in Ray v. Atlantic Richfield Co.[209] based on a sequence of regulatory actions and regulatory decisions declining to act by the Coast Guard. The second basis for a federal deregulation decision, however, is entirely consistent with some forms of state regulation of conduct previously regulated at the federal level. Indeed, the removal of prior federal controls in this circumstance may indicate an intent to permit states to exercise regulatory controls that previously were held to be inconsistent with federal regulation.

The initial problem in each case is to determine whether Congress or the agency intended primarily to preclude all regulation of the conduct or to transfer regulatory authority over the conduct to states when it eliminated or declined to exercise a preexisting federal regulatory power. This first step rarely should conclude the analytical process leading to a decision that a specific state exercise of regulatory power is, or is not, preempted by a federal deregulation decision, however. Even if Congress concludes that states should be free to exercise regulatory power over an area of conduct previously regulated exclusively by federal authorities, a state rarely, if ever, should have unlimited discretion to impose any regulation it perceives to be in its best interests. As Justice Holmes emphasized,[210] there are many circumstances in which a state has a powerful incentive to impose a regulation that advances its parochial interests at the nation's expense. Thus, some federal institution--Congress, the federal courts, or federal agencies--must engage in the difficult process of determining whether a specific exercise of state power in an area of federal deregulation so interferes with national goals that the state regulation should be preempted.

Congress should indicate its intent with respect to state regulatory authority clearly and explicitly when it eliminates a federal regulatory control or authorizes a federal agency to do so. In this context, however, Congress experiences particular difficulty anticipating and providing for all of the ways in which state authorities may attempt to impose new regulatory requirements in the wake of a partial federal withdrawal from a field in which a federal agency previously exercised extensive regulatory powers.[211] If Congress does not address the issue of the preemptive effect of a federal decision to remove a regulatory control in the detailed manner necessary to determine whether a specific state regulatory power is consistent with a federal decision to deregulate, the federal agency with residual authority in that area of regulation should address that issue. Whether a state exercise of regulatory power is coincident with continued federal regulation or is undertaken in the aftermath of a partial federal withdrawal from the field, the federal agency with expertise in the area affected by that state regulation has the same set of comparative advantages over federal courts in determining if such a state regulation is consistent with the national interest. If Congress and federal agencies decline to resolve preemption issues flowing from a federal deregulation decision, they force courts to resolve a host of controversies for which courts are poorly suited.[212]

A federal agency's determination whether a federal deregulation decision is consistent or inconsistent with a specific exercise of state regulatory power should be guided by the same considerations that should govern other federal agency preemption decisions. The agency's substantive decision should be based primarily on its analysis of the extent of the potential interstate spillover effect of the state regulation. Procedurally, the federal agency should be particularly sensitive to the need to permit all states potentially affected by a preemption decision to participate effectively in the proceeding.

VI. Conclusion

It is in the national interest to permit each state to adopt its own regulatory policy to the extent that such state decisions affect only, or predominantly, the interests of state residents. States should not be permitted, however, to make regulatory decisions that create substantial interstate spillovers. Federal courts have the power, through application of the commerce clause, to limit each state's ability to further its interests at the expense of residents of other states. This judicial power is severely limited, however, by the institutional characteristics of courts. Courts are not very efficient at conducting the careful empirical investigation that is often necessary to determine whether, and to what extent, one state's regulation has adverse effects on other states. Moreover, courts should not be asked to make the policy decisions implicit in many nation-state regulatory conflicts involving objectively incomparable goals. Congress has the power under the supremacy clause to limit the ability of each state to adopt regulatory policies that create substantial interstate spillovers. Congress' power is also severely limited, however, by its institutional characteristics. It does not have enough time or foresight to preempt all state regulatory actions that harm the national interest.

Federal regulatory agencies have characteristics that render them suitable institutions to play an important role in supplementing the power of Congress and the courts to limit the ability of states to further their parochial interests at the nation's expense. Agencies have more time to devote to consideration of nation-state regulatory disputes than does Congress. Agencies are more politically accountable than courts, and they have available procedures for conducting careful empirical studies far superior to the procedures available to courts. Moreover, agencies have a significant comparative advantage over both Congress and courts in their ability to understand the dimensions of the regulatory disputes that arise in each of their areas of specialized knowledge and responsibility.

Federal agencies should be alert to the need to preempt state regulatory rules when those rules have a substantial adverse effect on the nation. Federal agencies also should be sensitive, however, to the important values of federalism that are at stake whenever a federal agency considers preemption of a state or local regulation. They should evidence that sensitivity through both the procedures they adopt to resolve such controversies and the substantive approach they take in deciding whether to exercise their preemptive power. A federal agency should provide each affected state notice and an opportunity to participate effectively in any proceeding in which it considers preemption of a state regulation. A federal agency should not preempt a state regulation unless the agency finds that the state regulation creates substantial interstate spillovers.

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1. O. W. Holmes, Law and the Court, in Collected Legal Papers 291, 295-96 (1920).

2. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

3. State Intrastate Rate Authority-Texas, I.C.C. Decision, Ex Parte No. 388 (Apr. 13, 1984).

4. 48 Fed. Reg. 53,280 (1983) (to be codified at 29 C.F.R. § 1910.1200).

5. See N.Y. Times, May 10, 1984, § A, at 25.

6. Highway Safety Amendments, Pub. L. No. 98-363, § 158, 98 Stat. 435, 437-39 (1984).

7. See Arkansas Elec. Power Coop. v. Arkansas Pub. Serv. Comm'n, 103 S. Ct. 1905 (1983).

8. See H.R. 5766, 98th Cong., 2d Sess. (1984).

9. See Silkwood v. Kerr-McGee Corp., 104 S. Ct. 615 (1984); Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 103 S. Ct. 1713 (1983).

10. L. Tribe, American Constitutional Law 319 (1978).

11. H. P. Hood & Sons v. Du Mond, 336 U.S. 525, 537-39 (1949).

12. Id. at 533.

13. See New England Power Co. v. New Hampshire, 102 S. Ct. 1096, 1100 (1982); Maryland v. Louisiana, 451 U.S. 725, 760 (1981); Pennsylvania v. West Virginia, 262 U.S. 553 (1923).

14. Hughes v. Oklahoma, 441 U.S. 322 (1979).

15. Maryland v. Louisiana, 451 U.S. 725 (1981).

16. City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).

17. See J. Ely, Democracy and Distrust 84 (1980). See also J. Nowak, R. Rotunda, & J. Young, Constitutional Law 250 (1978).

18. See Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).

19. 434 U.S. 429 (1978).

20. Id. at 447.

21. Id. at 446-47.

22. Id. at 447. The Court's decision in Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981), underlines the extreme difficulty courts experience in determining the constitutional validity of state statutes that putatively further interests in health or safety on the basis of either: (1) the evidence purporting to show a link between the statute and health or safety; or (2) the motives of the legislature when it enacted the statute. In Kassel, the Court invalidated an Iowa statute that limited trucks to a length of 60 feet. The decision to hold the statute unconstitutional under the commerce clause was made by a 6-3 vote of the Justices, but no theory was supported by a majority of the Court.

A four Justice plurality held the length limit unconstitutional principally on the basis of their belief that Iowa's interest in safety was "illusory" because the evidence presented at trial was not sufficient to establish a link between the 60 foot limit and highway safety. Id. at 667-71. Two Justices concurred with the result reached by the plurality but explicitly rejected the basis for decision set forth in the plurality opinion. The concurring Justices rejected the theory that the state of the evidentiary record with respect to the safety rationale is dispositive because such an approach makes the constitutionality of statutes turn on the "vagaries of litigation." Id. at 680. The concurring Justices held the statute constitutional based solely on their belief that the interaction between the legislature and the governor that produced the 60 foot limit indicated that the legislation was motivated by an impermissible desire to divert interstate trucks to other states, rather than by a sincere desire to further safety interests. Id. at 681-85.

Three dissenting Justices disagreed with both the theory of the plurality and the theory of the concurrence. The dissenting Justices disagreed with the plurality on the basis that the state presented sufficient evidence to establish a relationship between truck length and highway safety and on the basis that safety benefits resulting from small increments in length never can be established clearly in evidence. Id. at 696-98. They disagreed with the concurrence on the basis that it is impossible to determine the "actual purpose" of a legislative body because legislative action is always motivated by many reasons and different legislators vote for a variety of different reasons. Id. at 702-03.

23. 303 U.S. 177 (1938).

24. Id. at 182.

25. Id. at 190-96.

26. 434 U.S. at 445 n.20.

27. See infra text accompanying notes 113-21.

28. Cooley v. Board of Wardens, 53 U.S. (1 How.) 229 (1851).

29. 294 U.S. 511 (1935).

30. *Id.* at 519-20.

31. 294 U.S. at 522.

32. 336 U.S. 525 (1949).

33. *Id.* at 527-29.

34. *Id.* at 545.

35. *See* L. Tribe, *supra* note 10, at 340-42. Professor Tribe states: "State regulations seemingly aimed at furthering public health or safety, or at restraining fraudulent or otherwise unfair trade practices, are less likely to be perceived as 'undue burdens on interstate commerce' than are state regulations evidently seeking to maximize the profits of local business." *Id.* at 340.

36. 340 U.S. 349 (1951). *See also* A & P Tea Co. v. Cottrell, 424 U.S. 366 (1976); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977).

37. 340 U.S. at 350.

38. *Id.* at 352-53.

39. *Id.* at 356.

40. *Id.* at 353.

41. *Id.* at 354-56.

42. *Id.* at 375 (Justice Black was joined in his dissenting opinion by Justices Black and Minton).

43. *See, e.g.*, C.A. Bradley v. Public Utility Comm'n, 289 U.S. 92 (1933); Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 103 S. Ct. 1713 (1983).

44. 267 U.S. 307 (1925).

45. *Id.* at 316.

46. 289 U.S. 92 (1933).

47. 397 U.S. 137, 142 (1970).

48. *See* Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960); Southern Pacific Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761 (1945).

49. *See, e.g.*, Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960); Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959); Southern Pacific Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761 (1945).

50. *See*, *e.g.*, Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960); Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959).

51. *See*, *e.g.*, Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960); Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959); Southern Pacific Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761 (1945).

52. 325 U.S. 761 (1945).

53. *Id.* at 763, 771-72.

54. *Id.* at 771-72.

55. *Id.* at 775.

56. *Id.* at 783.

57. *Id.* at 784 (Black, J., dissenting).

58. 359 U.S. 520 (1959).

59. *Id.* at 523.

60. *Id.* at 525-26.

61. *Id.* at 526.

62. *Id.* at 529-30.

63. *See*, *e.g.*, Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960). *See also* L. Tribe, *supra* note 10, at 339 ("In recent cases, the Supreme Court has refused to invalidate otherwise nondiscriminatory and nonexclusively local regulations absent a showing of *actual* conflict among the rules of different states . . . ." (emphasis in original)).

64. 434 U.S. 429 (1978). *See supra* text accompanying notes 19-22, 26-27.

65. 434 U.S. at 447.

66. *Id.* at 444.

67. *Id.* at 447.

68. *Id.* at 443.

69. *Id.* at 444 (quoting *Bibb*, 359 U.S. at 524).

70. *Id.* at 449 (Blackmun, J., dissenting).

71. 303 U.S. 177 (1938). *See supra* text accompanying notes 23-27.

72. 303 U.S. at 182.

73. *E.g.*, Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 445 n.20 (1978).

74. 437 U.S. 617 (1978).

75. *Id.* at 629 (Justice Rehnquist, joined by Chief Justice Burger, dissented).

76. 362 U.S. 440 (1960).

77. *Id.* at 618-19.

78. *Id.* at 629.

79. 15 Or. App. 618, 517 P.2d 691 (1973).

80. 517 P.2d at 695, 705.

81. 517 P.2d at 698.

82. *E.g.*, City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).

83. *E.g.*, Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).

84. *E.g.*, Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978).

85. *See supra* text accompanying note 12.

86. L. Tribe, *supra* note 10, at 329-31, 340.

87. *See supra* text accompanying notes 23-27.

88. *See* Note, *Preemption as a Preferential Ground: A New Canon of Construction*, 13 Stan. L. Rev. 208 (1959).

89. Gibbons v. Ogden, 22 U.S. (1 Wheat.) (1824).

90. *See* L. Tribe, *supra* note 10, at 386; J. Nowak, R. Rotunda & J. Young, *supra* note 17, at 267-68; M. Forkosch, Constitutional Law 263 (1969).

91. 331 U.S. 218 (1947).

92. *Id.* at 230 (citations omitted).

93. *E.g.*, Silkwood v. Kerr-McGee Corp., 104 S. Ct. 615, 621 (1984); Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 103 S. Ct. 1713, 1722 (1983).

94. *See*, *e.g.*, Jones v. Rath Packing Co., 430 U.S. 519 (1977); Northern Natural Gas Co. v. State Corp. Comm'n, 372 U.S. 83 (1963). *See also* L. Tribe, *supra* note 10, at 384-85.

95. *See*, *e.g.*, FPC v. State Corp. Comm'n, 363 F. Supp. 522, *aff'd*, 415 U.S. 961 (1974). *See also* L. Tribe, *supra* note 10, at 377-78.

96. *See*, *e.g.*, Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978). *See also* L. Tribe, *supra* note 10, at 386-87.

97. 103 S. Ct. 1905 (1983).

98. *See* FPC v. Florida Power & Light Co., 404 U.S. 453 (1972); FPC v. Southern Cal. Edison Co., 376 U.S. 205 (1964); Public Utilities Comm'n v. Attleboro Steam & Elec. Co., 273 U.S. 83 (1927). *See also* Flax, *Has the Supreme Court Pulled the Rug from Under the FERC's Electric and Natural Gas Regulation?*, 4 Energy L.J. 251 (1983); Anderson, *The Role of States in Energy Regulation*, 4 Energy L.J. 255 (1983).

99. 103 S. Ct. at 1911.

100. *Id.*

101. *Id.* at 1913, 1915.

102. *Id.* at 1913-14.

103. *Id.* at 1919-21.

104. 103 S. Ct. 1713 (1983).

105. *Id.* at 1726.

106. *Id.* at 1727.

107. *Id.* at 1727-28.

108. *Id.* at 1729.

109. *Id.* at 1731.

110. *Id.* at 1732.

111. *Id.* at 1726.

112. 104 S. Ct. 615 (1984).

113. *Id.* at 620.

114. *Id.* at 619.

115. *Id.* at 622.

116. *Id.*

117. *Id.* at 623.

118. *Id.* at 625.

119. *Id.*

120. *Id.* at 626.

121. *Id.*

122. *Id.* at 628, 635.

123. 435 U.S. 151 (1978). *See also* NLRB v. Nash-Finch Co., 404 U.S. 138 (1971).

124. 435 U.S. at 158-60.

125. *Id.* at 161.

126. *Id.* at 163.

127. *Id.* at 172-80.

128. *Id.* at 178.

129. *Id.* at 171-72.

130. *Id.*

131. *See* The Minnesota Rate Cases, 230 U.S. 431 (1912); Second Employers' Liability Cases, 223 U.S. 51 (1911).

132. 234 U.S. 342 (1914). This case decided suits brought by three railroads to set aside an order of the ICC. *Id.* at 345.

133. *Id.* at 345-47.

134. *Id.* at 349.

135. *Id.* at 350.

136. *Id.*

137. Black, *Perspectives on the American Common Market*, in Regulation, Federalism and Interstate Commerce (A. Tarlock ed. 1981).

138. Verkuil, *Preemption of State Law by the Federal Trade Commission*, 1976 Duke L.J. 225.

139. Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J. L. & Econ. 337 (1972); Stigler, *The Theory of Economic Regulation*, 2 Bell J. Econ. & Mgmt. Sci. 3 (1971).

140. Verkuil, *supra* note 138, at 225.

141. *Id.* at 230-31, 243.

142. *Id.* at 231-33, 243-47.

143. *Id.* at 243-46.

144. *Id.* at 246.

145. See, e.g., Troy & Young, Federal Trade Commission Preemption of State Regulation: A Reevaluation, 12 Suffolk U. L. Rev. 1248 (1978).

146. 612 F.2d 658 (2d Cir. 1979), reh'g en banc denied, 628 F.2d 755 (1980).

147. 612 F.2d at 666-76.

148. Id. at 667.

149. Id. Similarly, in American Optometric Ass'n v. FTC, 626 F.2d 896 (D.C. Cir. 1980), the D.C. Circuit reviewed an FTC rule purporting to prohibit virtually all state law restrictions on advertising prescription glasses and eye examinations. The court remanded the rule because the Supreme Court's decisions in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumers Council, 425 U.S. 748 (1976) (holding that state prohibitions on advertising prescription glasses violate the first amendment) and Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (holding that state prohibitions on advertising professional services violate the first amendment) had dramatically reduced the need for the FTC's preemptive rule. The court saw no need to address the serious issues of federalism and the scope of FTC's preemptive authority raised by the rule without first providing FTC an opportunity to reassess the need for the rule on remand. The court emphasized that a preemptive rule cannot be broader than evidence of need supports. Id. at 911-13.

150. See supra text accompanying notes 98-104.

151. 103 S. Ct. 1905, 1912 n.7 (1983).

152. South Carolina State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177 (1938). See generally G. Gunther, Constitutional Law: Cases and Materials 352-57 (10th ed. 1980). See also J. Nowak, R. Rotunda, & J. Young, supra note 17, at 243-44.

153. Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 103 S. Ct. 1905, 1912 (1983); Ray v. Atlantic Richfield Co., 735 U.S. 751, 178 (1978); NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971).

154. 426 U.S. 833 (1976).

155. See Schwartz, National League of Cities v. Usery Revisited--Is the Quondam Constitutional Mountain Turning Out To Be Only A Judicial Molehill?, 52 Fordham L. Rev. 329-30; see also Rotunda, The Doctrine of Conditional Preemption And Other Limitations On Tenth Amendment Restrictions, 132 U. Pa. L. Rev. 289, 290-91.

156. See Gelfand, The Burger Court and the New Federalism, 21 B.C.L. Rev. 763 (1980).

157. 456 U.S. 742 (1982). See also Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).

158. 456 U.S. at 759.

159. *Id.* at 760.

160. *Id.* at 765.

161. *Id.* at 759.

162. *See, e.g.*, Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. L. & Econ. 23 (1983); Ackerman, *Does Federalism Matter? Political Choice in a Federal Republic*, 89 J. Pol. Econ. 152 (1981); A. Hirschman, Exit, Voice, and Loyalty (1970); Tiebout, *A Pure Theory of Local Expenditures*, 64 J. Pol. Econ. 416 (1956).

163. Gray, *Regulation and Federalism*, 1 Yale J. Reg. 93 (1983).

164. *Id.* at 94.

165. *Id.* at 95.

166. *Id.* at 96-110.

167. *See* C. Goetz, Law and Economics: Cases and Materials 8-32 (1983); A. Rappoport, N-Person Game Theory (1970); H. Raiffa & R. Luce, Games and Decisions 94-102 (1967); A. Rappoport & A. Chammah, Prisoner's Dilemma (1965).

168. *See* South Carolina State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177 (1938); J. Ely, *supra* note 17, at 84; J. Nowak, R. Rotunda, & J. Young, *supra* note 17, at 243-44, 250.

169. *See, e.g.*, E. Drew, Politics and Money: The New Road to Corruption (1983); Pierce & Shapiro, *Political and Judicial Review of Agency Action*, 59 Tex. L. Rev. 1175, 1195-1219 (1981); Levine & Plott, *Agenda Influence and Its Implications*, 63 Va. L. Rev. 561 (1977).

170. *See* Benham, *supra* note 139; *see also* Stigler, *supra* note 139.

171. *See, e.g.*, Pierce, *Reconsidering the Roles of Regulation and Competition in the Natural Gas Industry*, 97 Harv. L. Rev. 345 (1983); Pierce, *Natural Gas Regulation, Deregulation, and Contracts*, 68 Va. L. Rev. 63 (1982).

172. $\frac{0.8 \text{ X } \$10{,}000{,}000}{0.8} = \$10{,}000{,}000$

173. $\frac{0.8 \text{ X } \$10{,}000{,}000}{0.2} = \$40{,}000{,}000$

174. $\frac{0.2 \text{ X } \$10{,}000{,}000}{0.8} = \$\ 2{,}500{,}000$

175. *See* Coase, *The Problem of Social Cost*, 3 J. L. & Econ. 1 (1960).

176. U.S. Const., art. I, § 10, cl. 3.

177. *See* Easterbrook, *supra* note 162, at 33-40, 43-45.

178. Judge Breyer and Dean MacAvoy identify another good example of a state regulatory decision that frequently has the potential to create or

eliminate positive geographic spillovers less extreme than those implicated by the decision to permit a permanent nuclear waste storage facility in a state--the decision whether to permit an electric generating plant that will serve one state to be located in another state. S. Breyer & P. MacAvoy, Energy Regulation by the Federal Power Commission 93 (1974).

179. See, e.g., Brady & Maloley, Acid Rain: Science, Politics, Economics, 31 Fed. Bar News & J. 59 (1984).

180. See, e.g., Weyerhaeuser Co. v. Costle, 590 F.2d 1011, 1042 (D.C. Cir. 1978).

181. See Senate Comm. on Governmental Affairs, Study on Federal Regulation vol. IV, Delay in the Regulatory Process, S. Doc. No. 95-72, 95th Cong., 1st Sess. (1977). See also Pierce, The Choice Between Adjudicating and Rulemaking for Formulating and Implementing Energy Policy, 31 Hastings L.J. 1, 5-14 (1979).

182. See Pierce, supra note 181, at 21-30.

183. See FERC Order issued December 30, 1983 in Docket No. ER84-155, summarized in Inside FERC (Jan. 9, 1984).

184. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

185. See Pierce, Encouraging Safety: The Limits of Tort Law and Government Regulation, 33 Vand. L. Rev. 1281 (1980).

186. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981). See generally Symposium on Presidential Intervention in Administrative Rulemaking, 56 Tul. L. Rev. 811 (1982).

187. Foote, Beyond the Policies of Federalism: An Alternative Model, 1 Yale J. Reg. 217, 219-221 (1984).

188. See supra text accompanying notes 113-21.

189. 42 U.S.C. §§ 7401-7642 (1983).

190. 15 U.S.C. §§ 3301-3432 (1982); 42 U.S.C. § 7255 (1983).

191. See Env't Rep. (BNA) 1945-46.

192. See Pierce, The Regulatory Treatment of Mistakes in Retrospect: Canceled Plants and Excess Capacity, 132 U. Penn. L. Rev. 497 (1984).

193. See Boyer, Alternatives to Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues, 71 Mich. L. Rev. 111 (1972); Hamilton, Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking, 60 Cal. L. Rev. 1276 (1976). See also Pierce, supra note 181.

194. See Pierce & Shapiro, supra note 168.

195. Verkuil, *supra* note 138; Black, *supra* note 137.

196. *See* Pierce, *supra* note 181; Boyer, *supra* note 193.

197. *See* Pierce & Shapiro, *supra* note 168. *See also* Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573 (1984).

198. *See* Verkuil, *supra* note 138, at 243, 245-46.

199. *See id.* at 246-47.

200. For additional illustrative applications of the spillover model in the antitrust context, see Easterbrook, *supra* note 162, at 46-49.

201. 48 Fed. Reg. 53,280 (1983). I have borrowed much of the description and analysis of this controversy from Professor Foote. *See* Foote, *supra* note 186, at 221-24.

202. State Intrastate Rail Rate Authority--Texas, I.C.C. Decision, *Ex Parte* No. 388 (Apr. 13, 1984).

203. Pub. L. No. 96-448, 94 Stat. 1895, 49 U.S.C. § 10101 (1984).

204. *See* NLRB v. Wyman Gordon Co., 394 U.S. 759 (1969).

205. *See* Shell Oil Co. v. FERC, 707 F.2d 230 (5th Cir. 1983).

206. *See* N.Y. Times, May 10, 1984, § A, p. 25.

207. *See* Pierce, *supra* note 171.

208. *See* O'Donnell & Glassman, *After the EPAA: What Oil Allocation and Pricing Authorities Remain?*, 2 Energy L.J. 33 (1981).

209. 435 U.S. 151 (1978). *See supra* text accompanying notes 94-96.

210. O. W. Holmes, *supra* note 1.

211. *See, e.g.*, Pierce, *supra* note 171.

212. *See generally* O'Donnell & Glassman, *Constitutional Constraints on State Efforts to Control Oil Supplies and Prices*, 5 Energy L.J. 77 (1984).

BACKGROUND REPORT FOR RECOMMENDATION 84-6

INTERNATIONAL TRADE COMMISSION RELEASE OF CONFIDENTIAL INFORMATION UNDER PROTECTIVE ORDERS IN ANTIDUMPING AND COUNTERVAILING DUTY PROCEEDINGS

REPORT

to

THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

under ACUS Contract CU 1408102 8

This report was prepared for consideration by the Administrative Conference of the United States. It represents only the views of the authors and not necessarily those of the Conference. This report is not published, and should not be quoted or attributed without reference to this disclaimer.

Robert A. Anthony
Professor of Law

James E. Byrne
Assistant Professor of Law

George Mason University
School of Law
3401 North Fairfax Drive
Arlington, Virginia 22201

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This report will examine the protective orders practice of the United States International Trade Commission in antidumping and countervailing duty proceedings.

The Trade Agreements Act of 1979 authorizes the International Trade Commission to make available, under protective order, confidential business information that is submitted to it in such proceedings. Under this authority, the ITC releases the confidential data of one party to counsel for other parties. In almost all cases those other parties, to whose counsel the confidential information is disclosed, are business competitors of the party that submitted the information. The only companies whose confidential information is disclosed are those American companies that complain of injury from the alleged unfair import practices. Confidential data concerning their prices and cost of production can be released to counsel for both their domestic competitors and their foreign competitors.

One concern is that such information will, willfully or inadvertently, be passed along by a lawyer to his client, who then can make competitive use of it against the American company that submitted it. Though there is little hard evidence of such improper disclosure, there is much suspicion that it occurs.

A more significant concern is that the mere possibility of wrongful disclosure generates a chilling effect which, by discouraging voluntary submission of essential information, hampers the International Trade Commission's ability to do its job. The ITC's responsibility is to determine whether the allegedly unfair imports are threatening or causing "injury" -- not simply injury to individual American companies as such, but injury to the entire "industry" affected by competition from the imports. If American companies fear that their confidential business data will leak to their competitors, and for that reason refuse to submit such information, the Commission will be unable to the assemble complete industry figures it needs for a soundly-based determination of injury.

This report will assess these and related concerns arising from the ITC's protective orders practice, and will consider ways to alleviate them.

Pointing in another direction are proposals to broaden the classes of data disclosed under ITC protective orders in these cases; they too will be discussed here.

It will be recommended that the ITC establish by regulation a series of measures intended to reduce risks, protect submitters and safeguard the process of making disclosure of price and cost of production data. In some circumstances, these measures would preclude disclosures that are now permitted. If this is done, it would not be recommended that statutory amendment be sought to cut down the categories of information that are now disclosed. Indeed, the ITC might appropriately consider some enlargement of the classes of information it will release under protective order, particularly to facilitate more meaningful analysis of the kinds of information that are now disclosed. Any broader disclosure should be accompanied by the safeguards herein recommended, and should be provided only if the Commission's investigative and decisional processes will clearly be improved thereby. Existing and any enlarged disclosures should be available to domestic producers on the same terms as to importers and foreign producer parties.

I. THE PROCEDURES UNDER STUDY

A. The Setting: Antidumping and Countervailing Duty Proceedings

The export to the United States of goods at less than their fair value — called "dumping" — is treated by American law as an unfair method of international trade.[1] If dumped imports are found to cause or threaten material injury to an industry in the United States, the law provides for imposition of an "antidumping duty" in an amount intended to offset the margin of dumping.[2] There must be two determinations: (1) whether the imports in question have been dumped,[3] which is decided by the International Trade Administration of the Department of Commerce ("ITA"),[4] and (2) whether the imports are causing or threatening injury to an industry in the United States, which is decided more or less simultaneously by the International Trade Commission ("ITC").[5]

The subsidization by foreign governments of the export of their countries' products to the United States is similarly treated as an unfair method of international trade.[6] If subsidized imports are found to cause or threaten injury to an industry in the United States, the law provides for the imposition of a "countervailing duty" in an amount intended to offset the subsidy.[7] Again, there must be two determinations: (1) whether the imports have been subsidized, decided by the ITA,[8] and (2) whether they are causing or threatening injury, decided by the ITC.[9]

The Trade Agreements Act of 1979[10] extensively revised the antidumping and countervailing duty laws, and combined them into a new Title VII of the basic customs law, the Tariff Act of 1930.[11] Among other things that they did, the 1979 revisions accomplished the implementation for the United States of two pertinent international agreements adopted by the parties to the General Agreement on Tariffs and Trade (GATT) in the 1973-1979 round of multilateral trade negotiations (MTN).[12] One of these international agreements includes an Anti-Dumping Code;[13] the other established detailed standards for national countervailing duty laws, and also set rules to limit the signatory nations' use of subsidies.[14]

The injury proceeding at the ITC is substantially the same for both antidumping and countervailing duty cases. The 1979 Act lays down almost identical procedural and substantive rules to govern injury determinations in both kinds of case,[15] and the ITC has done the same thing in a unified set of regulations.[16]

The ITC proceeding is conceived of as an "investigation," and is so denominated.[17] The industry examined is comprised of American producers of the "like product" to the allegedly dumped or subsidized import;[18] these producers or some of them are ordinarily the petitioners in the proceeding. Upon filing of the petition, the ITC institutes a "preliminary investigation," whereby it must determine within 45 days whether there is "a reasonable indication" that the injury test will be met[19]. The Commission typically will address questionnaires to American producers (including those who have not joined in support of the petition), to importers of the products, and to American purchasers of the foreign or domestic products. Members of the

Commission's investigative staff pursue information from other sources, and follow up the questionnaires with telephone and field interviews.[20] Through this period, also, parties often will continue to submit information. As the date for decision nears, parties may appear at an informal hearing called a "conference," usually held between the 21st and the 25th day of the proceeding,[21] and presided over by the Commission's Director of Operations.[22] The conference is conducted in accordance with the Commission's rules governing "nonadjudicative hearings."[23] Ordinarily, witnesses present prepared testimony, and then are questioned by members of the Commission staff, typically including the investigator, the economist, the attorney and the commodity-industry analyst assigned to the case. Oral argument and post-hearing briefs are received.[24] The staff prepares a report.

On the basis of the record so made, the Commissioners by vote make a "preliminary determination" of injury.[25] If the determination is negative, the entire antidumping or countervailing duty proceeding (including the portion conducted by the ITA) is terminated.[26] If the determination is affirmative, the Commission is in a position to proceed to the second stage of its investigation, which leads to a final determination of the injury in question and is commonly called the "final investigation."[27] The ITC may not commence its final investigation until the ITA has made an affirmative determination — either preliminary or final — that the imports are being dumped or subsidized;[28] the ITC may continue informal activities, however, while awaiting the ITA's action.

In the ITC's final injury investigation, much the same methods are used as in the preliminary phase. More time (120 days in the usual case) is available under statutory limits,[29] and a more thorough job can be done. Supplementary, revised or new and more detailed questionnaires will be sent out. The investigative staff will gather new information and verify information that has been submitted to it. Parties submit additional data throughout the course of the investigation. Ultimately the Director of Operations will prepare the staff's report, presenting the facts that have been gathered, including detailed summaries of statistical information in aggregated form.[30] The parties, having access to the public version of the staff report, submit prehearing briefs.[31] Then a hearing is held before the full Commission, at which the parties present nonconfidential summaries of their prehearing briefs and rebut their opponents.[32] Short post-hearing briefs and statements in answer to questions raised at the hearing may be submitted within a few days after the hearing.[33] The Director of Operations submits a final staff report to the Commissioners, who will make the final injury determination.[34] In combination with an affirmative final determination of dumping or subsidy by the ITA, an affirmative final determination by the ITC fulfills the conditions for assessing an antidumping or countervailing duty.[35]

B. The ITC's Treatment of Confidential Information

Throughout these proceedings, the Commission devotes care to maintaining the security of confidential business information which is submitted to it or is gathered in its investigations.[36] The record of each antidumping and countervailing duty injury proceeding is divided into public and nonpublic sections.[37] The regulations provide procedures for requesting confidential treatment of proffered information,[38] and the staff in practice accords confidential treatment without specific request to information acquired in reponse to questionnaires and other investigative inquiries.[39] Parties customarily submit petitions, briefs and similar documents in confidential form, accompanied by a non-confidential version for inclusion in the public record.[40] Witnesses and counsel at the Director's conferences and at the full Commission's hearings are expected to refrain from mention of confidential information.[41] The prehearing staff report and other documents prepared for Commissioners' use at hearings are marked in the margin to show what material is confidential and therefore should not be discussed in open session.[42] The Commission's opinions, and the final staff reports which are usually appended to such opinions, are published with all confidential information aggregated so as not to be identifiable by company, or else deleted.[43]

The Trade Agreements Act of 1979 makes express provision for the maintenance of confidentiality in antidumping and countervailing duty cases.[44] Most of the data gathered in the ITC's injury proceedings are of a nature that calls for their being accorded confidential treatment.[45] The investigations seek information concerning the extent to which members of the domestic industry are experiencing cognizable injury or threat of injury, and if they are, whether it is caused by the imports in question. The Commission thus seeks information by which to gauge the effect of the import competition upon the prices and sales of domestic products and upon the economic health of domestic producers. Key elements of the inquiry are whether the volume of imports is substantial and rising, whether the imports undersell or otherwise depress the price of the domestic products and take sales away from domestic producers, and what economic effects the import competition is having upon members of the domestic industry. Most of this information comes from domestic producers, and typically relates to their own sales, prices, costs, capacity utilization, production, employment and profitability. Confidential information can also come from the importers and foreign producers of the allegedly offending imports, concerning their own business affairs. Information from others, such as purchasers of the foreign and domestic products, usually concerns primarily the affairs of those with whom they do business.

C. ITC Disclosure of Confidential Information Under Protective Order

Before the January 1980 effective date of the Trade Agreements Act of 1979, the International Trade Commission did not disclose to anyone, even to a party to the proceeding, the confidential information it acquired in these injury investigations.[46] Section 777(c) of the Trade Agreements Act now authorizes and in some circumstances has the effect of requiring the Commission to release such confidential information under protective order.[47]

The Commission has adopted regulations which limit its disclosures under section 777(c) to just two categories of confidential information — domestic price information and domestic cost of production information.[48] Disclosure is made to counsel for the foreign and domestic competitors of the American companies that submitted such information. These two categories of information correspond exactly to those which the Court of International Trade ("CIT") is given jurisdiction to compel the Commission to release under protective order: "confidential information submitted by the petitioner or an interested party in support of the petitioner concerning the domestic price or cost of production of the like product."[49] Interestingly, the specification of these two categories resulted directly from a compromise, arrived at within the United States government during the closing stages of the multinational trade negotiations, which was aimed at making the United States's implementing legislation more palatable to foreign trading partners.[50]

Application for access to this confidential information must be made by counsel for a party, upon a form which, when approved by the Secretary of the Commission, becomes the protective order itself.[51] Although the regulations call for a showing of counsel's need for the information, and judicial decisions reviewing similar procedures at the ITA say that such need must be weighed against the particular confidentiality needs of the submitters,[52] the ITC's requirements are satisfied in practice by counsel's general statement that the data are needed to participate meaningfully in analysis of the impact of the imports on the domestic industry; in the absence of unusual circumstances, the order will be routinely issued.[53] Applicants must serve copies of their applications upon the submitters, who thereupon have a de facto opportunity to object informally or perhaps to seek judicial restraint against release.[54] But, in contrast to the practice at the ITA, no formal procedure exists for submitters to be heard on objections to disclosure of their confidential information (because there may be insufficient time for such hearings), or to withdraw the information rather than allow its release (because information from all industry members is needed by the Commission).[55]

The information is most commonly released in the form of copies of particular pages of the submitters' questionnaire responses, which had been identified on the questionnaire form with a warning that they were subject to release under protective order. (Provision is made for coding the names of customers so that their identities are not disclosed.) Sometimes disclosable data also appear in the confidential versions of the original petitions, and of interim submissions and briefs filed by petitioners and their supporters. In these cases, the relevant information is abstracted from the documents for disclosure under the protective order.[56]

The Commission's protective orders are standard in form, and are not tailored to particular circumstances. In view of the tight time limits, the Commission has sought to keep the process of application and the operation of the protective order itself as close to self-executing as possible.[57] Counsel seeking the confidential data must swear that he or she will use the information only in connection with the instant proceeding, will not divulge it except to authorized personnel, and will observe specified security measures and limitations on copying and distribution.[58] The attorney also specifically acknowledges that breach of the order may subject him and his partners and associates to disbarment from practice before the Commission, and that the Commission may refer information about violations to the United States attorney and to bar association ethics panels.[59] The regulations apparently intend, but do not expressly or specifically provide, that the attorney be personally subject to sanctions for unauthorized disclosures by his legal or clerical staff or by economists or other experts to whom release of the information has been authorized.[60] The regulations also provide for imposing unspecified sanctions for breach of the protective order upon the party represented by the offender.[61]

In the first four years (1980 through 1983), 130 protective orders were issued in antidumping and countervailing duty proceedings at the ITC.[62] So far no question regarding the possible imposition of sanctions has arisen.[63]

The Commission has taken the position that the two categories of information just discussed (concerning (1) the domestic price of the like product and (2) the cost of production of the like product, both limited to information submitted by the petitioner or by an interested party in support of the petitioner) are all that it is required by the statute to release,[64] and its position has been upheld by the Court of International Trade.[65] Further, the Commission has held that to release more would be contrary to the public interest, in view of the possibility that, despite provisions of the protective order, the confidential information might leak to competitors of those who submitted it.[66] This prospect would tend to chill the voluntary submission by domestic producers of information which the Commission believes it must have in order to make informed decisions about the domestic industry as a whole. For this reason, it has proceeded on the basis that more extensive disclosure could impair the quality of Commission injury determinations.[67] Thus, beyond the two categories just described, no other confidential information supplied by American producers is released (except by agreement of all parties to the proceedings, which has occurred only once).[68] And, of the confidential information submitted by importers and foreign producers, none whatsoever will be released to the domestic industry parties (except by agreement, which has never occurred).[69]

D. Related Disclosure Procedures at the ITA and the CIT

As part of the larger environment in which ITC release of confidential information takes place, the disclosure practices at the International Trade Administration and the Court of International Trade are important to the present inquiry, and will now be briefly touched upon.

As sketched above, the International Trade Administration of the Department of Commerce plays a role parallel to that of the ITC in antidumping and countervailing duty cases. Like the ITC, the ITA gathers extensive confidential information. The data primarily concern the foreign producers' home-market prices and cost of production, any subsidies to their exports, and adjustments that should be made for the purpose of comparing those figures to the prices at which the foreign products are sold in the United States.[70] Almost all of the information which is confidential comes to the ITA from foreign producers of the imported merchandise in question or from American importers whose interests are aligned with those foreign producers.[71] Even though they are often beyond the reach of process, those parties have a strong incentive to submit the confidential information requested: if they do not, the ITA under the 1979 Act may base its determination on the "best information available * * *, which may include information submitted in support of the petition."[72]

Section 777(c) of the 1979 Act provides for the release of confidential information, under protective order, by the ITA as well as by the ITC. The provisions regarding the two agencies differ in one critical respect: Appeals to the Court of International Trade may be taken from ITA denials of requests for disclosure of confidential information regardless of the subject matter involved, whereas ITC denials can be appealed to the CIT only if they involve domestic price or cost of production information.[73]

The ITA has imposed no express limits on the categories of information it will release under protective order. It routinely releases to domestic industry parties confidential information it has obtained from importers and foreign producers, most of which relates to price and foreign cost of production.[74] In the less common case where domestic industry parties submit confidential information to the ITA, that information will in a similar manner be released to the importer and foreign producer parties who request such access to it.[75] The ITA practice generally results in the great bulk of the confidential information submitted by parties (except for customer names and confidential verification documents) being available under protective order to counsel for all parties.

The Court of International Trade (formerly the Customs Court) has exclusive jurisdiction to review ITC and ITA actions in Title VII antidumping and countervailing duty cases.[76] The 1979 Act provides for judicial review of several preliminary and interlocutory steps (including preliminary negative injury determinations) as well as of the final determinations in Title VII cases.[77] Section 777(c)(2) of the 1979 Act[78] expressly empowers the CIT to review denials by the ITC and the ITA of requests for disclosure of confidential information under protective order.[79] Moreover, the CIT has held that it has jurisdiction under a general provision[80] to review or enjoin the grant of such a request by the ITA (and presumably, therefore, by the ITC as well).[81]

Review in Title VII cases is based on the record made before the agency.[82] The ITC submits its record to the court in two packages — the public record and the confidential record; the latter is totally kept confidential until a judge of the court rules that parts of it should be released under protective order.[83]

The court has nine judges, who sit singly. The judges of the CIT have long heard varied cases involving confidential business information. Under the court's Rule 26(c), which is substantially identical to F.R.C.P. 26(c), they are well accustomed to disclosing confidential record material to parties under protective order.[84] For Title VII review cases, a specific provision of the 1979 Act empowers the court to disclose confidential material contained in the record for review "under such terms and conditions as it may order."[85] The decisions have evolved a broadly-worded test whereunder the judge seeks to balance the needs of the litigants to use the information, the needs of the submitters to protect its confidentiality, and the needs of the agencies to preserve their ability to obtain confidential information in future investigations.[86]

Judges of the CIT in fact have fairly routinely granted parties' counsel access, under protective order, to substantial parts of the confidential record in Title VII review proceedings.[87] Counsel often successfully assert that they cannot tell whether the agency's determination is supported by substantial evidence unless they can see the entire confidential record.[88] In several instances, over the objection of the ITC, the categories of information released have gone well beyond what the ITC had disclosed or would disclose under its much more restrictive protective order practice. Thus, domestic industry parties' information other than price and cost of production has been released under CIT protective order;[89] importer/foreign producer parties' information has been released.[90] It seems highly probable that information submitted by customers has been disclosed without their knowledge. It is uncertain whether information submitted to ITC by members of the domestic industry who chose not to support the petition has been disclosed without their knowledge; in a recent case a domestic producer, who had taken no part in the agency proceeding and submitted information only when threatened with court action by the ITC, successfully opposed the release by the CIT of the information it had ultimately supplied to the ITC.[91]

Citing the possible chilling effect upon the submission of confidential information deemed essential for its injury determinations, the Commission has vigorously opposed CIT disclosure of confidential data submitted by nonparties, disclosure to corporate (in-house) counsel, and wholesale release of confidential record material beyond counsel's needs.[92] So far, the Commission has been generally successful in maintaining these positions in the cases in which it has urged them.[93] But it has been unable to persuade judges of the CIT to limit the scope of their disclosures of material from the confidential record in the same restrictive way the Commission limits its own disclosures.

E. Some Considerations Affecting the Evaluation of ITC Disclosure Practices

The ITA and the CIT, both of which disclose broadly under protective orders, possess a luxury envied by the ITC: they are well assured of having available the information they need for decision. The ITA holds the powerful inducement of turning to the "best information available" (usually provided by the reluctant submitter's adversary) if the submitter does not submit, while the CIT has a record already made for it below.[94]

The ITC, by contrast, wields a very limited practical ability to back its information requests with compulsory process. It must rely largely on "voluntary" compliance.[95] Many submitters are suspicious that their confidential information might be improperly or inadvertently leaked, either from Commission offices or from those to whom it was released under protective order.[96] Those who do not volunteer are persuaded and cajoled, more than threatened, to yield up the needed data. The staff energies devoted to such persuasion and cajolery are considerable, and supply a lubricant which often is an essential ingredient of a successful investigation. The Commission has maintained that it must confine its disclosures within narrow limits, so as not to aggravate the difficulties of obtaining through voluntary submission the information it must have.[97]

After five years of experience under this narrow mode of disclosure, there are calls to re-examine it. Elements among the trade bar, believing they thereby can better their representation of clients, are pressing for wider disclosure. For the different reason that they feel increasingly overburdened and are looking for help in analysis, elements within the ITC are also considering whether broader disclosure to lawyers is desirable.[98] The ITC, of course, must weigh against these putative benefits the probability that broadened disclosure may heighten submitter reluctance, resulting not only in the devotion of greater staff energies to persuasion, but a likelihood that more information would be held back.

There can be little doubt that section 777(c) would supply authority for the Commission to release additional information under protective order if it decided to do so.[99] What is more debatable is whether the disclosure of more categories of confidential information -- potentially up to the full confidential record of data submitted by all parties -- would help the parties and the Commission, through better-informed argument, more than it would hurt the parties and the Commission's processes, through leaks to competitors, a chilling effect on the submission of confidential information, and bogging the investigation down in a sea of detailed rebuttals. It can also be debated, on the other hand, whether less information should be released than is now done, and whether more safeguards are desirable. Perhaps the provision requiring ITC disclosure of confidential information should be repealed. Less drastically, perhaps one domestic producer's price and cost information should no longer be released to another domestic producer. Or, for another example, perhaps the relatively modest utility of disclosure during the hurried preliminary investigation does not justify running the risk, however small, that these sensitive sorts of information will fall into competitors' hands.

Evaluation of disclosure practices is complicated by several almost imponderable elements. First is the unusual hybrid character of the ITC proceeding. Its essentially investigatory nature was modified by the 1979 Trade Agreements Act which, in addition to giving private counsel access to confidential information, replaced de novo judicial review with limited substantial evidence (or arbitrary-and-capricious) review by the CIT on the ITC-made record.[100] These developments have generated a sharp disagreement between those who still view it as essentially an investigative, managerial process and those who conceive it as an adversarial adjudicatory proceeding. This disagreement in turn yields fundamentally different perceptions about the function and value of the disclosure of confidential information. Those viewing the proceeding as adjudicatory hold a broad vision of the role of the parties' counsel, who need access to confidential information in order adequately to represent their clients. Those holding the other view conceive that it is the Commission's job to gather the facts, primarily through its own investigations (often involving unrepresented nonparties), that the parties' lawyers' ability to assist such investigations is limited, and that the lawyers' contributions will not be appreciably enhanced by having access to confidential data when preparing their briefs. These contrasting perspectives lead their respective adherents to assess the benefits of disclosure to counsel quite differently.

Second, the central problems resulting from disclosure are hard to assess because of the obscurity of substantiating facts. The risk that confidential information will be leaked by those to whom it was released under protective order simply cannot be scientifically assessed. Candid estimates of the prevalence or likelihood of leaks cannot be expected. Likewise the chilling of data submission, which the possibility of leakage creates, cannot be closely calculated. But possessors of information quite often acknowledge their unwillingness to submit it in an ITC proceeding, for fear that it will flow to competitors.[101]

Third, the statutory time limits -- 45 days to decision in the preliminary investigation and 120 days in the final -- exacerbate many of the difficulties here discussed.[102] People at the Commission are inclined to believe that time constraints make it impractical to allow for full consideration of the requesters' need for confidential data, to fashion protective orders to the circumstances of each case, to utilize subpoenas to enforce questionnaires, and to compile aggregated data in time for counsel's use at preliminary conferences.[103] Time pressures permeate all the procedures for disclosure under protective order. The statutory time limits frustrate obvious remedies, and must condition any proposal for change.[104]

Finally, there will be multiple policy considerations to be balanced in any practical recommendation. Some of these are: to facilitate accurate determinations, thereby to shield American industry from unfair practices when relief is warranted, and to maintain the free flow of international trade when it is not; to facilitate fast and efficient determinations, within the brief time frames established by the 1979 Act for preliminary and final investigations; to assure a thorough gathering of data needed for such determinations, through the submissions of parties as well as through the Commission's investigative processes; to assure fair treatment by government of parties and nonparties whose confidential information is gathered, including fair notice of potentially injurious dispositions of such information; to accord parties and nonparties opportunity to be effectively represented by counsel; to heed international understandings, developed after the GATT multilateral trade negotiations, concerning a right of access under protective order to confidential domestic price and cost of production information; and, to the extent possible, to cast recommendations in terms that will avoid the need to amend statutes. In the concrete, some of these considerations cut against each other. Fairness, for instance, may dictate that those asked to submit confidential data be warned that their data may be released to their competitors' counsel in certain circumstances; on the other hand, such a warning may provoke some submitters to refuse to comply or to submit incomplete information.

Because of these levels of complexity, practical conclusions must draw mainly upon judgment and informed opinion.

F. The ITC's Power to Limit Disclosure by Regulation

Before considering specific problems and proposals, it is useful to observe that the ITC can probably impose limits and conditions upon disclosure by regulation.

Section 777(c) calls for release in some situations and authorizes it in others. Even regarding those categories as to which it may be understood to require disclosure — domestic price and cost of production information — the statute in no way suggests that such a requirement is absolute, requiring the CIT to compel the release of all price and cost of production information, at all times and under all circumstances. To the contrary, the statute is properly construed to clothe the Commission with authority to establish reasonable and practical limitations upon the way it discharges its disclosure responsibilities. Section 777(c)(1)(B), of course, is express in its authorization to determine appropriate protective order requirements and sanctions. But beyond that, the statute should be understood to impart implicit authority to adopt reasonable rules and policies, regulating the circumstances of disclosure and conditions upon use of the confidential data, that will serve the overall objectives of the trade laws. Thus, if the risk of injury to parties and to the ITC's own information-gathering processes is especially acute in certain circumstances, the Commission should be able to limit disclosure of price and cost of production information in those circumstances.

Such a construction is supported by common sense, by general administrative law,[105] by the statute generally empowering the ITC to promulgate regulations,[106] and by the permissive formulation of the general provision through which section 777(c) authorizes but does not require the Commission to make confidential information available under protective order. This result is also borne out by the portion of the statute which, because it authorizes the CIT to order the ITC to disclose price and cost of production information, is thought to require the ITC to release such data upon proper request. The court may issue such an order "if [it] finds that, under the standards applicable in proceedings of the court, such an order is warranted * * *."[107] The CIT's standards, expressed in its well-established tripartite balancing test, require that account be taken of the needs of the Commission to preserve its ability to obtain confidential information, and of the confidentiality needs of submitters, as well as of the needs of those requesting the information for use in litigation.[108]

Thus the ITC (assuming, at least, that it can accurately foretell the way the judges of the CIT will apply this test) seems to be fully entitled to frame its protective order and disclosure policies in terms that appropriately accommodate these considerations, even if that to some degree reduces the disclosure of price and cost of production information below the theoretical maximum.

II. THE VIRTUES OF DISCLOSING CONFIDENTIAL INFORMATION, AND PROPOSALS FOR EXPANSION

Disclosure enables counsel to offer better informed and more particularized rebuttals, analysis and argument. Counsel can often rebut or explain particular disclosed items of information. They can offer pointed economic analysis based upon information received under protective order as well as upon aggregates and other nonconfidential data. Such information and analysis, and the argument that accompanies them, can be discernibly helpful to the ITC staff.[109] Especially when its manpower is stretched thin, the ITC staff can get some help from attorneys whose submissions are incrementally more useful where they have access to detailed confidential data under protective order than where they do not. The attorneys thus afford their clients more effective representation, and this in turn can enhance the parties' acceptance of the fairness of ITC proceedings, and their sense of meaningful participation in those proceedings.

The availability of composite figures — presented as aggregates, averages and ranges — can be helpful to counsel, and, through counsel's submissions, to the Commission.[110] Such figures are assembled in a staff report, which is made available to parties before the hearing, in final investigations (though not in preliminaries).[111] These staff reports are usually nonconfidential. They set forth not only price and cost of production data, but also aggregated data for all other categories gathered in the investigation. But, on critical issues like those of underselling or price suppression, such aggregates cannot do for counsel what having access to individual company price data can do[112] — for example, enable them to explain the discount or credit terms accompanying particular price quotations, or to challenge the accuracy of particular quotations, which staff can then check with the customers involved. Such submissions can add benefits for both clients and the Commission.

A considerable body of practitioner opinion, including that of attorneys for domestic producers as well as of attorneys for importers and foreign producers, holds that protective orders work well under the present system, with little real risk of leakage, and that access to confidential data benefits the quality of client representation and of agency decision.[113] Some of these lawyers believe that, in various ways, counsel ought to be given access to broader categories of data that are in the record collected by the ITC. Specifically, some urge disclosure of information submitted by importer and foreign producer parties;[114] others favor release of detailed kinds of information relating to price and cost production, submitted by domestic parties, which are not now released;[115] still others advocate that additional categories of domestic party information, beyond price and cost of production, be released to representatives of the importers and foreign producers.[116]

Some practitioners would go so far as to require that virtually the entire confidential record — or at least as much as had been submitted by parties — be disclosable to all parties, perhaps with a few exceptions such as customer names.[117] They assert that full disclosure is indispensible to the formulation of an adequate response to information in the record, and note that all the information may in any event be released by the CIT if an appeal is taken. Because the proceeding at the CIT will be based upon the record established at the ITC, rebuttals and other apt submissions for that original record cannot be made on an informed basis without knowledge of the other information that the Commission has before it; the opportunity to rebut may have been lost by the time counsel sees the information for the first time at the CIT.

The ITC staff, on the other hand, has traditionally tended to doubt that broadening the scope of disclosure would appreciably enhance the quality of analysis available to it. The Commission's basic investigative style does not rely very heavily upon the parties or their attorneys to provide necessary information or analysis.[118] The staff's established position has been that there is little benefit to be obtained from additional disclosure in light of the considerable chilling effect it would have.[119] Recent internal deliberations at the ITC, however, indicate a willingness to consider proposals for broadening disclosure where counsel's input could thereby be made more useful.[120]

All of these suggestions are discussed below.

III. RISKS RELATING TO DISCLOSURE UNDER PROTECTIVE ORDER: LEAKS AND CHILL

A. Risk of Leaks of Confidential Information

The confidential information regarding price and cost of production submitted to the ITC can be very sensitive. Revelation to a competitor of confidential price or cost of production information could be highly damaging to the domestic producer who submitted it. The damage, of course, would be compounded where the producer is already hard pressed by competition. There thus can be considerable incentive to obtain confidential information and pressure to pass it to persons not entitled to it, for business use against the submitters.

It is impossible to determine the extent to which leaks may occur. It is very unlikely that they can be detected; obviously, the persons involved will not come forward, and there is no other ready method of discovery. Knowledgeable sources believe that some wrongful disclosure does occur, and this view must be given weight in view of the sensitive nature of the information, its importance to clients and the virtual impossibility of detection.[121] Leaks can, of course, occur through the carelessness or the unscrupulous conduct of an attorney.[122] Such risks are entailed in any protective order.

Of equal concern is unintentional disclosure, occuring when the attorney inadvertently reveals the confidential information or relies upon it while giving advice on related aspects of the client's business. If the attorney to whom price information was released in a Title VII case, for example, counseled the client regarding competitive pricing tactics, it would require a conscious and perhaps unnatural effort to avoid reference to the competitor's confidential price information.[123]

Such a concern underlies the way in which the Federal Circuit in U.S. Steel Corp. v. United States couched its opinion vacating the CIT decision which denied access to confidential information to in-house counsel.[124] Like the ITC, the CIT had decided to release no information to in-house counsel, on the reasonable assumption that such counsel are more likely to be placed in situations where inadvertent disclosure can occur than are retained counsel. While recognizing the danger, the Federal Circuit observed that similar dangers can exist with retained counsel who advise on a broad range of matters. It therefore required the CIT to make a factual determination on a "counsel-by-counsel basis" of whether retained as well as in-house lawyers should be denied access to confidential information because, for example, they are involved in "competitive decisionmaking."[125] The issue of denying access to in-house counsel is receiving considerable attention elsewhere and is not central to this report.[126] It is cited here as a vexing illustration of the possibility of inadvertent leakage.

An additional hazard may arise from the secondary disclosure by attorneys to employees or consultants.[127] The statute does not identify those to whom confidential information may be released; the ITC's regulations permit direct release only to an attorney.[128] The attorney, in turn, may disclose the confidential information to other attorneys or consultants who supply a sworn statement that they will comply with the governing protective order.[129] It is the attorney who is charged with monitoring the recipients of such secondary disclosures to assure that they do not pass the information further.[130]

There appears to be no reason to believe that the form of the protective order, even though it is not individually formulated for each case, is inadequate.[131] The sanctions likewise seem adequate even though there is no experience by which to measure them.[132]

B. Effect of the Risk of Leaks upon the ITC's Ability to Gather Information: the Chill Factor

While leaks harm the domestic producer, the chill which they may induce impairs the ITC's ability to do its job. In determining whether injury has occurred, the ITC must look to the entire American industry involved and not just the petitioning party.[133] The industry is defined as "the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product."[134] To determine whether there is cognizable injury, the ITC needs figures from all or most of the industry. If members of the industry are concerned about unauthorized disclosure of confidential information, they may be unwilling to file a petition in the first place, to join in a petition already filed, or to submit confidential data to the ITC. The Commission will find it difficult to get sound data for the industry as a whole.[135]

There is no precise way to gauge the impact upon ITC data gathering of the perceived risks of leakage. Submitters are unlikely to declare with candor that they have failed to be candid. But those who were dissuaded from submitting information or supporting a petition will quite frequently be vocal about their fear of leaks, though there is no way of tabulating their criticisms.[136] In the informed opinion of some members of the bar, of ITC staff, and of the single published commentator, however, it is widely believed that concern about unauthorized disclosure lessens the amount and reliability of information submitted to the ITC.[137]

Several factors bolster the likelihood that this assessment is accurate. Obviously, the high potential for damage from the release of such sensitive information is likely to dispose domestic producers against seeking relief or cooperating with an investigation. The chilling effect touches nonparties as well as parties. Even though the ITC assiduously protects nonparty information, nonparties often apparently act upon the belief that their best interests lie in noncooperation. Nonparty withholding of information can stymie the ITC's efforts to round out a picture of the entire industry. And yet the Commission is highly dependent on the submitters' voluntary cooperation, since it has little practical ability within the statutory time limits to compel disclosure by subpoena.[138] The chilling effect may be magnified by the fact that nonparty data, though carefully kept confidential by the ITC, are frequently released during appeals under CIT protective orders.[139]

Chill can induce a more subtle form of noncooperation, difficult to detect. Apart from reluctance to file a petition, to join as a party, or to answer a questionnaire, there can be disingenuous responses.[140] It would be relatively easy for a suspicious producer, concerned that his business information might be leaked, to craft his submission in a manner that makes the data meaningless, inaccurate, or useless.

One further, almost ironic, effect of submitters' concerns about leaks may be a chilling inhibition upon the Commission itself: There is reason to believe that its investigators refrain from asking for especially sensitive information, lest submitters feel especially threatened by its release, and withhold cooperation in the future.[141]

As these observations indicate, the success of the ITC's investigations depends upon industry cooperation and, in turn, upon the reputation of its own protective orders for safeguarding confidentiality. Serious as direct damage from leaks may be in individual cases, their chilling effect probably poses an even greater threat to the public interest. It weakens the Commission's reputation for safeguarding confidentiality, and thus undermines the ITC's ability to get information that it must have to carry out its responsibilities.

C. CIT Disclosure of Confidential Information Originally Submitted by Parties and Nonparties to the ITC

Despite the care given by the ITC to confidential information submitted by parties and its absolute refusal to disclose confidential information submitted by nonparties, all such information may be disclosed by the CIT if the decision of the ITC is appealed.

The ITC, of course, limits its disclosure to price and cost of production data submitted by domestic parties who support the petition. In its protective order practice, though, the CIT is prepared to release virtually all of the confidential information in the record before it, which had originally been submitted in to the ITC.[142] The court typically orders this broad disclosure in response to counsel's contention that he or she must see the full record in order to frame arguments as to whether it contains substantial evidence sufficient to support the ITC's findings.[143]

Broad disclosure by the CIT magnifies the risk of unauthorized disclosure, amplifies the chill factor, and compounds the problem of inadequate warning to submitters of possible disclosures.

Because the record made at the ITC usually contains confidential information submitted by nonparties, appellants will quite naturally urge the CIT to disclose such information along with that originating from parties. The statute does not appear to authorize release of nonparty information by the ITC, and the Commission has never released any nonparty information under it.[144] So far, the ITC has succeeded in its selective case-by-case efforts to persuade the CIT to deny disclosure of nonparty data in particular circumstances;[145] whether this pattern will prevail, though, is problematic.

Nonparty disclosure would be unfair to those who chose not to take part in the proceeding, and surely would heighten the resistance of nonparties to the Commission's inquiries and questionnaires. Neither the ITC's questionnaires nor its regulations warn nonparties of the possibility that the CIT will disclose the information they submit.

In addition to the disadvantages of insufficient warning which parallel those of parties, nonparties experience an additional fairness problem. The CIT has no mechanism or requirement to afford the nonparty notice of a request for disclosure of its information.[146] There is no readily apparent reason why the court should not assure that nonparties get such notice and are given a opportunity to protest the requested disclosure of their data.

IV. PROPOSALS TO REDUCE THE RISKS OF DISCLOSURE

Without information from substantially all domestic producers, the ITC cannot fulfill its mandate to determine whether the domestic industry is injured by dumped or subsidized imports. To assure the flow of needed information, the apprehensions of potential submitters should be alleviated by reducing opportunities for unauthorized disclosure of their data, as will now be discussed. Cooperation should also be induced, to the extent feasible, through the use and enforcement of subpoenas, as discussed in a later section of this report.

Much can be said for a return to the ITC's pre-1980 practice, under which no disclosure of confidential information occurred. Obviously, a resumption of this practice would remove the danger of leaks and their chilling effect, safeguard the rights of submitters and ease the burdens on the ITC. In the opinion of some observers, little would be lost; since access to confidential data has not materially improved the capacities of counsel to represent clients or contribute to the ITC decisional process, the protective order process serves no end other than to mollify our international trading partners.[147] But any attempt to repeal the disclosure provisions of the 1979 Act would encounter strong opposition. Foreign governments and producers, importers, segments of the trade bar, and perhaps elements of the United States government could be expected to voice powerful support for the existing statute. And apart from these political concerns, limited disclosure has its benefits. Participation by counsel provides the ITC a wholesome balance and different perspective, and access to disclosed data enhances that participation. It also gives parties -- at least those whose counsel are eligible to receive released information -- a perception that they are able to argue their cases on a substantial factual basis. In view of these considerations, it is neither desirable nor worthwhile to attempt a repeal of the statutory requirements under which price and cost of production information are released.

Because of the potential effects of unauthorized disclosure and of a fear of leakage, however, every reasonable step should be taken to reinforce the security of the system of disclosure. Protection of the data should be a predominant consideration in revising the policies that determine what information should be released under protective order, and the circumstances and conditions of such release.

The chances of unauthorized disclosure, and the attendant chilling effect, can be reduced by a) decreasing the categories of information released, b) limiting the persons to whom release is made, c) diminishing the duration of release, d) tightening the mechanics of disclosure, and e) amending the practice of the CIT. Each of these will be considered in turn.

A. Restricting the Categories of Information Released

The language of Section 777(c) does not expressly require the Commission to disclose any information.[148] However, a refusal by the Commission to disclose information "concerning the domestic price or cost of production", submitted by an interested party supporting the petition, would be subject to review by the Court of International Trade, which may direct disclosure.[149]

The ITC's decision to release no information, beyond those categories as to which disclosure can be compelled, certainly limits the risks of leakage and chill, and simplifies the work of the Commission. It may be asked whether the categories should be further restricted.

1. Price

Price information is frequently the critical element in the determination of injury. If no price information were released, it is difficult to conceive how there could be effective participation of counsel as contemplated by the 1979 Act.

There is, however, some room for disagreement as to what constitutes disclosable price information.[150] The ITC takes a narrow view, which is effective for purposes of risk reduction. It would be strengthened by adoption of a regulation defining the price information that can be released, to forestall judicial imposition of a broader or unexpected definition.

2. Cost of production

Just what constitutes cost of production is somewhat unclear.[151] Accountants are uncomfortable with the category.[152] It allocates joint costs and overhead in ways that distinguish it only marginally from the cost of goods sold.[153] The instances in which pure cost of production information is gathered are few. Occasionally, domestic producers' cost of production information appears in the petition to demonstrate that the foreign producers must be selling below cost. In other situations, as where products are assembled from components imported from other countries, cost of production figures may assist in the determination of which producers are domestic producers.[154]

Since experience is negligible, the usefulness of counsel's access to cost of production information is hard to assess . Where the information is submitted, however, absolute non-disclosure would emasculate the statute and be unacceptable. Since the information is seldom sought by the Commission and the category is narrowly construed,[155] it again would be useful to establish an explicit definition of disclosable cost of production information, with careful attention to its role in the inquiry.

B. Limiting the Persons to Whom Disclosure is Made

An obvious approach to reducing the risks attendant upon disclosure is by narrowing the classes eligible to receive confidential information under protective order. Two classes must be considered: the parties or entities for whose benefit the information is released, and the individual representatives of those entities to whom the information is actually given.

1. Parties whose representatives may receive disclosure

a. Disclosure to competing domestic producers

Some risk of wrongful disclosure was necessarily accepted by the United States during the GATT negotiations when it explained to foreign trading partners that the implementing statute would temper broad disclosure at ITA with limited disclosure at the ITC of at least domestic price and cost information.[156] To that extent, the risk is a necessary evil. Where disclosure exceeds that required by the statute, however, the added risk may be thought unnecessary and therefore undesirable. The statute's policies mandate the disclosure of domestic producers' data to foreign producers (and importers). But ITC release of the confidential data of individual domestic producer submitters, to other parties who are also domestic producers, may present an example of unnecessarily enlarging the risk.

The disclosure of company-identifiable information submitted by those domestic producers who support the petition, to counsel for other domestic parties (who need not necessarily support the petition), is very rarely requested.[157] To the extent it occurs, it appears to generate more-than-usual risks of leakage, without any particular benefits. Domestic producers are often more intensely competitive for the domestic market with each other than they are with foreign producers. Accordingly their counsel's incentive to pass along information would seem to be at least as strong as that to which counsel for foreign producers are subject. Their need to have their domestic competitors' information for litigation may be quite different, however. Without domestic producer information, a foreign producer's counsel might well be unable to make meaningful contribution to the injury determination. But, although individual cases vary, there generally seems to be little that counsel for one domestic producer can add to the ITC's fund of analysis, based upon his possession of domestic competitors' figures, beyond what he could have argued based only on his own client's information and available aggregates. Any such incremental benefit does not seem to justify the added risk that American producer submitters generally will be damaged through unauthorized disclosure.[158]

To discontinue the eligibility of such competing domestic producers would do no violence to the intent of the statute or to the operations of the ITC. It would have the further merit of ending an egregious unfairness: a domestic producer who becomes a party to the investigation, but who does not support the petition, can see (through counsel) the data submitted by its domestic competitors (petitioners and supporters of the petition), but at the same time enjoys immunity from the disclosure of its own confidential data (because it is not "a party in support of the petitioner"). In such instances one may wonder whether the free rider is more interested in access to information than in the case itself.

b. Interested parties to the investigation

The Trade Agreements Act of 1979 does not expressly indicate to whom confidential information may be disclosed. The confidential information which section 777(c)(1) authorizes to be released, however, is that "submitted by any other party to the investigation"; the inference is strong that disclosure is authorized to be made only to a party. By terms of the statute the Commission may be compelled to make disclosure only to members of an even narrower class: "an interested party who is a party to the investigation in connection with which the information was obtained or developed," and the regulations condense this phrase to "an interested party to the investigation."[159] This formulation represents a combination of the separate status of "party" and "interested party." To appreciate its limitations, one must give patient attention to several terms.

Departing from its frequent tendency to narrow definitions, the ITC in a rulemaking defined "party" (a term not addressed in the Trade Agreements Act) in a way that permits entities which are not "interested parties" to play an active role in Title VII investigations.[160] To be accorded such status, the would-be party must show sufficient interest and state its intent to file a brief. A major supplier of a domestic producer, for example, could thus qualify as a party even though it is not an interested party.

Although the statute identifies interested parties, it does not explain their status.[161] An "interested party" is not ipso facto a "party to the investigation" under ITC terminology.

What an interested party must do to become a party to the investigation, and thus to become eligible to receive disclosure, however, is not clear from the statute. By regulation, the Commission has provided that an interested party must file an entry of appearance which includes a statement of "the person's intent to file briefs with the Commission regarding the subject matter of the investigation;" the associated preamble purported to require active participation, but the language of the regulation itself is ambiguous.[162] If a mere statement of intent to file a brief suffices, an interested party can thereby become eligible to receive disclosure of its competitors' confidential information, even though it may never actually file a brief or otherwise actively participate. Since disclosure is mainly intended to permit use of the information in brief preparation,[163] disclosures which do not come to fruition in briefs probably entail greater-than-usual risks of unauthorized use. A remedy is to condition disclosure upon a stronger commitment to active participation than is now demanded for party-to-the-investigation status, and to discipline the observance of that commitment.

2. Individual representatives to whom disclosure is made

In the face of statutory silence as to which individual representatives may receive disclosure of confidential information on behalf of an eligible party, the rules take a straightforward approach: Disclosure may be made only to "an attorney for an interested party to the investigation."[164] Other lawyers, and other professionals such as accountants and economists whose analysis of the disclosed information might assist the attorney, may gain access indirectly through the attorney, if they have need for the information and swear to uphold confidentiality.[165] Oddly enough, the regulations do not expressly provide that the attorney is liable for a breach by another person to whom he or she has properly revealed information, even though the Commission probably intended such a result.[166] This omission weakens the incentive for attorneys to instruct secondary recipients carefully and to monitor them closely. Indirect disclosure poses compounded dangers of unauthorized use or disclosure, especially where the experts or associated attorneys advise the same client on related matters. Since the ITC must rely upon the attorneys to whom release is directly given, those attorneys should be specifically made personally accountable for violations by clerical personnel, experts and other lawyers associated with them.

C. Diminishing the Duration of Disclosure

1. Return of confidential materials after the preliminary investigation

Before an ITC final investigation may commence, there must exist not only an ITC preliminary finding of injury, but also an affirmative ITA determination (preliminary or final) that subsidization or dumping has occurred.[167] Thus there can be substantial gaps of time between conclusion of the preliminary and commencement of the final ITC investigations, and it is quite possible that there will be no final investigation at all.[168]

During such dormant periods, the disclosed confidential materials ordinarily remain in the possession of the counsel to whom they were released during the preliminary proceedings. Since there are no formal ITC proceedings and no role for parties' counsel during such interims, little purpose is served beyond the convenience of counsel and avoidance of minor administrative burden. But the opportunities for unauthorized disclosure continue and even arguably increase during this period. This increment of risk could be eliminated by requiring counsel to return all confidential materials at the conclusion of the preliminary stage, to be reclaimed if and when a final investigation is undertaken.[169]

2. Limiting disclosure to the final investigation

In partial response to concerns of importers and foreign producers that the mechanisms of the law might be invoked solely to impede imports during the lengthy predecisional proceedings, the 1979 Trade Agreements Act provides for a quick preliminary determination by the ITC of whether there is a "reasonable indication" of the existence or threat of material injury.[170] The forty-five day time limit, of course, constrains the conduct of the investigation and influences the methods used. The statute, however, does not address the extent or scope of this preliminary proceeding. The CIT has recently held that Congress intended a rather summary proceeding, based upon the petition and readily available information, by which an affirmative determination would be rendered upon a reasonable prima facie showing.[171] There would not be a full scale investigation at this stage; there would be no substantial role for the parties and their counsel to play. If the ITC had followed this approach, little confidential information would be gathered and even less released.

As the Commission has in fact taken up its task, however, the preliminary investigation has become a far more intensive and adversarial proceeding than that scenario called for.[172] As a result, a large volume of confidential information is generated during the preliminary stage. Counsel have of course sought and received access to such information, so far as it is submitted by parties supporting the petition and concerns price or cost of production. Because of the pressures of time, however, it is questionable how far counsel's access to such information can make a real difference in the preliminary proceedings. By the time information is received by the ITC, it often will get to counsel too late for use in the Conference, which is held between the 21st and 25th day, or in briefs.

The value of such disclosure should be reconsidered. The statute does not expressly require disclosure during the preliminary stage. Indeed, the statute probably gives the ITC adequate implied authority, in implementing the disclosure provisions, to impose reasonable restrictions upon release of information during the preliminary stage, just as it reasonably limits disclosure by establishing strict terms for protective orders and requiring a showing of need.[173] Without altering the active mode of the preliminary investigation, it would seem desirable to eliminate the release of confidential information at the preliminary stage entirely. In view of the risks avoided and advantages gained, such a restriction ought to be deemed reasonable. In addition to lessening the prospects of leak and chill, such a step would lessen time pressures on the ITC staff, yielding fuller opportunity to pursue information, and perhaps even enabling earlier preparation of the staff report that summarizes the data gathered. If the staff report could be completed just a few days earlier than now is usual, that could be early enough for counsel to use it at least in post-conference briefs. Even if the figures were aggregated and sanitized to preserve confidentiality, the staff report, summarizing all factual aspects of the investigation, seems likely to offer counsel data more valuable for use in argument than the fragments of price and cost of production now available under protective order during the preliminary stage.[174]

D. Tightening the Mechanics of Disclosure

1. Inadequate opportunity to protest disclosure

The submitter receives notice that disclosure of his information has been requested, since the request for release must be served on all parties.[175] The Secretary ordinarily acts upon the request within ten business days, but is not restricted from acting more quickly.[176] As where service upon the Secretary is by hand delivery and upon the parties is by mail, the Secretary might occasionally act before the affected party has time to object to the request.[177] The ITC does nothing to inform the submitter -- directly or even by the regulations -- of what he can do to object.[178]

In practice a submitter may informally protest to the Secretary.[179] But there exists no published procedure for the presentation of objections, or for withholding grant of the disclosure order until such objections are received and considered.

The Commission should establish by regulation an assured informal procedure whereunder the submitter may object to the disclosure of its confidential information under protective order, except in cases of extraordinary urgency. The regulations should also provide that, when the submitter is given notice of an application for disclosure of its information, it also be advised specifically of the procedures whereunder it may object.

2. The requester's need for the information

The regulations require an attorney requesting disclosure of confidential information to demonstrate "a substantial need for the information in the preparation of his case," and "that he is unable without undue hardship to obtain the substantial equivalent of the information by other means."[180] The federal courts including the CIT traditionally impose similar requirements for the release of confidential information under protective order.[181]

Recitation of this standard suggests that the release of confidential information will occur only after a considered exercise of discretionary judgment. But in practice it is sufficient to state in general terms that, without the requested information, counsel cannot meaningfully prepare analysis of the facts relating to injury.[182] The ITC often makes no further assessment of need whatsoever; its regulation is to this extent virtually a dead letter.[183] For the submitter or non-specialist attorney who relies on the regulation as a safeguard, however, the regulation is misleading and imparts an impression that the ITC says one thing and does another.

In the ordinary case the present practice is nevertheless satisfactory, given time and personnel constraints, so long as submitters receive notice of the request and have a practical though informal opportunity to object whenever feasible. Where extraordinary sensitivity or other unusual considerations are demonstrated by the submitter, however, the ITC should to the extent feasible require an actual showing of substantial need before releasing confidential information. In any event, the regulations and the practice should be harmonized.

3. Conditions of disclosure

Another way to limit the possibility of unauthorized disclosure is to impose conditions upon use of the information which will improve its security. The regulations and the form of protective order excellently anticipate dangers and prescribe steps to minimize them. The sanctions are well-formulated and appear fully adequate, despite the absence of experience by which to assess them.[184] What is absent, though, is follow-up. To require a periodic certification of compliance, executed by all individuals receiving the information through the attorney, would impose only a modest burden. It would remind the recipients of their obligations, and would serve renewed notice of the Commission's serious concern with compliance.

E. Safeguarding the Interests of Submitters at the CIT

As explained, present Court of International Trade practice permits release under protective order of confidential information submitted by nonparties, without giving the nonparty submitters notice or opportunity to object.[185] Such a practice is unfair to the nonparties, who ordinarily have submitted information even though they would have preferred to have nothing to do with the case. The CIT should amend its rules to provide notice to nonparties when release of their confidential information is requested, and an opportunity to support and argue their objections.

There is probably little that can or should be done to cause the CIT to cut back the information it discloses so that it is limited to the same two categories as those the ITC discloses. The court has very broad statutory discretion to "disclose [confidential] material under such terms and conditions as it may order."[186] In the three-factor test by which the CIT implements this authority, one element is the need of the ITC to preserve its ability to obtain confidential information in future investigations.[187] One may hope that the court, when urged to limit its disclosures because of unusual sensitivities of the data or unusual opportunites for leaks, will give full weight to this factor.

V. STRENGTHENING THE FORCE OF QUESTIONNAIRES

A principal occupation of this study is to protect the ability of the ITC adequately to gather the information it needs to assess injury to domestic industries. Reducing the risks of unauthorized disclosure is one means of addressing that concern. Taking steps to compel submission of data is a complementary approach.

The regulations provide that questionnaires issued by the Commission may be issued as subpoenas.[188] In fact, though, the Commission does not issue its questionnaires as subpoenas.[189] It does not even make much use of its statutory subpoena power to remedy noncompliance with its questionnaires. The apparent explanation for this posture is that there probably will be insufficient time (within the statutory limits) to actually get the requested information by these means; even if there were, such enforcement would divert ITC lawyers and other resources from priority needs elsewhere.[190]

Use of the subpoena format from the outset seems a promising way to alleviate the squeeze of statutory deadlines. If the Commission regularly sought judicial remedies for refusals to respond, there would soon be positive incentive to answer the questionnaires. Enforcement would be more difficult in the situation where only a partial response is made to the questionnaire. Court proceedings might be factually complicated, and contumacious or evasive intent might be hard to establish. Even here, though, enforcement against carefully chosen respondents could stimulate more thorough questionnaire responses. This approach should be considered for use as an alternate to the present approach in particular cases for which such use is deemed appropriate by the Commission.

VI. ATTENTION TO THE INTERESTS OF SUBMITTERS

Rules and procedures in force at the ITC appear in some degree to undermine the interests of persons who submit confidential information. To the extent this results in a perception that the Commission has incompletely implemented its commitment to the vigilant protection of such information, members of industry may cooperate less willingly. Because the ITC relies upon their voluntary cooperation, and in the interests of fairness, submitters' interests should have high priority in any recommendations. Where present procedures could compromise submitters' interests or diminish their good will, adjustments should be made.

A. Inadequate Warning of the Possibility of Disclosure

Although confidential information regarding price and cost of production may be disclosed under protective order by the ITC, and virtually all confidential information submitted to the ITC may be disclosed in the course of an appeal proceeding at the CIT, the submitter is given no specific and straightforward warning that these things may happen. The only notice is contained in the general explanation given on questionnaires to producers. It indicates that information which is designated confidential "will not be disclosed except as may be required by law. Such confidential information will not be published in a manner that will reveal the individual operations of your firm." Subsequently, it states:

> In the event that your firm is an interested party supporting the imposition of antidumping duties, the domestic price information requested in sections H, I, and J could become subject to the protective order provisions of the Tariff Act of 1930 and section 207.7 of the Commission's Rules of Practice and Procedure (19 CFR sec. 207.7).[191]

To one acquainted with ITC practice, this language is not misleading. To the layman or non-specialist, however, it implies that confidentiality will be protected in the ordinary case, with exceptions only in vague circumstances "required by law." Even the last-quoted passage does not convey that such information is regularly released almost automatically, to counsel for foreign (and sometimes domestic) competitors of the submitter. Nor does reference to the statute or regulations reveal this practical fact.[192] It would require familiarity with the practice of the ITC to know that release under a protective order is so likely and routine a prospect. Moreover, there is no warning whatsoever with respect to information submitted other than that contained in the questionnaire. Such warning as is given may only serve to lull the submitter, and make actual disclosure more galling.

The Commission's questionnaires and other inquiries should present more specific and informative warnings, framed in language understandable by laypersons and by nonspecialist attorneys.

These same ITC documents should give a parallel warning that all confidential information of whatever kind (and not merely that in the price and cost of production categories) is subject to disclosure at the CIT, under protective order, to counsel for any party to a judicial review proceeding involving such information.[193]

It may be thought that such warnings will discourage full submissions in some cases. Nevertheless, it seems fundamentally unfair to request or compel the submission of confidential business information without revealing that it may be made available through counsel to the submitter's competitors. Moreover, use of subpoenas as suggested above would diminish the effect of such warnings upon submissions.

B. Processes for Classifying Information as Confidential

The system of gathering information by questionnaire and field investigation presumes that sensitive company-level data will be given confidential treatment. If they are not so treated, of course, the data might as a practical matter become available not only to adversaries in litigation, but indeed to all competitors and to the general public.[194] At present there is no problem with the Commission's treatment of confidential information, which it fastidiously classifies and safeguards. But a possibility of confusion and inadvertent disclosure may exist in the conflict between practice and the regulations.

The regulations (which apply to all ITC proceedings, and apparently were not drawn with Title VII proceedings specifically in mind) state in considerable detail the steps the submitter must take to obtain confidential treatment.[195] No doubt is left that the affirmative duty to seek confidential treatment rests with the submitter. But these rules diverge strikingly from the actual practice of the ITC in Title VII cases. The standard questionnaire preamble blandly states that data revealing individual company operations "will be treated as confidential by the Commission."[196] Nowhere is there an indication that the respondent has an affirmative burden to request confidential treatment, noris there any reference to the regulations. The impression conveyed is that confidential treatment is accorded such data as a matter of course. Indeed, the ITC does treat as confidential all submissions of such information — whether in response to questionnaires or to other inquiries — apparently without regard to the requirements of its own regulations.[197]

This state of affairs presents two dangers. First, the Commission has acknowledged that it might "inadvertent[ly] overlook[]" portions of documents not clearly marked by the submitter as confidential.[198] The other hazard arises from a recent amendment tightening the requirements for confidential treatment and requiring more detailed marking of documents by submitters.[199] If the practice were conformed to this strict regulatory system some parties (or, especially, nonparties), who had expected but had not requested confidential treatment for their information, might find that it had been released, not only to a competitor's attorney but to the whole world.[200]

The regulations and the practice should be harmonized, so that parties can know what they must do and what they may rely upon. If the practice is changed to conform to the regulations, there should be adequate notice of the change.

One provision of the regulation appears to conflict on its face with the statute as well. Section 777(b) of the 1979 Act promises generally that information designated as confidential by the submitter will be so treated. It places upon the Secretary the initial burden of determining that the classification is unwarranted, and then states that the Secretary shall "notify the person who submitted it and ask for an explanation of the reasons for the description."[201] The regulation, by contrast, requires that an explanation accompany the request for the designation. If the required explanation is pro forma, it probably should not be sought at all. If it is intended to be detailed, the requirement conflicts with the statute.[202]

VII. PROPOSALS FOR BROADER DISCLOSURES

A. Disclosure of Importer and Foreign Producer Information to Domestic Parties

The ITC releases (through counsel) confidential information, submitted by parties who are domestic producers, to interested parties who are foreign producers or importers; it does not, however, release information about foreign producers or importers to petitioners or to other domestic producers, even though they are interested parties.[203] An impression of unfairness is engendered: The foreign producer has access to the domestic producer's information, while reciprocal access is denied. Such access is not normally critical, since the determination of injury to the domestic industry turns mainly upon the figures of domestic producers. But specific prices and terms of sale offered by the foreign producers and their importers in the American market may bear upon penetration of that market, underselling, price suppression, and other factual issues which in turn bear upon the question of injury or threat of injury. Where importers and foreign producers do submit such information to the ITC, its release under protective order could well enable counsel for domestic producers to present useful analysis and rebuttal. For one example, domestic producers' counsel will want to check and rebut information about specific quotations offered in the United States, especially to major customers and when the defense of "meeting competiton" is claimed. Foreign cost of production data are rarely presented to the ITC, but when they are, they may have value to counsel, for parallel reasons.

To the extent such information is useful to the domestic producers' case and is not otherwise available, it probably should be released to counsel under regular protective order procedures. Provision for such release could be accomplished by regulation, without statutory amendment. While it is likely to arouse opposition from importer and foreign interests, it is not inconsistent with any multinational understanding, and might not enjoy widespread use in any event. Perhaps more important is the stronger impression of the fairness of the ITC's procedures that it would create among domestic producers.

B. Additional Disclosure of Domestic Producer Information to Importers and Foreign Producers

The consideration of injury might be benefitted by disclosure to importers and interested foreign producer parties of further data or categories of data received from domestic producer parties.

The best candidates are aspects of price information—such as credit terms and other terms of sale, volumes and discounts, or detailed specifications for custom-made equipment--which bear directly upon the analysis of whether underselling or price suppression is causing injury. Credit terms, for example, rather obviously affect the way a price figure should be interpreted. Although the ITC frequently gathers such data, surprisingly it does not usually disclose them, despite the absence of any apparent impediment in the statute or regulations.[204] Since the responses of attorneys to such price information can be useful to the

ITC, by permitting a more meaningful analysis, this information probably should be released.

Cost of production information, when obtained, is also disclosed. Whether the ITC should broaden the scope of disclosure to include closely-allied data on cost of goods sold, for example, is more problematic. A pair of related cases currently before the CIT raises the question of whether the ITC may gather only data on cost of goods sold, rather than on cost of production, and then withhold the information from disclosure.[205]

Beyond these, it is more difficult to identify categories of information that might usefully be disclosed, especially if their sensitivity is taken into account. Other standard categories of data which appear to be especially sensitive are profitability, shipments (sales), purchases (for processing or resale), capacity, production and inventory. Perhaps less sensitive would be data on wages, employment, and transportation adjustments. Any broadening of the categories of information susceptible to disclosure should be accompanied by the safeguards recommended in this report. Such broader release should be provided only where the Commission's investigative and decisional processes will clearly be improved thereby, without impeding fulfilment of statutory deadlines, and only in cases where the requester shows a substantial need for access to the information.

If the ITC should decide to permit disclosure in any such category, it should specifically define the category, and, where appropriate, the particular kinds of information within the category that may be released. If additional categories are disclosed to counsel for importers and foreign producers, consideration should be given to a reciprocal disclosure to domestic producers of similar information submitted by foreign producers.

The considerations that would support disclosure of all (or substantially all) confidential information at the ITC are not weighty. Full release would no doubt improve at least marginally the ability of some attorneys to make better-informed arguments. This putative improvement, however, seems clearly outweighed by the sharply enlarged opportunity for leaks and the probable rise in submitter resistance, in combination with the increase in costs, delay, and complexity which such a procedure would generate. Even if it is confined to information submitted by parties, broader release would increase the cost and complexity and duration of Title VII injury proceedings. All parties could file fuller rebuttals and briefs than at present. The proceeding would move further from the investigative format toward an increasingly adjudicative one. As cases became more complex and more openly adversarial, it might be thought necessary to provide for oral evidentiary procedures, for a presiding hearing officer, and perhaps for a recommended decision. Looking to its resources and its traditions of determining injury primarily by reliance on its own expert investigative staff, the Commission would undoubtedly ask whether its ability to decide injury cases would be impeded by more complex proceedings. Beyond a certain point, the statutory time limits would decisively rule out the enlarged proceedings that such wider disclosure would engender.

The present scheme is structured to draw information from the entire industry, instead of only from the parties, in a timely and cost-efficient manner. Nonparty submissions can best be encouraged by nonrelease; party submissions by limited release. The present system works well in its fundamental structure. The radical change of full release is not warranted.

FOOTNOTES

NOTES TO PART I — THE PROCEDURES UNDER STUDY

1. On the antidumping law generally, *See* C. Barshefsky and R. Cunningham, *The Prosecution of Antidumping Actions Under the Trade Agreements Act of 1979*, 6 N.C.J. of Int'l L. & Com. Reg. 307 (1981); Note, *Technical Analysis of the Antidumping Agreement and the Trade Agreements Act*, 11 Law Policy Int'l Bus. 1405 (1979). On prior antidumping law, see R. Anthony, *The American Response to Dumping from Capitalist and Socialist Economies — Substantive Premises and Restructured Procedures After the 1967 GATT Code*, 54 Cornell L. Rev. 159 (1969); J. Barcelo, *Antidumping Laws as Barriers to Trade -- The United States and the International Antidumping Code*, 57 Cornell L. Rev. 491 (1972).

2. 19 U.S.C. secs. 1673, 1673e.

3. Dumping exists when foreign merchandise is found being "sold in the United States at less than its fair value," 19 U.S.C. sec. 1673(1). The margin of dumping is reckoned by comparing the "United States price" (defined in 19 U.S.C. sec. 1677a) with the foreign market value (defined in 19 U.S.C. sec. 1677b).

4. 19 U.S.C. secs. 1673(1), 1673b(b), 1673d(a). Because a reorganization was pending at the time of enactment of the Trade Agreements Act of 1979, that Act provided for the determination of the existence of subsidy to be made by "the administering authority," 19 U.S.C. sec. 1671(a), which is defined to be "the Secretary of the Treasury, or any other officer of the United States to whom the responsibility for carrying out the duties of the administering authority under this title are transferred by law." 19 U.S.C. sec. 1677(1). The functions of the Secretary of the Treasury under Title VII were transferred to the Secretary of Commerce by Reorg. Plan No. 3 of 1979, sec. 5(a)(1)(c), 44 Fed. Reg. 69275, 93 Stat. 1381, effective Jan. 2, 1980, as provided by sec. 1-107(a) of the Exec. Order No. 12188, Jan. 2, 1980, 45 Fed. Reg. 993.

5. 19 U.S.C. secs. 1673(2), 1673b(a), 1673d(b). The ITC was originally known as the United States Tariff Commission, 39 Stat. 795 (1916). The name was changed to United States International Trade Commission by the Trade Act of 1974, sec. 171, 88 Stat. 2009, 19 U.S.C. 2231. As an alternative to determining that "(A) an industry in the United States (i) is materially injured, or (ii) is threatened with material injury," the Commission may determine that "(B) the establishment of an industry in the United States is materially retarded" by reason of imports of the dumped merchandise. 19 U.S.C. secs. 1671(a)(2), 1673(2).

6. On countervailing duty law generally, *See* D. deKieffer, *When, Why and How to Bring a Countervailing Duty Proceeding - A Complainant's Perspective*, 6 N.C.J. of Int'l L. & Com. Reg. 363 (1981); N. Hemmendinger

& W. Barringer, *The Defense of Antidumping and Countervailing Duty Investigations Under the Trade Agreements Act of 1979*, 6 N.C.J. of Inr'l L. & Com. Reg. 427 (1981). P. Feller, *Preface--Observations on the New Countervailing Duty Law*, 11 Law and Pol'y Int'l Bus. 1439 (1979).

7. 19 U.S.C. sec. 1671e (1982).

8. 19 U.S.C. secs. 1671(a)(1), 1671b(b), 1671d(a) (1982).

9. A small number of cases are still governed by prior law because the exporting countries have not made deposit of their ratifications of the 1979 multilateral trade agreements, which is a precondition for the products of those countries to get the more favorable treatment of the 1979 Act. 19 U.S.C. sec. 1303(a), 1671(b). In these cases, if the imported products are dutiable, no injury investigation or determination by the ITC is required; a countervailing duty can be imposed simply upon the finding of subsidy. 19 U.S.C. sec. 1303(b). But if the products of such countries are regularly admitted free of duty, then the ITC must conduct an injury investigation, and must make a final determination of injury, before the countervailing duty can be imposed. *Id.* The ITC's procedures for these investigations are identical to those used in the more common cases involving the products of countries that have adhered to the Trade Agreements. *Id.*

10. Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144, codified at 19 U.S.C. secs. 2501-2581 and elsewhere throughout 19 U.S.C., including notably for present purposes secs. 1303, 1671-1677g, and 1516a.

11. 19 U.S.C. secs. 1671-1677g (1982).

12. *Agreements Reached in the Tokyo Round of the Multilateral Trade Negotiations*, H.R. Doc. No. 153, 96th Cong., 1st Sess. pt. 1 (1979).

13. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, April 12, 1979, entered into force January 1, 1980, TIAS 9650.

14. Agreement on Interpretation and Application of Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade. April 12, 1979, entered into force January 1, 1980, TIAS 9619.

15. *Compare* 19 U.S.C. secs. 1671(a)(2), 1671(b), (d), 1671b(a) and 1671d(b) (countervailing duties) *with* 19 U.S.C. secs. 1673(2), 1673a(b), (d), 1673b(a) and 1673(b) (antidumping), respectively.

16. 19 C.F.R. Part 207.

17. 19 U.S.C. secs. 1671a, 1673a, 19 C.F.R. secs. 207.12, 207.20.

18. 19 U.S.C. sec. 1677(4).

19. C.F.R. secs. 1671b(a), 1673(a). Within 20 days after filing, the ITA determines whether the petition alleges the necessary elements, and contains information reasonably available to the petitioner supporting the allegations. If the determination is negative the petition is dismissed. 19 U.S.C. secs. 1671a(c), 1673a(c).

20. See 19 C.F.R. sec. 201.9.

21. Interview with Michael H. Stein, General Counsel, U.S. International Trade Commision, in Washington, D.C. (September 24, 1984).

22. 19 C.F.R. sec. 207.15.

23. 19 C.F.R. sec. 201.13.

24. 19 C.F.R. sec. 201.13(h), (i).

25. 19 U.S.C. secs. 1671b(a), 1673b(a); 19 C.F.R. 207.17, 207.18.

26. 19 U.S.C. secs. 1671b(a), 1673b(a).

27. 19 U.S.C. secs. 1671d(b), 1673d(b); 19 C.F.R. secs. 207.20, 207.25.

28. 19 U.S.C. secs. 1671d(b)(2), (3); 1673d(b)(2), (3).

29. 19 U.S.C. 1671d(b)(2), 1673d(b)(2). Where ITA has made a negative preliminary determination of dumping or subsidy, but then goes on to make an affirmative final determination, the ITC has 75 after the date of that determination to make its own final determination. 1671d(b)(3), 1673d(b)(3).

30. 19 C.F.R. sec. 207.21.

31. 19 C.F.R. sec. 207.22.

32. 19 C.F.R. sec. 207.23.

33. 19 C.F.R. sec. 207.24.

34. 19 C.F.R. secs. 207.25, 207.26, 207.27.

35. 19 U.S.C. secs. 1671e, 1673e.

36. Interview with William Fry, Director of Office of Investigation, U.S. International Trade Commission, in Washington, D.C. (June 15, 1983); Interview with Lynn Featherstone, Supervisory Investigator, U.S. International Trade Commission in Washington, D.C. (June 16, 1983). See 19 C.F.R. secs. 201.6, 201.21(b), 201.30, 207.4, 207.23(b). For context, one may note that "[t]he federal courts have long recognized a qualified evidentiary privilege for trade secrets and other confidential commercial information. [citation]. The Federal Rules of Civil Procedure [Fed. R. Civ. P. 27(c)(7)] provide similar qualified protection for trade secrets and confidential commercial information in the civil discovery context." Federal Open Market Committee v. Merrill, 443 U.S. 340, 356 (1979). This policy to protect confidentiality has been strengthened by the recent decision in Seattle Times Co. v. Rhinehart, 104 S.Ct. 2199 (May 21, 1984) (protective order restricting public disclosure of information received through discovery is not a prior restraint on constitutionally-protected speech).

37. 19 C.F.R. sec. 207.4.

38. 19 C.F.R. sec. 201.6.

39. Interview with Gracia Berg, Acting Assistant General Counsel, U.S. International Trade Commission, in Washington, D.C. (October 23, 1984).

40. See 19 C.F.R. sec. 201.6(b).

41. See 19 C.F.R. sec. 207.23.

42. Interview with Kenneth R. Mason, Secretary, U.S. International Trade Commission, in Washington, D.C. (March 29, 1983).

43. Id.

44. Trade Agreements Act of 1979 sec. 777(b), 19 U.S.C. sec. 1677f(b) (1982).

45. This paragraph is based in principal part on interviews with Michael H. Stein, General Counsel, U.S. International Trade Commission, in Washington, D.C. (March 24, 1983, and March 31, 1983) and Edward Easton, Assistant General Counsel, U.S. International Trade Commission, in Washington, D.C. (April 4, 1983 and April 6, 1983).

46. Interview with Michael H. Stein, General Counsel, U.S. International Trade Commission, in Washington, D.C. (March 24, 1983). See 44 Fed. Reg. 76,458-59 (1979).

47. Section 777(c), 19 U.S.C. sec. 1677f(c) (1982), is the provision that gives rise to the questions examined in this report. It provides:

> "(c) LIMITED DISCLOSURE OF CERTAIN CONFIDENTIAL INFORMATION UNDER PROTECTIVE ORDER.--
>
> (1) DISCLOSURE BY ADMINISTERING AUTHORITY OR COMMISSION.--
>
> (A) IN GENERAL.--Upon receipt of an application, which describes with particularity the information requested and sets forth the reasons for the request, the administering authority and the Commission may make confidential information submitted by any other party to the investigation available under a protective order described in subparagraph (B).
>
> (B) PROTECTIVE ORDER.--The protective order under which information is made available shall contain such requirements as the administering authority or the Commission may determine by regulation to be appropriate. The administering authority and the Commission shall provide by regulation for such sanctions as the administering authority and the Commission determine to be appropriate, including disbarment from practice before the agency.
>
> (2) DISCLOSURE UNDER COURT ORDER.--If the administering authority denies a request for information under paragraph (1), or the Commission denies a request for confidential information submitted by the petitioner or an interested party in support of the petitioner concerning the domestic price or cost of production of the like product, then application may be made to the United States Customs Court for an order directing the administering authority or

the Commission to make the information available. After notification of all parties to the investigation and after an opportunity for a hearing on the record, the court may issue an order, under such conditions as the court deems appropriate, which shall not have the effect of stopping or suspending the investigation, directing the administering authority or the Commission to make all or a portion of the requested information described in the preceding sentence available under a protective order and setting forth sanctions for violation of such order if the court finds that, under the standards applicable in proceedings of the court, such an order is warranted, and that--

> (A) the administering authority or the Commission has denied access to the information under subsection (b)(1),
>
> (B) the person on whose behalf the information is requested is an interested party who is a party to the investigation in connection with which the information was obtained or developed, and
>
> (C) the party which submitted the information to which the request relates has been notified, in advance of the hearing, of the request made under this section and of its right to appear and be heard.

48. 19 C.F.R. sec. 207.7.

49. Trade Agreements Act of 1979 sec. 777(c)(2), 19 U.S.C. sec. 1677f(c)(2) (1982).

50. The story is an interesting one, succintly told by ITC General Counsel Michael H. Stein, Remarks to the Eighth Judicial Conference of the U.S. Court of Customs and Patent Appeals, 92 F.R.D. 181, 348 (1981). Foreign trading partners were concerned about a provision, insisted upon by the United States in the multilateral trade negotiations, whereunder foreign producers' confidential information (primarily concerning prices and cost of production) submitted to the U.S. administering authority (now the ITA) could be disclosed under protective order to domestic parties seeking relief under what is now Title VII. In consideration of this concern of foreign interests, key U.S. negotiating factions compromised, and Congress agreed in the implementing legislation, to provide procedures to require the ITC to release to importers and their foreign producers the same kinds of domestic producers' information -- involving prices and cost of production -- as the foreign producers and importers must submit to ITA, where it will be released to the complaining domestic producers. Mr. Stein called the compromise provision "a hazing requirement rather than a bona fide effort to open the proceedings." Id. at 350.

51. Interview with Kenneth R. Mason, Secretary, U.S. International Trade Commission, in Washington, D.C. (March 29, 1983).

52. See Sacilor, Acieries et Laminoirs de Lorraine v. U.S., 542 F. Supp. 1020, 3 I.T.R.D. 2225 (Ct. Int'l Trade 1982). The ITA regulations there involved required Commerce to "weigh whether the need of the person requesting the information outweighs the need of the person submitting it for confidential treatment." 19 C.F.R. sec. 353.30 (1982). But see ARBED, S.A. v. U.S., 3 I.T.R.D. 2370 (Ct. Int'l Trade 1982).

53. Interview with Kenneth Mason, Secretary, U.S. International Trade Commission, in Washington, D. C. (March 29, 1983). Recently the Secretary has returned some requests, where need was not self-evident from the general statements, and asked for substantiation of need. Interview with Gracia Berg, Acting Assistant General Counsel, U.S. International Trade Commission, in Washington, D.C. (September 28, 1984). The proposed ITC regulation did not contain a requirement of need. In response to comments that disclosure would be "too automatic", the Commission decided "to add a standard of need similar to that incorporated in rule 26 of the Federal Rules of Civil Procedure." 44 Fed. Reg. 76,458 (1979) (preamble).

54. 19 C.F.R. sec. 207.3 (1984); Interview with Kenneth R. Mason, Secretary, U.S. International Trade Commission, in Washington, D.C. (March 29, 1983).

55. Interview with Kenneth R. Mason, Secretary, U.S. International Trade Commission, in Washington, D.C. (March 29, 1983). See pages 44-45 infra regarding the informal procedures that exist. On rare occasions the Secretary permits information to be withdrawn after the submitter has informally objected to its release under protective order. Interview with Gracia Berg, Acting Assistant General Counsel, U.S. International Trade Commission, in Washington, D.C. (Sept. 28, 1984).

56. Interview with Kenneth R. Mason, Secretary, U.S. International Trade Commission, in Washington, D.C. (March 29, 1983); Interview with Lynn Featherstone, Supervisory Investigator, U.S. International Trade Commission, in Washington, D.C. (June 16, 1983).

57. Interview with Kenneth R. Mason, Secretary, U.S. International Trade Commission, in Washington, D.C. (March 29, 1983). See 19 C.F.R. sec. 207.7 (1984) and note 130 infra for excerpts from the text of an application.

58. 19 C.F.R. sec. 207.7 (b) (1984).

59. 19 C.F.R. sec. 207.7 (d) (1984).

60. 19 C.F.R. sec. 207.7 (d) and (e). See page 38 and note IV - 20 infra.

61. Id.

62. Telephone interview with Gail Johnson, Office of the Secretary, U.S. International Trade Commission, Washington, D.C. (October 4, 1984). In 1984 through September 26, 46 protective orders were granted in Title VII cases. Id.

63. Interviews with Kenneth R. Mason, Secretary, U.S. International Commerce Commission, and Michael H. Stein, General Counsel, U.S. International Trade Commission, in Washington, D.C. (March 31, 1983). The only suggestions of violation occured in 1984; no formal investigations were conducted, and no sanctions were imposed. Telephone interview with Kenneth R. Mason, Secretary, U.S. International Trade Commission, in Washington, D.C. (November 5, 1984).

64. See 44 Fed. Reg. 59,393 (1979) (preambular discussion of proposed 19 C.F.R. 207.7); 44 Fed. Reg. 76,462 (1979) (preambular discussion of proposed 19 C.F.R. 207.7); Memorandum of Points and Authorities in Support of the Motion of Defendants, United States, U.S. International Trade Commission, and Kenneth R. Mason For Dismissal of Count Three for Lack of Subject Matter Jurisdiction and Cross-Motion for Summary Judgment on Count Three of the Complaint at 28-30, American Spring Wire Corp. v. United States, 4 I.T.R.D. 1308 (Ct. Int'l Trade 1982) ("Although the statute allows the Commission to disclose more information without the consent of the submitter, it does not *require* the Commission to do so." at 28); H.R. Rep. No. 317, 96th Cong., 1st Sess. 78 (1979).

65. *See* American Spring Wire Corp. v. United States, 4 I.T.R.D. 1308 (Ct. Int'l Trade 1982).

66. Remarks by Michael H. Stein, General Counsel, U.S. International Trade Commission, at The Eighth Judicial Conference of the U.S. Court of Customs and Patent Appeals, 92 F.R.D. 181, 349 (1981) ("It has been the experience of those at the Commission charged with sending out these questionnaires and getting the response that respondents to Commission questionnaires have often been quite nervous about giving information to the agency, lest the agency disclose it, or lest it fall into the hands of competitors."); Garfinkel, *Disclosure of Confidential Documents Under the Trade Agreements Act of 1979: A Corporate Nightmare*, 13 Law and Pol'y Int'l Bus. 465, 469 & n. 19, 474 & n. 42 (1981); Affidavit by E. William Fry, Director of Investigations, U.S. International Trade Commission, 2-3, Exhibit A of Defendant's Memorandum in Partial Opposition to Plaintiffs and Intervenor's Motions for Access to Confidential Documents and in Support of Defendant's Cross-Motion for Protective Order, Roquette Freres v. United States, 554 F. Supp. 1246 (Ct. Int'l Trade 1982) ("13. The ability of the investigative staff to obtain voluntary compliance with Commission questionnaires will suffer if it becomes known that confidential material is being released. It would be extremely difficult, if not impossible, to complete an investigation within the statutory time limits without voluntary compliance. 14. The lack of confidential business data would seriously handicap Commission Title VII investigations, since by statute, the Commission must consider such factors as price undercutting, output, sales, market share, profits, productivity, return on sales, investments, utilization of capacity, cash flow, inventories, employment, wages, ability to raise capital and investment. 15. I believe that the knowledge that the courts will permit counsel to review a firm's confidential business information will have an immediate and adverse effect on the willingness of questionnaire recipients to provide the Commission with data on their operations. 16. I believe that disclosure of confidential information will have an immediate and adverse effect on the Commission's ability to compile a proper record for decision.")

See the ITC's argument opposing release under CIT protective order, in Defendant's Memorandum in Partial Opposition to Plaintiffs' and Intervenor's Motion for Access to Confidential Documents and in Support of Defendant's Cross-Motion For Protective Order at 7-9, Roquette Freres v. United States, 554 F. Supp. 1246 (Ct. Int'l Trade 1982): "[T]he information submitted in response to ITC questionnaires [by two nonparties] constitutes highly sensitive information such that disclosure, *even under a protective order*, would not adequately assure its interest in strict confidentiality * * *. The businessmen who possess such data are extremely reluctant to disclose it, since they are well aware that in the hands of a competitor the information could translate into an advantage in the marketplace." (Emphasis added).

67. Interviews with Michael H. Stein, General Counsel, U.S. International Trade Commission, in Washington, D.C. (March 24, 1983 and March 31, 1983). In resisting disclosure by the CIT of information kept confidential at the ITC, the Commission has consistently urged this point. See Memorandum of Points and Authorities in Support of the Motion of Defendants, United States, U.S. International Trade Commission, and Kenneth R. Mason for Dismissal of Count Three for Lack of Subject Matter Jurisdiction and Cross-Motion for Summary Judgment on Count Three of the Complaint at 14, American Spring Wire Corp. v. United States, 4 I.T.R.D. 1308, (Ct. Int'l Trade 1982) ("If these non-interested parties could not be provided with strong assurances of non-disclosure in the absence of their consent to the release of the information, voluntary compliance would be virtually impossible."); Defendant's Memorandum in Partial Opposition to Plaintiffs and Intervenor's Motions for Access to Confidential Documents and in Support of Defendant's Cross-motion for Protective Order at 7, Roquette Freres v. United States, 554 F. Supp. 1246 (Ct. Int'l Trade 1982) ("The willingness of firms to submit such [sensitive] data rests to a large degree upon their confidence in the Commission's ability to maintain the confidentiality of their information."); Affidavit of E. William Fry, Director, Office of Investigations, U.S. International Trade Commission 2-3, in Roquette Freres v. United States, 554 F. Supp. 1246 (Ct. Int'l Trade 1982) ("11. In my opinion, disclosure of confidential business information, even under protective order, would seriously hamper the Commission's ability to gather information through questionnaires. 12. Because of the sensitivity of the business information requested in questionnaires and the potential for harm to a firm's competitive position if it becomes public or falls into the hands of a competitor, businessmen will not supply such information unless they are confident that the information will remain secret.... 15. I believe that the knowledge that the courts will permit counsel to review a firm's confidential business information will have an immediate and adverse effect on the willingness of questionnaire recipients to provide the Commission with data on their operations.") See also Garfinkel, supra n. 66, 474 & n. 42.

68. Softwood Lumber from Canada, Investigation 701-TA-197, I.T.C. Pub. No. 1320 (preliminary, 1982). Telephone Interview with Jack M. Simmons III, Attorney, U.S. International Trade Commission, in Washington, D.C. (November 5, 1984).

69. Telephone interviews with Kenneth R. Mason, Secretary, U.S. Int's Trade Commission and Jack M. Simmons III, Attorney, U.S. Int'l Trade Commission, in Washington, D.C. (November 5, 1984), neither of whom could recall any instances of such agreements.

70. See 19 C.F.R. secs. 353.1 - 353.9, 353.13 - 353.23, 353.36 (antidumping); 19 C.F.R. sec. 355.26 (countervailing duty).

71. Interviews with Lynn J. Barden, Senior Counsel, International Trade Administration, U.S. Department of Commerce, in Washington, D.C. (April 11, 1983 and May 5, 1983).

72. Trade Agreements Act of 1979 sec. 776(b), 19 U.S.C. sec. 1677e(b) (1982); 19 C.F.R. secs. 353.51, 355.39.

73. Trade Agreements Act of 1979 sec. 777(c)(2), 19 U.S.C. sec. 1677f(c)(2) (1982).

74. Interviews with Lynn J. Barden, Senior Counsel, International Trade Administration, U.S. Department of Commerce, in Washington, D.C. (April 11, 1983 and May 5, 1983).

75. Id.

76. 28 U.S.C. 1581(c) (1982).

77. Trade Agreements Act of 1979 sec. 1001(a), amending Tariff Act of 1930 sec. 516A(a), 19 U.S.C. 1516a(a) (1982).

78. 19 U.S.C. sec. 1677f(c)(2) (1982).

79. 28 U.S.C. sec. 1581(f) provides that such jurisdiction shall be exclusive.

80. 28 U.S.C. sec 1581(i) (1982).

81. Sacilor, Acieries et Laminoirs de Lorraine v. U.S., 542 F.Supp. 1020, 3 I.T.R.D. 2225 (Ct. Int'l Trade 1982).

82. Trade Agreements Act of 1979 sec. 1001(a), amending Tariff Act of 1930 sec. 516A, 19 U.S.C. sec. 1516a(b)(2) (1982); 28 U.S.C. sec. 2640(b) (1982).

83. Interview with Joseph E. Lombardi, Clerk of the U.S. Court of International Trade, in New York, N.Y. (May 9, 1983).

84. Interview with Joseph E. Lombardi, Clerk of the U.S. Court of International Trade, in New York, N.Y. (May 9, 1983).

85. Trade Agreements Act of 1979, sec. 1001(a), amending Tariff Act of 1930 sec. 516A, 19 U.S.C. sec. 1516a(b)(2)(B) (1982).

86. American Spring Wire Rope Corp. v. U.S., 566 F. Supp. 1538, 4 I.T.R.D. 2210 (Ct. Int'l Trade 1983).

87. Interview with James L. Watson and Herbert N. Maletz, Judges, U.S. Ct. Int'l Trade, in New York, N.Y. (May 9, 1983). See, e.g., Japan Exlan Co. v. United States, 1 Ct. Int'l Trade 286, 3 I.T.R.D. 1008 (1981).

88. See Nakajima All Co. v. United States, 2 Ct. Int'l Trade 170, 3 I.T.R.D. 1453 (1981).

89. See, e.g., Melamine Chemicals, Inc. v. United States, 2 I.T.R.D. 1398 (Ct. Int'l Trade 1980); Connors Steel Co. v. United States, 2 I.T.R.D. 1129 (Ct. Int'l Trade 1980).

90. See. e.g., Nakajima All Co. v. United States, 2 Ct. Int'l Trade 170, 3I. T.R.D. 1453 (1981).

91. Roquette Freres v. United States, 554 F.Supp. 1246 (Ct. Int'l Trade 1982).

92. See notes 66 and 64 supra.

93. Interviews with Michael H. Stein, General Counsel, U.S. International Trade Commission, in Washington, D.C. (Sept. 24, 1984 and March 29, 1983). See, e.g., Roquette Freres v. United States, 554 F.Supp. 1246, 1248 (Ct. Int'l Trade 1982), in which the request for disclosure of vital nonparty information was denied. In the run-of-the-mill case, though, the ITC does not enter an objection to the release of nonparty information. See also note 144 infra.

94. Trade Agreements Act of 1979, secs. 733(b)(1), 776,1001, 19 U.S.C. sec. 1673b(b)(1), 1677e, 1516a(b) (1982).

95. Interview with Michael H. Stein, General Counsel, U.S. International Trade Commission, in Washington, D.C. (May 24, 1983).

96. Interview with Gracia Berg, Acting Assistant General Counsel, International Trade Commission, in Washington, D.C. (September 28, 1984). "[O]ur experience has been that businessmen are skeptical of protective orders in general, and refuse absolutely to submit information if they think that it will be disclosed to employees of their competitors, even if they are members of the bar [i.e., in-house counsel]. Brief of the U.S. International Trade Commission at 15, United States Steel Corp. v. U.S., 730 F.2d 1465 (Fed. Cir. 1984).

97. Upon enactment of the Trade Agreements Act of 1979, the ITC promulgated regulations by which it permitted only the disclosure minimally required, recognizing that as it accumulated experience it might modify its rules to permit greater access to confidential information. 44 Fed. Reg. 76,458, 76,458-59 (1979) (preamble). The Commission referred to its previous practice of not releasing any information under protective order in antidumping and countervailing duty cases, and said it "has found that practice to be very helpful in obtaining sensitive data quickly in order to fulfill its statutory mandate of determining within a short time whether there is injury to U.S. industries." Id.

98. Interview with Gracia Berg, Acting Assistant General Counsel, U.S. International Trade Commission, in Washington, D.C. (September 28, 1984).

99. The grant of discretionary authority to the ITC to make confidential information available under protective order is expressly circumscribed only with respect to the source of the information to be disclosed, which must be from a party. The dictum in American Spring Wire Corp. v. United States, 566 F.Supp. 1538 (Ct. Int'l Trade 1982) that "Congress intended only information pertaining to the prices or the costs of production of the petitioner or interested parties supporting the petitioner be disclosed under protective order" correctly refers only to the power of the CIT to order the ITC to make information available under protective order, 19 U.S.C. sec. 1677f(c)(2), not to the ITC's own authority to release information, 19 U.S.C. Sec. 1677f(c)(1) (1982).

100. Trade Agreements Act of 1979, sec. 1001, *amending* 19 U.S.C. sec. 1516a (1982). Prior to the 1979 Trade Agreements Act, the ITC proceeding was investigative in the sense that the fact-gathering responsibility rested upon the Commission itself, without sharply defined adversarial roles for parties. To some extent, the 1979 act altered this arrangement. Parties to the investigation are permitted access to confidential information submitted by other parties, thereby enhancing the opportunity for attorneys to utilize this information in an adversarial mode. A further effect of the 1979 Act was to impel the ITC to make a record which would be the basis of judicial review. *See* Ehrenhaft, *What the Antidumping and Countervailing Duty Provisions of the Trade Agreements Act [Can] [Will] [Should] Mean for U.S. Trade Policy*, 11 Law and Policy Int'l Bus. 1361, 1396 (1979). The present procedure is perhaps a hybrid. It is, in one view, an "investigation with a record", Interview with Edward Easton, Assistant General Counsel, U.S. International Trade Commission, in Washington, D.C. (April 5, 1983); but the proceedings are, as comments made to the Commission state, "in some senses adversarial." 47 Fed. Reg. 6,187 (1984) (preamble to proposed regulations). A signficant consequence of limited review is that parties are generally unable to adduce new evidence at the CIT, even though it is not until the CIT proceedings that attorneys will see their opponent's submissions for the first time. 19 U.S.C. sec. 1516a(b) (1982).

101. Interview with Michael H. Stein, General Counsel, U.S. International Trade Commission, in Washington, D.C. (March 24, 1983 and March 31, 1983); Interview with Gracia Berg, Acting Assistant General Counsel, U.S. Int'l Trade Commission, in Washington, D.C. (September 28, 1984). *See* Defendant's Memorandum in Partial Opposition to Plaintiff's and Intervenor's Motions for Access to Confidential Documents and in Support of Defendant's Cross-Motion for Protective Order at 7-9, Exhibit B (Affidavit of Daniel W. Byles, Senior Staff Counsel, Merck & Co.), Roquette Freres v. United States, 554 F. Supp. 1538 (Ct. Int'l Trade 1982) in which disclosure of sensitive information to competitors even under protective order is resisted; Memorandum of ICI Opposing Disclosure of ICI's Confidential Data at 6-7, Roquette Freres v. United States, 554 F. Supp. 1538 (Ct. Int'l Trade 1982); Memorandum of Points and Authorities in Support of the Motion of Defendants, United States, U.S.International Trade Commission, and Kenneth R. Mason for Dismissal of Count Three for Lack of Subject Matter Jurisdiction and Cross-Motion for Summary Judgment on Count Three of the Complaint at 14, American Spring Wire Corp. v. United States, 566 F. Supp. 1538 (Ct. Int'l Trade 1982) ("If these non-interested parties could not be provided with strong assurances of non-disclosure in the absence of their consent to the release of the information, voluntary compliance would be virtually impossible."); Affidavit of Richard L. Enochs (Marketing Manager of ICI Americas Inc.) in Support of ICI Americas Inc.'s Motion for leave to Intervene and in Opposition to Motion for Access to ICI'S Confidential Documents of Record at 4-5, Roquette Freres v. United States, 554 F. Supp. 1538 (Ct. Int`l Trade 1982) ("[T]he principal reason ICI did not participate in any manner in either the ITC or ITA antidumping proceedings regarding sorbitol was that it was informed by the ITC that by not appearing, ICI's information would not be released under protective order by the ITC....ICI repeatedly made it clear to the ITC staff that it did not wish to complete the questionnaire.").

102 Trade Agreements Act of 1979, secs. 703, 705, 733(a), 735(b), 19 U.S.C. secs. 1651b, 1671d, 1673b, 1673d (1982).

103. Interview with Edward Easton, Assistant General Counsel, U.S. International Trade Commission, in Washington, D.C. (April 5, 1983).

104. See pages 40-47 infra.

105. Such a regulation would probably be valid as a binding procedural rule or as a legislative rule with the force of law. See National Petroleum Refiners Ass'n v. F.T.C., 482 F. 2d 672 (D.C. Cir. 1973), cert. den. 415 U.S. 951 (1974), discussed in Gellhorn, Byse & Strauss, Administrative Law — Cases and Comments 211-12 (7th ed. 1979); 2 K.C. Davis, Administrative Law Treatise 36-57 (2d ed. 1979). See also Melamine Chemicals, Inc. v. United States, 732 F.2d 924, 928-30 (Fed. Cir. 1984).

106. 19 U.S.C. sec. 1335 (1982).

107. 19 U.S.C. sec. 1677f(c)(2) (1982).

108. American Spring Wire Corp. v. United States, 566 F. Supp. 1538 (Ct. Int'l Trade 1983); Roquette Freres v. United States, 554 F. Supp. 1246 (Ct. Int'l Trade 1982).

NOTES TO PART II — THE VIRTUES OF DISCLOSING CONFIDENTIAL INFORMATION, AND PROPOSALS FOR EXPANSION

109. Interview with Gracia Berg, Acting Assistant General Counsel, U.S. International Trade Commission, in Washington, D.C. (September 28, 1984).

110. Interview with William Fry, Director of Investigations, U.S. International Trade Commission, in Washington D.C. (June 15, 1983).

111. See 19 C.F.R. sec. 207.21 (1984).

112. Interview with Richard O. Cunningham in Washington D.C. (October 24, 1984); Interview with Herbert C. Shelley in Washington D.C. (October 24, 1984).

113. Interview with Edward Easton, Assistant General Counsel, U.S. International Trade Commission, in Washington, D.C. (April 4, 1983).

114. Interview with Eugene L. Stewart in Washington D.C. (April 29, 1983); Interview with Herbert C. Shelley in Washington D.C. (October 24, 1984).

115. Interview with Edward M. Lebow in Washington D.C. (May 16, 1983).

116. Interview with Richard O. Cunningham in Washington D.C. (May 27, 1983); Interview with Edward M. Lebow in Washington D.C. (May 16, 1983); Interview with Herbert C. Shelley in Washington D.C. (October 24, 1984).

117. Interview with Eugene L. Stewart in Washington D.C. (April 29, 1983); Interview with Paul Plaia, Jr. in Washington D.C. (April 21, 1983).

118. Interview with William Fry, Director of Office of Investigations, U.S. International Trade Commission, in Washington, D.C. (June 15, 1983). Interview with Michael H. Stein, General Counsel, U.S.International Trade Commission, in Washington, D.C. (March 31, 1983); Interview with Edward Easton, Assistant General Counsel, U.S. International Trade Commission, in Washington, D.C. (April 4, 1983).

119. Interview with William Fry, Director of Office of Investigations, U.S. International Trade Commission, in Washington, D.C. (June 15, 1983); Interview with Lynn Featherstone, Supervisory Investigator, U.S. International Trade Commission, in Washington, D.C. (June 16, 1983); Interview with Michael H. Stein, General Counsel, U.S. International Trade Commission, in Washington, D.C. (March 24, 1983); see Garfinkel, supra note 66 at 469 and n. 19.

120. Interview with Michael H. Stein, General Counsel, U.S. International Trade Commission, in Washington, D.C. (September 28, 1984); Interview with Gracia Berg, Acting Assistant General Counsel, U.S. International Trade Commission, in Washington, D.C. (September 28, 1984).

NOTES TO PART III — RISKS RELATING TO DISCLOSURE UNDER PROTECTIVE ORDER: LEAK AND CHILL

121. Of the sixteen responses to the survey of practitioners undertaken in connection with this report, eight expressed little or no concern with leaks. The other eight responses varied from the certainty that leaks occurred (3), to concern among clients, to gradations between these positions. Pasco Terminals, Inc. v. United States, 477 F. Supp. 201 (Cust. Ct. 1979), aff'd, 634 F. 2d 610 (C.C.P.A. 1980), is cited as an instance where sanctions were employed by the Customs Court (now the CIT) for a breach of its protective order, in Garfinkel, Disclosure of Confidential Documents Under the Trade Agreements Act of 1979: A Corporate Nightmare, 13 Law and Pol'y Int'l Bus. 465, 491 (1981) (based upon interview with a U.S. Department of Justice staff attorney, since no order was published). No complaints or charges of leaks under Title VII were known to Edward Easton, Assistant General Counsel, U.S. International Trade Commission, interview in Washington, D.C. (April 4, 1983), or to Michael H. Stein, who points out that a leak may not be detectable even where there is extrinsic evidence of knowledge by the attorney's client. Interview with Michael H. Stein, General Counsel, U.S. International Trade Commission, in Washington, D.C. (May 24, 1983).

122. One of the two incidents of leakage known to Edward Easton in connection with a ITC unfair competition proceeding under 19 U.S.C. sec. 337 occurred through the accidental use of the wrong envelope. Interview with Edward Easton, Assistant General Counsel, U.S. International Trade Commission, in Washington, D.C. (April 4, 1983). Carelessness in segregating files and screening materials forwarded or made available to a client could lead to similar accidental disclosure.

123. In response to proposed revisions of the rules excluding in-house counsel from release of confidential information under protective order, the Commission received a number of comments emphasizing the danger of inadvertent leaks. Stating that "it is impossible to segregate information in the human mind," the Commission concluded that "there is an opportunity for the inadvertent misuse of information — even if no misuse is intended. . . ." 47 Fed. Reg. 6,187 (1982) (preamble).

124. United States Steel Corp. v. United States, 730 F.2d 1465 (Fed. Cir. 1984).

125. The Federal Circuit stated that the CIT's assumption of a greater likelihood of inadvertent disclosure by in-house attorneys could not be applied generally, but that each case must be considered separately, as to retained as well as to corporate attorneys. Application of this test could result in the denial of confidential information to retained counsel who are closely involved in the affairs of the client; such counsel now may receive confidential data.

Although the court carefully limited its decision to the procedure before the CIT, expressly refraining from consideration of the ITC's practice under 19 C.F.R. sec. 207.7 (1984), the ITC probably will have to reconsider its practice of excluding in-house counsel in light of this decision. The court's rationale seems fully applicable to the ITC, except on the possible basis that the ITC has a particular discretion in the exercise of investigative powers.

126. See Arthurs, House Counsel Clamor for Access to Foreign Data, Legal Times, Jan. 9, 1984 at 2, col. 1; Arthurs, House Counsel's Battle Over Data Not Finished, Legal Times, April 16, 1984 at 2, col. 1; Joel R. Junker, "Protective Orders and Exclusion of Corporate Counsel from Access to Confidential Information," (to be published soon). See also, Arthurs, Court Curbs Document Access of Chrysler In-House Counsel, Legal Times July 9, 1984 at 4, col. 3 (discussing an order in Chrysler Corp. v. General Motors Corp. No. 84-115, D.D.C. June 28, 1984, by which in-house counsel with management duties were barred from access to confidential documents.) Intense interest has been generated by this issue. Organizations of in-house counsel, including the American Corporate Counsel Association and Corporate Counsel, which retained former U.S. Attorney General Griffin Bell, submitted amicus briefs to the CIT in the United States Steel case. The position of Corporate Counsel was, first, that a blanket rule prohibiting disclosure under protective order to corporate counsel impairs a corporation's right to choose the legal representation of one who can provide it most effectively, and that corporate counsel are bound by the same obligations as all attorneys and should not be discriminated against.

127. The concern of domestic submitters regarding secondary disclosure is aptly summarized in the argument of Fairchild Aircraft Corp., resisting a provision of a proposed protective order that would permit disclosure to experts under the supervision of a competitor's attorney. Fairchild stated that it was "wary of allowing experts who at a later date may be hired by Embraer [the foreign competitor] as marketing, commercial, or financial consultants to examine the confidential data submitted by Fairchild to the Commission. Even though the experts may be prohibited from disclosing specific confidential information directly to Embraer, such information could be used to Fairchild's competitive disadvantage if these experts are subsequently retained by Embraer to

provide advice on marketing strategies or other competitive aspects of the commuter airline business. In such a situation, release of confidential information to these experts would be virtually equivalent to release of the information to Embraer's management." [Footnotes omitted]. Plaintiff's Opposition to Defendant-Intervenor's Motion For Release of Documents in the Administrative Record Previously Treated as Confidential And Cross Motion for a Protective Order at 11-12, Fairchild Aircraft Corp. v. United States, 4 I.T.R.D. 2075 (Ct. Int'l Trade 1983).

128. 19 C.F.R. sec. 207.7 (1984) provides:

> Limited disclosure of certain confidential information under a protective order.
>
> (a) Upon request of an attorney for an interested party to the investigation, excepting corporate counsel which (1) describes with particularity the information requested, (2) sets forth the reasons for the request, (3) demonstrates a substantial need for the information in the preparation of his case, and (4) demonstrates that he is unable without undue hardship to obtain the substantial equivalent of the information by other means, the Secretary will make available confidential information concerning the domestic price and cost of production of the like product submitted by the petitioner or by an interested party in support of the petitioner to such attorney under a protective order described in paragraph (b) of this section. Upon filing with the Secretary of an agreement among all interested parties who are parties to the proceeding requesting the release under protective order of confidential information submitted by such interested parties, other than domestic price and cost of production data, the Secretary may make such confidential information available to an attorney of such an interested party, excepting corporate counsel under a protective order described in paragraph (b) of this section. The Secretary may adopt, from time to time, forms for submitting requests for disclosure pursuant to a protective order incorporating the terms of this rule. The Secretary shall determine whether the requirements for release of information under this rule have been satisfied. The Secretary's determination shall be final for purposes of review by the Customs Court under section 777(c)(2) of the Act.
>
> (b) Protective order. The protective order under which information is made available to the attorney of an interested party shall require him to submit to the Secretary in a form prescribed by the Secretary a personal sworn statement that, in addition to such other conditions as the Secretary may require, he will:
>
> (1) Not divulge any of the information so obtained and not otherwise available to him, to any person other than
>
> (i) Personnel of the Commission concerned with the proceeding,
>
> (ii) The person or agency from whom the information was obtained,

(iii) An attorney, excepting in-house counsel, employed on behalf of the party requesting the disclosure, and who has furnished a similar statement, or

(iv) Those persons independently contracted with, or employed or supervised by, the attorney having a need thereof in connection with the proceeding and who have furnished a similar statement;

(2) Use such information solely for the purposes of the Commission proceeding then in progress or for judicial or Commission review thereof;

(3) Not consult with any person not described in paragraph (b)(1)(iii) or (iv) concerning such confidential information without first having received the written consent of the Secretary and the attorney of the party from whom such confidential information was obtained;

(4) Not copy or otherwise reproduce any confidential material obtained under protective order except in accordance with procedures to be established by the Secretary; and

(5) Report promptly to the Secretary any breach of the protective order.

(c) Final disposition of material released under protective order. Upon completion of a proceeding, or at such earlier date as the Secretary may determine appropriate for particular data, the security of confidential information shall be protected by the return of all copies of materials released to attorneys of parties pursuant to this section and all other materials containing the confidential information, such as charts or notes based on any such information received under protective order, accompanied by a certificate from the attorney to whom the material was disclosed attesting to his personal, good faith belief that no other copies of such materials have been made available to the party he represents or any other person to whom disclosure was not specifically authorized.

(d) Sanctions for breach of protective order. The sworn statement referred to in paragraph (b) shall include an acknowledgment by the person providing it that breach thereof may, for up to seven years following publication of a determination that the order has been breached, subject to being barred from practice in any capacity before the Commission:

(1) The person submitting the statement, and

(2) Such person's partners, associates, employer, and employees.

Any breach of a protective order may be referred to the United States Attorney. In the case of an attorney, accountant, or other professional, such breach also may be referred to the ethics panel of the appropriate professional association, and the offender and the party he represents shall be subject to such other administrative

> sanctions as the Commission determines to be appropriate, including striking from the record any information or briefs submitted by, or on behalf of, the party represented by the offender.
>
> (e) Sanction procedures. The Commission shall determine whether any person has violated a protective order, and may impose sanctions in accordance with paragraph (d). Any person against whom a sanction is proposed to be applied shall be afforded a reasonable opportunity to be heard before the determination is made.

129. 19 C.F.R. sec. 207.7(b)(1)(iv) (1984). The regulation does not specify to whom the sworn statement is to be given. In practice, it is sent to the Secretary, with a copy to submitters. For additional attorneys in the same firm, no approval is required. For outside attorneys and consultants, the Secretary's approval is required before they may come under the protective order; the submitter may object informally. No approval or sworn statement is required for clerical personnel employed by the attorney. Telephone interview with Pamela Cassidy, Office of General Counsel, U.S. International Trade Commission, in Washington, D.C. (October 26, 1984). *See* the ITC's standard form of protective order for Title VII cases, page 6.

130. *But see* discussion regarding possible lack of power to impose sanctions against an attorney for disclosures by members of the attorney's team, pages 39-40, *infra*.

131. In order to facilitate the process, the application for a protective order is designed to become the actual order. Its operative language states:

> C. Precautions
>
> In order to avoid unauthorized disclosure of the confidential information requested, should it be released to me under protective order, I certify that the following procedures shall be followed: (1) no copies of any information shall be made without my prior express written approval; (2) each page of all copies shall be marked "business confidential"; (3) distribution of such copies shall accord with section D of this protective order; (4) any person to whom a copy is given pursuant to section D(1)(iv) of the protective order, excepting clerical personnel, shall sign and date a copy of this protective order reflecting his or her acceptance of the terms hereof, the signed original of which copy will be returned immediately to the Secretary; and (5) whenever any document subject to this protective order is not being used, it shall be stored in a locked filed cabinet, vault, safe, or other suitable container.
>
> D. Use of Information
>
> I hereby swear that I will —
>
> (1) Not disclose any of the information obtained hereunder to any person other than to:
>
> (i) personnel of the Commission who are involved in this proceeding;

(ii) the person or responsible official of the agency from whom the information was obtained;

(iii) an attorney, excepting in-house counsel employed on behalf of the party requesting the disclosure who has furnished an appropriate protective order, identical to this;

(iv) those attorneys in my firm who have a need thereof in connection with the proceeding and who have each signed and returned to the Secretary a copy of this or an identical protective order; or

(v) those persons independently contracted with me or my firm who have a need thereof in connection with the proceeding and who have each signed an identical protective order, which has been accepted by the Secretary;

(2) Use such information solely for the purposes of this Commission proceeding or for judicial or Commission review thereof;

(3) Not discuss with any person, other than a person described in paragraph (1), such information without having first received the written consent of the Secretary and the attorney for the party from whom the information was obtained;

(4) Take adequate precautions as described above to ensure the security of the business confidential materials and the information contained therein subject to the protective order;

(5) Promptly report any breach of the conditions of this protective order to the Secretary; and

(6) Upon completion of this proceeding, or at such earlier time as the Secretary may designate, return or destroy all copies of materials released pursuant to this protective order and all other materials containing the confidential information, such as charts or notes based on any such information received under this protective order, accompanied by my certification that all such copies and materials have been returned or destroyed.

E. Sanctions

I acknowledge that violation of this protective order --

(1) May subject me, any firm of which I am a partner, associate, or employee, and my partners, associates, employer and employees, to disbarment from practice before the Commission following publication of a determination that the order has been breached;

(2) May be referred to the United States Attorney;

(3) May, if I am an attorney, accountant, or other professional, lead to referral of such breach to the ethics panel of appropriate professional associations; and

(4) Shall subject me and the party I represent to such other administrative sanctions determined to be appropriate, including

striking from the record any information or briefs submitted by, or on behalf of, the party I represent.

132. See Garfinkel, supra note 121 at 490-92; see page 39-40 infra.

133. Trade Agreements Act of 1979 sec. 701, 19 U.S.C. sec. 1671 (1982); sec. 731, 19 U.S.C. sec. 1673 (1982); sec. 771(4)(A), 19 U.S.C.sec. 1677(4)(A)(1982). "[A]ll information that is 'accessible or may be obtained,' from whatever its source may be, must be reasonably sought by the Commission." Budd Co., Ry. Division v. U.S. 507 F.Supp 997, 1003-4 (Ct. Int'l. Trade 1980).

134. Trade Agreements Act of 1979, sec. 771(4), 19 U.S.C. sec. 1677(4) (1982). An exception exists for regional industries, where an affirmative finding may be made "if the producers of all, or almost all, of the production within that [regional] market are being materially injured or threatened by material injury * * * ." Id.

135. "The Commission must provide some reasonable assurance that this information will not be disclosed to competitors, if it is to have any hope of achieving adequate voluntary responses to the questionnaires. * * * Our concern that we will have insufficient information to allow us to make informed decisions has been the overriding determinant of the Commission's protective order policy." Brief of the U.S. International Trade Commission at 15, United States Steel Corp. v. U.S., 730 F.2d 1465 (Fed. Cir. 1984).

The chilling effect of judicial protective orders was considered in Martindell v. Int'l Tel. & Tel. Corp., 594 F.2d 291 (2nd Cir. 1979). A U.S. Department of Justice criminal investigation had been denied access by the trial court, to transcripts of depositions taken in a private civil action. The transcripts had been made available to parties under a protective order. Affirming, Judge Mansfield stated that a Fed. R. Civ. P. 26(c) protective order is intended to encourage full disclosure of all evidence conceivably relevant. "Unless a valid Rule 26(c) protective order is to be fully and fairly enforceable, witnesses relying upon such orders will be inhibited from giving essential testimony in civil litigation, thus undermining [the] procedural system. . . . In short, witnesses might be expected frequently to refuse to testify pursuant to protective orders if their testimony were to be made available to the Government for criminal investigatory purposes in disregard of those orders." The test formulated by the court was that "absent a showing of improvidence in the grant of a Rule 26(c) protective order or some extraordinary circumstance or compelling need, none of which appear here, a witness should be entitled to rely upon the enforceability of a protective order against any third parties, including the Government, and that such an order should not be vacated or modified merely to accomodate the Government's desire to inspect protected testimony for possible use in a criminal investigation. . . ." Id. at 295-96.

136. Interview with Gracia Berg, Acting Assistant General Counsel, U.S. International Trade Commission, in Washington, D.C. (September 28, 1984).

137. Interview with William Fry, Director of Office of Investigations, U.S. International Trade Commission, in Washington, D.C. (June 15, 1983); Interview with Michael H. Stein, General Counsel, U.S. International Trade Commission, in Washington, D.C. (March 24, 1983 and September 24, 1984).

In its conclusions about release of information to in-house counsel, the Commission acknowledged that a "chilling effect" may result. 47 Fed. Reg. 6,187-88 (1982).

In an affidavit submitted in connection with Defendant's Memorandum in Partial Opposition to Plaintiffs and Intervenor's Motions for Access to Confidential Documents and in Support of Defendant's Cross-Motions for Protective Order, at Exhibit A, in Roquette Freres v. United States, 554 F. Supp. 1246 (Ct. Int'l Trade 1982), E. William Fry, Director of the ITC's Office of Investigations, stated that release under protective order "would seriously hamper the Commission's ability to gather information." Memorandum of ICI Opposing Disclosure of ICI's Confidential Data at 6-8, Roquette Freres v. United States, 554 F.Supp. 1246 (Ct. Int'l Trade 1982) (questioning the reliability of legal support staffs, temporary secretaries, and the use of hypothetical questions by lawyers to clients on explanations without mention of precise figures. "A lawyer advising his client at a later date is likely to base his advice on the confidential information, thus giving the client the benefit of it without literally disclosing it."); Defendant's Memorandum in Partial Opposition to Plaintiffs and Intervenor's Motions for Access to Confidential Documents and in Support of Defendant's Cross-Motion for Protective Order at 6-7, Roquette Freres v. United States, 554 F.Supp. 1246 (Ct. Int'l Trade 1982) ("Disclosure of confidential information in the record unquestionably has an adverse and chilling effect upon the ITC's ability to gather information necessary for an informed determination of the health of the domestic industry."). Remarks of Michael H. Stein, General Counsel, U.S. International Trade Commission, 92 F.R.D. 181, 350 (1981) (as to the impact of disclosure of confidential information upon questionnaire respondents: "All I can say is I spend a lot of time on the telephone explaining the protections that we give to this information to nervous questionnaire recipients.").

See Garfinkel, Disclosure of Confidential Documents Under the Trade Agreements Act of 1979: A Corporate Nightmare? 13 Law and Pol'y Int'l Bus. 465, 492 (1981). Notwithstanding the Commission's bland explanation that it was limiting disclosure until it accumulated experience, the author cites General Counsel Michael H. Stein as stating "that the ITC's real concern is maintaining its ability to conduct investigations." Id. at 474.

Actions of the ITC underscore its assumption that there is a chill: It sometimes refrains from asking questions which elicit sensitive information to avoid noncooperation arising from fear of unauthorized disclosure. Interviews with Michael H. Stein, General Counsel, U.S. International Trade Commission, in Washington, D.C. (March 24, 1983, Sept. 24, 1984). It sometimes urges domestic producers not to become parties to an investigation even though a negative inference might be drawn from their non-participation). See, e.g., Affidavit of Richard L. Enochs In Support of ICI Americas Inc.'s Motion for leave to Intervene and in Opposition to Motions for Access to ICI's Confidential Documents of Record at 4-5, Roquette Freres v. United States, 554 F.Supp. 1246 (Ct. Int's Trade 1982); It refused to release information to in-house counsel because it recognized the chill that would result from such disclosure, 47 Fed.Reg. 6,187 (1982), 44 Fed. Reg. 76,458(1979), even though it recognized that the same problem of inadvertent disclosure may exist as to retained counsel who provide business advice, 46 Fed. Reg. 28,674 (1981) (proposed Aug. 27, 1980).

In an analogous situation, the commodity futures trading industry was sufficiently concerned over potential improper use of confidential information submitted to the Commodity Futures Trading Commission to petition Congress to exempt such information from disclosure. Instead an amendment, 7 U.S.C. sec. 12(f)(1983), was enacted to provide for increased notice and opportunity for submitters to protect their interests. Letter from Kenneth M. Raisler, General Counsel, Commodities Futures Trading Commission, to Jeffrey S. Lubbers, p. 2-3 (July 18, 1983).

Of the ten attorneys who responded to the question in the survey undertaken in connection with this report, only three stated categorically that they perceived no chill and one of the three admitted to very limited experience in dealing with clients. Four respondents believed that there was chill. Two responses indicated that chill was a factor occasionally or as to a willingness to submit complete information and in one instance the attorney stated that he convinces clients that they need have no concern.

138. Interview with Michael H. Stein, General Counsel, U.S. International Trade Commission, in Washington, D.C. (March 24, 1983). "[T]he fact is that the Commission has no hope of enforcing responses to more than the tiniest fraction of its questionnaires." Brief of the U.S. International Trade Commission at 16, United States Steel Corp. v. U.S., 730 F.2d 1465 (Fed. Cir. 1984).

139. See page 15, supra, and pages 30-32, infra.

140. Interviews with Michael H. Stein, General Counsel, U.S. International Trade Commission in Washington, D.C. (March 31, 1983 and May 29, 1983).

141. Interviews with Michael H. Stein, General Counsel, U.S. International Trade Commission, in Washington, D.C. (March 23, 1983 and September 24, 1984).

142. Only the most sensitive data available to the ITC, such as customer names, have consistently escaped disclosure by the CIT. Interview with Gracia Berg, Acting Assistant General Counsel, U.S. International Trade Commission, in Washington, D.C. (September 28, 1984).

143. Interview with James L. Watson and Herbert N. Maletz, Judges, U.S. Court of International Trade, in New York, N.Y. (May 9, 1983); Interview with Joseph E. Lombardi, Clerk, U.S. Ct. Int'l Trade, in New York, New York (May 9, 1983);

144. Interview with Michael H. Stein, General Counsel, U.S. International Trade Commission, in Washington, D.C. (May 24, 1983).

145. Interview with Gracia Berg, Acting Assistant General Counsel, U.S. International Trade Commission, in Washington, D.C. (Sept. 28, 1984), See, e.g., Roquette Freres v. United States, 554 F. Supp. 1246 (Ct. Int'l Trade 1982). This success may be largely attributed to the careful choice of cases by the ITC staff. In many cases the ITC does not object to disclosure of nonparty information, with the result that nonparty confidential data are often released. The ITC does in some instances, however, try to warn parties by telephone that the disclosure of data has been requested in CIT proceedings. Interview with Gracia Berg, supra.

146. Interview with James L. Watson, Judge, U.S. Court of International Trade, in New York, N. Y. (May 9, 1983).

NOTES TO PART IV -- PROPOSALS TO REDUCE THE RISKS OF DISCLOSURE

147. Interview with Michael H. Stein, General Counsel, U.S. International Trade Commission, in Washington, D.C. (March 31, 1983); Interview with Edward Easton, Assistant General Counsel, U.S. International Trade Commission, in Washington, D.C. (April 6, 1983).

148. See note 47 supra.

149. Trade Agreements Act of 1979 sec. 777(c)(2), 19 U.S.C. sec. 1677f (1982).

150. Often the investigation will reveal that price lists have been published. Interview with Kenneth R. Mason, Secretary, U.S. International Trade Commission, in Washington, D.C. (March 29, 1983). In such a situation the list, although not confidential, may not reflect the actual prices at which goods are sold. Prices can be distinguished as wholesale prices or discounted prices and can either include or exclude shipping, handling and other amounts. According to Michael H. Stein, General Counsel, U.S. International Trade Commission in an interview, in Washington, D.C. (March 24, 1983), there have been several substantial disagreements between the ITC and attorneys representing parties to the investigation over the meaning of "price."

151. 19 U.S.C. sec. 1336 (1982) empowers the Commission to investigate differences in cost of production of domestic and foreign articles and recommend additional duties to attain equalization. But 19 U.S.C. sec. 1352 (1982) provides that Section 1336 does not apply to any article with respect to which the United States has entered an agreement under the Reciprocal Trade Agreements Act of 1934 and its successors. Since almost all imports move under such trade agreements, Section 1336 has virtually no application.

152. Interview with Kenneth R. Mason, Secretary, U.S. International Trade Commission, in Washington, D.C. (March 29, 1983).

153. Interview with Edward Easton, Assistant General Counsel, U.S. International Trade Commission, in Washington, D.C. (April 6, 1983). A pair of cases are now pending in the CIT in which this distinction is at issue. Societe' Nationale des Poudres et Explosifs v. United States, CIT 83-9-01325 (Ct. Int'l Trade, filed Sept. 9, 1983) and CIT 83-7-01075 (Ct. Int'l Trade, filed July 21, 1983).

154. Interview with Edward Easton, Assistant General Counsel, U.S. International Trade Commission, in Washington, D.C. (April 6, 1983). In Fresh Cut Roses from Columbia, No. 731-TA-148 (U.S. Int'l Trade Commission Publication 1575, September 1984), the actual cost of production figures were used in a situation where there was no inventory and, consequently, no difference from the cost of goods sold.

155. See 44 Fed. Reg. 76,461-762 (1979); Interview with Edward Easton, Assistant General Counsel, U.S. International Trade Commission, in

Washington, D.C. (April 6, 1983); Interview with Kenneth R. Mason, Secretary, U.S. International Trade Commission, in Washington, D.C. (March 29, 1983).

156. See Remarks by Michael H. Stein, General Counsel, U.S. International Trade Commission to the Eighth Judicial Conference of the U.S. Court of Customs and Patent Appeals, 92 F.R.D. 181, 348 (1981).

157. Interview with Michael H. Stein, General Counsel, and Gracia Berg, Acting Assistant General Counsel, U.S. International Trade Commission, in Washington, D.C. (September 28, 1984).

158. Interview with Richard O. Cunningham in Washington D.C. (May 27, 1983); Interview with Herbert C. Shelley in Washington D.C. (October 24, 1984). Counsel for domestic producers often agree to submit their clients' individual information to a trade association or other central dataholder, which will aggregate the information for use of all domestic producer parties, in a way that does not reveal individual company figures.

159. 19 U.S.C. sec. 1677f(c)(2); 19 C.F.R. sec. 207.7(a) (1982).

160. 47 Fed. Reg. sec. 6,182-83 (1982). 19 C.F.R. sec. 201.2(h) (1984) provides that for purposes of Title VII investigations a party is "any person who has filed a complaint or petition on the basis of which an investigation has been instituted, or any person whose entry of appearance has been accepted. . . ."

161. Trade Agreements Act of 1979 sec. 771(9), 19 U.S.C. sec. 1677 (1982), provides that an "interested party" is:

> (A) a foreign manufacturer, producer, or exporter, or the United States importer, of merchandise which is the subject of an investigation under this title or a trade or business association a majority of the members of which are importers of such merchandise,
>
> (B) the government of a country in which such merchandise is produced or manufactured.
>
> (C) a manufacturer, producer, or wholesaler in the United States of a like product,
>
> (D) a certified union or recognized union or group of workers which is representative of an industry engaged in the manufacture, production, or wholesale in the United States of a like product, and
>
> (E) a trade or business association a majority of whose members manufacture, produce, or wholesale a like product in the United States.

162. 19 C.F.R. sec. 201.11 (1984). In so defining "party" the Commission expressed its hope that "only those persons who have a direct interest in the investigation will become parties." 47 Fed. Reg. sec. 6,182-83 (1982).

163. Confidential information may not be directly referred to in oral argument, although knowledge of it will certainly shape arguments. The principal use of confidential information is in the preparation of briefs.

164. 19 C.F.R. sec. 207.7(a) (1984).

165. 19 C.F.R. sec. 207.7(b)(1)(iv) (1984).

166. In adopting the present provisions, the Commission justified disclosure to nonlegal professionals (through the auspices of an attorney) on the ground not only that the professional will be bound, but also that "the attorney will also be responsible for any breach by the professionals working for him." 44 Fed. Reg. 78,458 (1979).

167. See page 5 supra.

168. 19 U.S.C. secs. 1671b and 1673b (1982) provide that the preliminary determination by the ITA precedes that of the ITA. Forty-five days are allotted to the ITC preliminary investigation. A substantial period then follows for completion of a preliminary investigation by the ITA: 40 days in a countervailing duty investigation, 19 U.S.C. sec. 1671b(b) (1982), and 115 days in an antidumping investigation, 19 U.S.C. sec. 1673b(b)(1) (1982). If the preliminary investigation by the ITA is negative, the ITC must wait for a final ITA determination before beginning its own final investigation, for which 75 days are then available. 19 U.S.C. sec. 1973d(a)(1) and 1971d(a)(1) (1982). If both ITA investigations are negative, there is of course no final investigation by the ITC. 19 U.S.C. secs. 1671b(a), 1673b(a)(1982).

169. 19 C.F.R. sec. 207.7(c) (1984) appears to permit the Secretary to require the return of released information.

170. The Trade Agreements Act of 1979, secs. 703 (a), 733(a), 19 U.S.C. secs. 1671b(a), 1673b(a) (1982), requires the Commission to determine the existence of a reasonable indication of injury within 45 days after the date of filing of the petition.

171. Republic Steel Corp. v. United States, 5 I.T.R.D. 2433 (Ct. Int'l Trade July 11, 1984). Judge Watson, reviewing the legislative history, concluded that the preliminary determination involves "an extremely low threshold for finding a reasonable indication of injury." Id. at 24-38.

172. Interview with Edward Easton, Assistant General Counsel, U.S. International Trade Commission in Washington, D.C. (April 6, 1983). See Statement by Alfred Eckes, Chairman, U.S. International Trade Commission, Testimony to Committee on Ways and Means, U.S. House of Representatives (March 16, 1983), justifying a thorough preliminary investigation on the ground that it screens out unmeritorous cases, thereby reducing the caseload for which the ITC must conduct final investigations.

173. See pages 20-22 supra.

174. One leading practitioner, who favors elimination of release under protective order during the preliminary stage, would retain the discipline afforded by allowing importer's counsel access to the petitioner's own price information. Interviews with Richard O. Cunningham in Washington D.C. (June 2, 1983 and October 24, 1984).

175. 19 C.F.R. sec. 201.16 (1984).

176. The Secretary has adapted the rule of 19 C.F.R. sec. 201.6 (1984), which requires that a response to a request for confidential treatment be made within ten days, to create an analogous internal rule calling for action upon a protective order application within ten days. Usually the Secretary will wait until about the seventh day to allow the submitter an opportunity to make an informal objection. Interview with Kenneth R. Mason, Secretary, U.S. International Trade Commission, in Washington (March 29, 1983). This approach, of course, assumes that the submitter has prompt notice of the application and is aware of the unpublished procedure for making informal objections.

177. The Commission rejected a fixed five-day waiting period (from the date of service of a request for release) for the purpose of receiving objections. 47 Fed. Reg. 6,188 (1982) (proposed May 28, 1981).

178. Whether the opportunity to object can be of much value to the submitter is problematic. Apparently few if any protective orders have been denied on grounds advanced solely by objecting parties. Interview with Gracia Berg, Acting Assistant General Counsel, U.S. International Trade Commission, in Washington, D.C. (September 28, 1984).

179. Interview with Kenneth R. Mason, Secretary, U.S. International Trade Commission, in Washington, D.C. (March 29, 1983).

180. 19 C.F.R. sec. 207.7(a)(3), (4) (1984).

181. In their application of Fed. R. Civ. P. 26(c) in cases involving trade secrets or confidential business information, the federal district courts require the requester to show need and relevancy before ordering release under protective order. "No absolute privilege protects the [confidential business] information sought here from disclosure in discovery proceedings. The claim of irreparable competitive injury must be balanced against the need for information in the preparation of the defense. Judicial inquiry should not be unduly hampered. Inconvenience to third parties may be outweighed by the public interest in seeking the truth in every litigated case." Covey Oil Co. v. Continental Oil Co., 340 F. 2d 993, 999, (10 Cir. 1965) cert. den. 380 U.S. 964 (1965). The courts balance need and relevancy against the submitter's need for secrecy. "It is within the sound discretion of the trial court to decide whether trade secrets are relevant and whether the need outweighs the harm of disclosure. Likewise, if the trade secrets are deemed relevant and necessary, the appropriate safeguards that should attend their disclosure by means of a protective order are also a matter within the trial court's discretion." Centurion Industries, Inc. v. Warren Steurer, 665 F. 2d 323, 326 (10th Cir. 1981).

While the CIT requires a showing of need (as well as of relevancy), the degree of need that the requester must show is uncertain. The court in American Spring Wire Corp. v. United States, 566 F. Supp. 1538 (Ct. Int'l Trade 1983) presents a useful review of cases decided by the CIT and its predecessor, the Customs Court. See also ARBED, S.A. v. U.S., 3 I.T.R.D. 2369 (Ct. Int'l Trade 1982). In Japan Exlan Co. v. United States, 1 Ct. Int'l Trade 286, 3 I.T.R.D. 1008 (1981) the court rejected the argument that the need must be "compelling".

Holding that the ITA may not order the release of confidential information until the information has actually been submitted, the CIT stated that "the release of confidential information must be the result of a reasoned decision which carefully evaluates the need of the applicant as opposed to the demands of confidentiality." Sacilor, Acieries et Laminoirs de Lorraine v. U.S., 3 I.T.R.D. 2225, 2227, 542 F.Supp 1020, 1025 (Ct. Int'l. Trade 1982). The court referred to the statutory requirement for an application for release under protective order which "describes with particularity the information requested and sets forth the reasons for the request . . . ." 19 U.S.C. sec. 1677f(c)(1).

182. The preamble to the statement of need in the application for a protective order reads:

> I certify that I have a substantial need for the information for which release is sought under this protective order in the preparation of the case of my client and that I am unable without undue hardship to obtain the substantial equivalent of such information by other means. My specific reasons for concluding that I have a substantial need for the information within the meaning of 19 C.F.R. 207.7 include:

Ironically, in promulgating 19 C.F.R. sec. 207.7 (1984), the Commission rejected automatic disclosure and "decided to add a standard of need similar to that incorporated in rule 26 of the Federal Rules of Civil Procedure. Before the Secretary releases domestic price and cost of production information to an interested party, an interested party must demonstrate a substantial need for the information in the prosecution of his case and that he is unable without undue hardship to obtain the substantial equivalent of the information by other means." 44 Fed. Reg. 78,458 (1979).

183. See Garfinkel, supra note 66 at 473 and note 38 (giving Michael H. Stein, General Counsel, U.S. International Trade Commission, as the source of information). Recently the Secretary has returned some requests, where need was not self-evident from the general statements, and asked for substantiation of need. Interview with Gracia Berg, Acting Assistant General Counsel, U.S. International Trade Commission, in Washington, D.C. (September 28, 1984).

184. See Garfinckel, supra note 66 at 490-492.

185. See text at note 146 supra.

186. Trade Agreements Act of 1979, sec. 1001(a), amending Tariff Act of 1930 sec. 516A, 19 U.S.C. sec. 1516a(b)(2)(B) (1982), provides:

> [T]he court may examine, in camera, the confidential or privileged material, and may disclose such material under such terms and conditions as it may order.

187. The other elements are the need of the litigants for data used by the Government in order to respond adequately, and the need of the manufacturer/submitter to protect sensitive information from disclosure. See, e.g., American Spring Wire Corp. v. United States, 566 F. Supp. 1538, 4 I.T.R.D. 2210 (Ct. Int'l Trade 1982).

NOTES TO PART V -- STRENGTHENING THE FORCE OF QUESTIONNAIRES

188. 19 C.F.R. sec. 207.8 (1984) provides:

> Questionnaires to have the force of subpoenas; subpoena enforcement.
>
> Any questionnaire issued by the Commission in connection with any proceeding under section 303 or title VII of the Act, may be issued as a subpoena and subscribed by a Commissioner, after which it shall have the force and effect of a subpoena authorized by the Commission. Whenever any party or any other person fails to respond adequately to such a subpoena or whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise signficantly impedes an investigation, the Commission may (a) use the best information otherwise available in making its determination; (b) seek judicial enforcement of the subpoena pursuant to 19 U.S.C. 1333; (c) take such other actions as are necessary and appropriate, including waiver of any time limitation set forth in this part, as necessary to obtain needed information; or (d) any combination of the above.

The Commission appears to have adequate authority to cast its questionnaire as a subpoena. 19 U.S.C. sec. 1333(a)(4) (1982) empowers the Commission to "require any person, firm, copartnership, corporation or association, to furnish in writing, in such detail and in such form as the Commission may prescribe, information in their possession pertaining to such investigation" and authorize any member of the Commission to sign subpoenas. Although this arrangement has not received judicial scrutiny, it seems directly analogous to the Federal Trade Commission's investigative power to demand information and reports, directly enforceable in federal court. 15 U.S.C. secs. 46(b), 49, 57b-1 (1982).

189. Interviews with Michael H. Stein, General Counsel, U.S. International Trade Commission, in Washington, D.C. (March 29, 1983 and Sept. 24, 1984).

190. Id. See Defendant's Memorandum in Partial Opposition to Plaintiffs and Intervenor's Motions for Access to Confidential Documents and in Support of Defendant's Cross-Motion for Protective Order at 8-9, Roquette Freres v. United States, 554 F.Supp. 1246 (Ct. Int'l Trade 1982). ("[R]esort to subpoena enforcement actions (see 19 U.S.C. sec. 1333) may be of little avail to the ITC especially when one considers the short periods in which ITC must make its determinations, particularly with respect to ITC's preliminary determinations."). An additional reason advanced is the perception of the ITC staff that use of the subpoena format from the outset would in some fashion restrict its flexibility in the negotiation process by which information is elicited from uncooperative recipients of ITC questionnaires. Id. Use of the subpoena format does not, of course, require actual enforcement of the subpoena, but it makes more visible the ability of the Commission to enforce its requests, and it ought to shorten the time involved. For an example of the ITC's current subpoenas practice, see Defendants' Memorandum in Partial Opposition to Plaintiffs and Intervenor's Motions for Access to Confidential Documents and in Support of Defendants' Cross-Motion for Protective Order at 3-5, Roquette Freres v. United States, 554 F.Supp 1246 (Ct. Int'l Trade 1982) : ICI, the largest domestic producer, refused to cooperate with the ITC during the preliminary investigation. During the final investigation, it returned the questionnaire but did not

include financial information "for the specific reason that it was concerned about the release of its information to third parties." A letter was then sent on January 25, 1982, by the Secretary, outlining the treatment given confidential information. On February 4, 1982, the ITC Director of Investigations asked the General Counsel's office to prepare Commission orders requiring submission of the information, which were approved by the Commission and mailed on February 17, 1982. On that date, as the Commission was prepared to file an action to enforce its order, ICI submitted the information under protest.

NOTES TO PART VI — ATTENTION TO THE INTERESTS OF SUBMITTERS

191. These statements are taken from the Producer's Questionnaire used in the ITC investigation of Certain Carbon Steel Products from Argentina, Australia, Finland, and Spain (due date, September 12, 1984).

192. The "protective order provisions of the Tariff Act of 1930" may not be easy for the layman or nonspecialist questionnaire recipient to find. The original 1930 Act did not address disclosure or protective orders (or, for that matter, antidumping). Why can't the questionnaire recipient be straightforwardly referred to 19 U.S.C. sec. 1677f, which was added in 1979? Such petty obscurantism causes needless toil for nonspecialist lawyers, and reinforces the impression of bureaucracy's thoughtlessness.

193. See pages 30-32, _supra_.

194. Trade Agreements Act of 1979, sec. 777(a)(4), 19 U.S.C. sec. 1677f(a)(4) (1982); Freedom of Information Act, 5 U.S.C. sec. 552 (1982). _But see_ Chrysler Corp. v. Brown, 441 U.S. 281 (1979).

195. 19 C.F.R. sec. 201.6(a)-(c) (1984), as amended 49 Fed. Reg. 32571 (Aug. 15, 1984), provides:

> _Confidential business information._
>
> (a) _Definition._ Confidential business information is information which concerns or relates to the trade secrets, processes, operations, style of works, or apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories, or amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or other organization, or other information of commercial value, the disclosure of which is likely to have the effect of either: (1) Impairing the Commission's ability to obtain such information as is necessary to perform its statutory functions, or (2) causing substantial harm to the competitive position of the person, firm, partnership, corporation, or other organization from which the information was obtained, unless the Commission is required by law to disclose such information.
>
> (b) _Procedure for submitting business information in confidence._ (1) A request for confidential treatment of business information shall be addressed to the Secretary, United States International Trade Commission, 701 E Street NW., Washington, D.C. 20436, and shall indicate clearly on the envelope that it is a request for confidential treatment

(2) In the absence of good cause shown, any request relating to material to be submitted during the course of a hearing shall be submitted at least three (3) working days prior to the commencement of such hearing.

(3) With each submission of, or offer to submit, business information which a submitter desires to be treated as confidential under paragraph (a)(2) of this section, the submitter shall provide the following, which may be disclosed to the public:

(i) A written description of the nature of the subject information;

(ii) A justification for the request for its confidential treatment;

(iii) A certification in writing under oath that substantially identical information is not available to the public;

(iv) A copy of the document (A) clearly marked on its cover as to the pages on which confidential information can be found, and (B) with information for which confidential treatment is requested cleraly identified by means of brackets (except when submission of such document is withheld in accord with paragraph (b)(4) of this section); and

(v) A nonconfidential copy of the documents as required by sec. 201.8(d).

(4) The submission of the documents itemized in paragraph(b)(3) of this section will provide the basis for rulings on the confidentiality of submissions, including rulings on the confidentiality of submissions offered to the Commission which have not yet been placed under the possession, control, or custody of the Commission. The submitter has the option of providing the business information for which confidential treatment is sought at the time the documents itemized in paragraph (b)(3) of this section are provided or of withholding them until a ruling on their confidentiality has been issued.

(c) Identification of business information submitted in confidence. Business information which a submitter desires to be treated as confidential shall be clearly labeled "confidential business information" when submitted, and shall be segregated from other material being submitted.

196. E.g., Certain Carbon Steel Products from Argentina, Australia, Finland, and Spain, General Information and Instructions, Producer's Questionnaire, p. 2, (U.S. Int'l Trade Comm., return date September 12, 1984). The general cover letter used in connection with the Carbon Steel Products Investigation, dated August 22, 1984, states somewhat ambiguously:

> The information supplied by you in this questionnaire or in connection therewith that qualifies as confidential business information will be so treated by the Commission.

The formal notice of the Carbon Steel Investigation, by contrast, requires that any business information for which confidential treatment is desired shall be submitted separately. 49 Fed. Reg. 33348 (Aug. 22, 1984). It provides that the envelope and all pages of such submissions must be clearly labeled "Confidential Business Information," and that confidential submissions and requests for confidential treatment must conform with the requirements of section 201.6 of the Commission's rules (19 C.F.R. sec. 201.6). Id. at 33349.

197. Interview with Gracia Berg, Acting Assistant General Counsel, U.S. International Trade Commission, in Washington, D.C. (October 23, 1984). But if a domestic producer submits information on its own initiative, it must specifically request confidential treatment. Id.

198. 49 Fed. Reg. 14,503 (1984) (preamble to final regulations).

199. 19 C.F.R. sec. 201.6 (1984). See 49 Fed. Reg. 14,503 (1984) (preamble), in which the Commission explains that confidential documents "presently filed with the Commission often do not clearly identify which information is confidential. When the confidential information is not clearly identified, the Commision staff must spend extra time comparing confidential and non-confidential versions in order to identify the confidential information. This causes delays in processing requests and may result in the Commission's inadvertent overlooking of portions not clearly marked as confidential."

200. The Commission in Title VII proceedings may disclose any submitted information "not designated as confidential by the person submitting it." Trade Agreements Act of 1979, sec. 777(a) (4)(B), U.S.C. sec. 1677f (a)(4)(B) (1982). See Freedom of Information Act, 5 U.S.C. sec. 552 (1982).

201. Trade Agreements Act of 1979, sec. 777(b), 19 U.S.C. sec. 1677f(1982), provides:

> "(b) CONFIDENTIAL INFORMATION.—
>
> "(1) CONFIDENTIALITY MAINTAINED.—Except as provided in subsection(a)(4)(A) and subsection (c), information submitted to the administering authority or the Commission which is designated as confidential by the person submitting it shall not be disclosed to any person (other than an officer or employee of the administering authority or the Commission who is directly concerned with carrying out the investigation in connection with which the information is submitted) without the consent of the person submitting it. The administering authority and the Commission may require that information for which confidential treatment is requested be accompanied by a non-confidential summary in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence, or a statement that the information is not susceptible to summary, accompanied by a statement of the reasons in support of the contention.
>
> "(2) UNWARRANTED DESIGNATION.—If the administering authority or the Commission determines, on the basis of the nature and extent of the information or its availability from public sources, that designation of any information as confidential is unwarranted, then

it shall notify the person who submitted it and ask for an explanation of the reasons for the designation. Unless that person persuades the administering authority or the Commission that the designation is warranted, or withdraws the designation, the administering authority or the Commission, as the case may be, shall return it to the party submitting it."

202. Curiously, in response to an unusual request made by an intervenor for complete and unrestricted public disclosure of confidential information at the CIT without any protective order whatsoever, the ITC urged a construction of 19 U.S.C. sec. 1677 f(b)(1) (1982) which contradicts its own regulations promulgated under the statute: "This section mandates that any information designated as confidential by the party submitting the information shall be accorded confidential treatment by the Commission. the language is mandatory, not hortatory leaving the Commission no discretion on the issue...Section 777 does provide the Commission with the authority to challenge a submitter's confidential designation." Opposition of Defendants United States and United States International Trade Commission to Defendant-Intervenor's Motion forRelease of Documents Previously Treated as Confidential, Fairchild aircraft Corp. v. United States, 4 I.T.R.D. 2075 (Ct. Int'l Trade 1983).

NOTES TO PART VII -- PROPOSALS FOR BROADER DISCLOSURE

203. See pages 11-12, supra . It is true that some of this information may often be known to the domestic parties through protective order at the ITA. Under the ITA protective order, however, this material cannot be used at the ITC. Interview with Gracia Berg, Acting Assistant General Counsel, U.S. International Trade Commission, in Washington, D.C. (October 4, 1984).

204. Interview with Michael H. Stein, General Counsel, U.S. International Trade Commission, in Washington, D.C. (September 28, 1984); Interviews with Gracia Berg, Acting Assistant General Counsel, U.S. International Trade Commission, in Washington, D.C. (September 28, 1984 and October 23, 1984).

205. Societe' Nationale des Poudres et Explosifs v. United States, CIT 83-9-01325 (Ct. Int'l Trade, filed Sept. 9, 1983) and CIT 83-7-01075 (Ct. Int'l Trade, filed July 21, 1983).

BACKGROUND REPORT FOR RECOMMENDATION 84-7

Final Report
(October 1984)

ADMINISTRATIVE HANDLING OF MONETARY CLAIMS: TORT CLAIMS AT THE AGENCY LEVEL

By

George A. Bermann
Professor of Law
Columbia University School of Law

This report has been prepared for and at the request of the Administrative Conference of the United States. The views expressed herein are solely those of the author and do not necessarily represent views held by the Administrative Conference.

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Anyone seeking an exhaustive account of case law and statutes in the federal tort claims area should consult Lester Jayson's three-volume treatise, Handling Federal Tort Claims, as supplemented to date, which proved infinitely valuable to the author in the conduct of his research.

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Chapter One

INTRODUCTION: DEFINING THE MONETARY CLAIM

How do federal agencies go about responding to monetary claims against the government? Even limited to its strictly procedural aspects, this question has to my knowledge never been studied as a government-wide phenomenon cutting across agency, program and subject matter lines. This is no wonder, for monetary claims against the government may take an immense variety of forms, each with its peculiar characteristics, procedural as well as substantive. The Administrative Conference clearly has placed on its agenda a procedural problem as broad and pervasive as any it has undertaken to study and one that understandably has escaped comprehensive review for all the time that the government has been in the important but not always very conspicuous business of satisfying demands from private parties for monetary relief.

The notion of monetary claim against the government clearly requires refinement if its procedural handling by the generality of agencies is to be examined in any meaningful and manageable way; this report focuses, for reasons that will be made clear, on tort and tort-like claims. Still, the universe of monetary claims against the government is a vastly larger one, and this introductory section, without seeking to construct anything even resembling a strict typology of such claims, seeks simply to sketch the extraordinary range of demands that fall within that larger universe.

What is a monetary claim against the government? A sensible way to start identifying the various kinds of monetary claims that may be made against the government is to ask from what sources the government derives authority to satisfy demands for money. This is so because one may assume that agencies and agency officials, unlike private persons, are not basically at large in deciding whether and how to spend funds, but must be able to point to some express or implied statutory authority to justify each expenditure. If agencies need substantive authority to satisfy monetary claims, then the sources of that authority are a guide to the kinds of claims that may seriously be presented to them for their consideration.

A. Statutory Entitlements

One whole category of monetary claim that emerges from this analysis is what may fairly be called an agency-level statutory entitlement. By this I mean a payment to which the claimant has a statutory right as against the government department in charge of the program. The claimant typically bears the burden of establishing eligibility for the entitlement by showing that he or she satisfies whatever criteria may be found in the relevant statute and implementing regulations. That a claimant enjoys a statutory entitlement does not necessarily mean that he or she is entitled to a predetermined sum of money. That may or may not be the case, for while some entitlements are expressed as fixed sums or referenced to mathematical formulas set out in statute or regulation, others are subject to more or less vague standards of valuation. What signifies a statutory entitlement is not that it embodies a claim of fixed value, but that it expresses a reasonably well-defined right against the government. Typically, the claimant deals with an agency specifically designated to administer the entitlement program and the claim, if valid, is satisfied by funds made available to the agency for that purpose. I emphasize the agency-level character of most statutory entitlements in order to underscore the important point, from the perspective of the Administrative Conference, that the procedures by which such entitlements are regularly asserted and determined are administrative procedures. A claimant turns to court, assuming that avenue has not been cut off by the statute creating the entitlement, not as the principal mechanism for vindicating his or her claim, but as a means of redress against the agency's denial of the claim or failure to satisfy it in full. Judicial redress is secondary not only because postponed, but because the standard of review employed by the court is likely to be less than de novo both on findings and characterizations of fact and on the agency's exercise of discretion. This makes the procedural adequacy of the entitlement program only that much more important.

A good many entitlement programs -- indeed many of those that come most readily to mind -- obligate the government to provide benefits in the absence of any direct governmental responsibility for the circumstances giving rise to the claim. Social security, food stamps, medicare -- even farm support payments -- illustrate this sort of wealth redistribution. But such is not invariably the case. Examples come readily to mind of statutory entitlements as to which the government cannot assume so neutral and detached a posture. Take, for example, workmen's compensation benefits for those in the civilian or military employ of the federal government. As to these, the government occupies principally the role of employer rather than provider of social insurance, but it administers statutory entitlements nonetheless. A variant on this example is the Military Personnel and Civilian Employees' Compensation Act which provides compensation to government employees for certain losses of personal property and household goods incident to service. The statute does not presuppose governmental fault, but it does presuppose a certain governmental responsibility.

Much clearer examples of active government involvement in the loss to which a claim of statutory entitlement relates are programs to indemnify persons whose property is knowingly destroyed or damaged by government pursuant to statutory direction in the interest of some larger social good. An illustration would be the indemnification of herd owners for the Agriculture Department's compulsory "depopulation" of livestock infected with brucellosis or other highly communicable disease. Procedural aspects of such a program reflect the fact that indemnification is an element of a larger affirmative governmental program, here brucellosis eradication. Whereas food stamp claimants must come forward with an application and suitable evidence of eligibility, persons entitled to statutory indemnification can expect the government, as a legal condition of its action, to raise and address the matter. The central point is that even these essentially nongratuitous payment programs are in every sense of the word statutory entitlements, as I have used that term.

Despite its prominence as a subset of monetary claims against the government -- and despite the obvious importance of administrative procedure in its implementation -- the statutory entitlement does not fall comfortably within a generalized study of agency handling of monetary claims. The reason is implicit in what has already been said. Predicated as they are on a statutory right, entitlement programs tend to operate within a more or less precise, but almost invariably statute-specific procedural framework. Within this framework, issues such as the individual's eligibility for the entitlement, valuation of his or her particular claim, and the eventual appropriateness of a reduction or termination of benefits will be established. To be sure, the statute establishing the entitlement program (or the program of which the entitlement is only an incidental feature) will rarely occupy the entire procedural field. Room may be left to apply, as appropriate, the adjudicatory procedures of the Administrative Procedure Act or supplemental procedures called for by regulations of the agency or agencies involved. Finally, the due process clause of the Constitution may superimpose on all of this its own procedural demands in the name of fundamental administrative fair play, especially where by hypothesis an entitlement is concerned. Still, a certain coupling, typically in one and the same programmatic legislation, is to be expected between the substantive entitlement, on the one hand, and the basic procedural framework by which claims to it are raised and decided, on the other. Though one might disengage the two, that is, enact a series of substantive entitlements without regard to procedural detail and submit the entire series to a separately enacted and largely standardized claims adjudication procedure, such has not been the general practice. Each entitlement scheme tends to carry its own procedural baggage, reflecting in some sense the view expressed by Mr. Justice Rehnquist, in a different context and for a quite different purpose, that "the grant of a substantive right [may be] inextricably intertwined with the limitations on the procedures which are to be employed in determining that right."[1]

If Congress tends to address on a statute-by-statute, and therefore necessarily somewhat haphazard, basis the procedural framework for administering our bewildering variety of statutory entitlements, what can be said about the exercise of the government's other claims payment authority? What are the sources of that other authority, and to what extent have administrative procedures for their exercise been articulated? Without purporting to exhaust the range of possibilities, one can broadly distinguish from claims of statutory entitlement at least the following: claims based on contracts with the government, claims based on an employment relationship with the government, and claims that, for lack of a more convenient concept, I shall call claims of a tort or tort-like character. It is to the final category that the focus of this report is turned, but a glance at established procedures for resolving contract and employee claims at the agency level may, by their contrast, help frame and inform the discussion.

B. Contract Claims

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[1] Arnett v. Kennedy, 416 U.S. 134, 153-54 (1974).

Though federal legislation has long provided an administrative mechanism for agency resolution of contract claims against the government -- and has recently reformed and modernized it -- the substantive basis for answering such claims is essentially nonstatutory. Aggrieved government contractors predicate their monetary claims against federal agencies not on any substantive statutory entitlement as such but on their contract with the government understood in light of the law of contracts as recognized by the courts.

Without fundamentally altering the substantive basis of government contract claims, Congress has simply facilitated their resolution through a comprehensive framework of administrative and judicial remedies. The Contract Disputes Act of 1978,[2] which applies to practically all government contracts for the purchase or sale of personal property or services, now requires that all claims be submitted in writing to the contracting officer for decision. That officer is not required to proceed in any particular fashion, and certainly not to conduct hearings of any sort. He or she, upon reaching a determination, simply issues to the contractor a reasoned decision in writing, with or without specific findings of fact, but with notice of the contractor's appeal rights. The standard contract dispute clause may, however, afford the contractor an opportunity, before or after the decision, for an informal conference with someone in the agency from a level above the office to which the contracting officer is attached with a view to effecting a compromise.

The Act requires the contracting officer to make a decision on claims of $50,000 or less within sixty days of the receipt of a written request from a contractor to that effect. On larger claims, the contracting officer must within the same period either render a decision or notify the contractor of the time when one will be reached. No matter what the size of the claim, the decision must be issued within a reasonable time and "in accordance with regulations promulgated by the agency, taking into account such factors as the size and complexity of the claim and the adequacy of the information in support of the claim provided by the contractor." The Act encourages a speedy resolution of disputes by granting the Board of Contract Appeals the power to order the contracting officer to render a decision and by providing that the officer's failure to do so within the required time shall be considered a denial of the claim and generate a right of appeal in accordance with the procedures of the Act.

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[2] Act of Nov. 1, 1978, Pub. L. No. 95-563, 92 Stat, 2383, 41 U.S.C. §§ 601-13 (Supp. 1983). The Act was intended "to provide for a fair and balanced system of administrative and judicial procedures for the settlement of claims and disputes relating to government contracts." H.R. REP. NO. 95-1556, 95th Cong., 2d Sess. 5 (1978). On the Act generally, see Jacoby, The Contract Disputes Act of 1978: An Important Development, 39 FED. B. J. 10 (1980).

The contracting officer's decision is subject to two possible avenues of appeal: the agency's Board of Contract Appeals (within ninety days of the initial decision)[3] or suit in the Claims Court (within twelve months). The choice of remedy is a new concept and essentially requires the contractor's lawyer to make a strategic decision about which avenue of appeal is more promising. The Boards may grant any relief that would be available to a litigant asserting a contract claim in the Claims Court. Review of a Board decision may be brought within 120 days in the Court on a "substantial evidence" basis. In appeal proceedings, the Court in its discretion may retain the case, rather than remand to the Board, for such additional evidence or action as may be necessary for final disposition of the claim.

Whichever appellate forum the contractor chooses, the procedure is generally formal and trial-type and the decision made de novo, though resolution of contract disputes through the administrative process is generally speedier and less expensive than a trial de novo in the Claims Court. The Contract Disputes Act specifically provides for the accelerated disposition of appeals by the Board where the amount in dispute is $50,000 or less. In this event, resolution "whenever possible" should be within 180 days. A small claims procedure is also available for appeals involving $10,000 or less. Under this procedure, a single member of the Board decides the appeal within 120 days in accordance with simpler, less formal rules. Decisions reached this way, however, have no precedential value and are not subject to further appeal except for fraud. Use of both the accelerated and small claims procedures is at the sole discretion of the contractor.

While guaranteeing direct access to the courts from an adverse ruling by a contracting officer, Congress clearly has strengthened the attractiveness of the alternative administrative remedy. Revised selection provisions for board members are intended to guarantee as nearly impartial a view of the dispute as might be had in the Claims Court; and board procedures already in place for the conduct of hearings, introduction of evidence, motions, and the like, virtually ensure as full and as adversarial a ventilation of the issues.[4] The

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[3] The Contract Disputes Act provides for Boards of Contract Appeals of at least three members with no other inconsistent duties. Members are appointed under the Administrative Procedure Act and must have had no fewer than five years' experience in public contract law.

The Act authorizes the establishment of boards within an executive agency if justified by the workload. As of January 1982, thirteen were in existence. GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW p. 11-67 n. 14 (1982).

[4] The agencies have promulgated elaborate procedural rules for the conduct of proceedings before their respective Board of Contract Appeals. E.g., 41 C.F.R. §§ 12-60.1-.203 (1983)(Transportation Department). The procedures can only be described as fully evidentiary

(Footnote Continued)

government's interest as contracting party is clearly served by affording potential government contractors an impartial, accurate, procedurally fair, and reasonably expeditious means of resolving disputes at the agency level.[5] Congress expected that, in over ninety percent of claims appealed, contractors would prefer the less formal, time-consuming and expensive avenue of appeal furnished by the agency boards.

C. Monetary Claims by Employees

The government employee with employment-related grievances shares some of the characteristics both of a government contractor and of the beneficiary of a statutory entitlement. His or her monetary claims may be cast in terms of an alleged breach of contract (including, by extension, a violation of the civil service or civil rights laws) or of a simple statutory entitlement to work-related benefits or compensation. Not surprisingly, in light of the special employment relationship between the federal government and its employees, diverse administrative mechanisms exist for airing employee grievances, of a monetary nature or otherwise. This is as it should be, for the government, like any enterprise, has an interest in sorting out its personnel problems on an internal basis and in fashioning grievance procedures that promote employee morale.

The highly particular employment relationship out of which this disparate set of monetary claims flows makes it a questionable model for ventilating the far less discrete claims of individual members of the public. Nevertheless, a brief outline may be useful of some of the procedures by which employee claims are handled at the agency level. Of the numerous statutory schemes for making monetary payments to federal personnel, the two that are most broadly suggestive of claims likely to reach the government from the public generally are the Federal Employees' Compensation Act and the Military Personnel and Civilian Employees' Compensation Act. By contrast, a program like the Back Pay provisions of the Pay Administration Act is by its nature more strongly rooted in the employment relationship and less general in its implications.

(Footnote Continued)
and trial-type in nature.

The Contract Disputes Act specifically grants the Boards broad subpoena powers and authority to order discovery of all sorts. In the event of contumacy, the Boards may apply through the Attorney General to a district court for an order to comply; disobedience is punishable by the court as a contempt.

[5] Shedd, Administrative Authority to Settle Claims for Breach of Government Contracts, 27 G.W. L. REV. 481, 517-18 (1959).

The Federal Employees' Compensation Act (FECA)[6] establishes a comprehensive scheme for compensating the disability or death of a federal employee when it results from personal injury in the performance of duty; it constitutes, by virtually any standard, a statutory entitlement.[7] As such, it neither requires a showing of fault or negligence on the part of the government nor bars recovery where the claimant himself or herself is at fault.[8] In most cases, compensation follows a precise statutory schedule of different sums for different specific kinds of injuries.[9] To that extent, the amount of recovery is essentially predetermined -- a feature, as noted, common to many though by no means all entitlement programs. Eligibility -- covering such diverse items as employment status, scope of employment and causation, among others -- is thus the principal issue.

The interesting dimension of FECA, for our purposes, is procedural. The statute itself generally requires that a claim in writing be filed within a period of three years by the injured employee or by someone on his or her behalf and, except in case of death, be accompanied by a physician's certificate describing the nature of the injury and the probable extent of disability.[10] Labor Department regulations specify that a claim should be delivered to the Department's Office of Workers Compensation Programs, Employment Standards Administration ("Office") or to the employee's official superior for immediate referral by him or her.[11] Under the regulatory framework, the superior of an injured employee must assist the employee with the appropriate forms and advise him or her of the legal rights that FECA confers.[12]

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[6] Act of Sept. 7, 1916, 39 Stat. 742 (1916), 5 U.S.C. §§ 8101-51 (1980).

[7] 5 U.S.C. § 8102(a)(1980)("The United States shall pay compensation as specified by this subchapter . . .") Payment is made from an Employees' Compensation Fund in the Treasury consisting of sums appropriated by Congress for that purpose. Id. § 8147.

[8] Id. The exclusion covers willful misconduct, an intent to cause injury to oneself or another, and intoxication.

[9] Id. § 8107.

[10] Id. §§ 8121-22 (1980). There are statutory provisions for postponing accrual in the case of latent disabilities and for tolling the limitations period in certain other circumstances. Independent of any claim, injured employees must report any on the job injuries to their superiors, and the latter in turn must immediately file with the Labor Department a report of such incidents. Id. §§ 8119-20.

[11] 20 C.F.R. 10.106 (1983). The Department has issued forms for these purposes.

[12] Id.

The initial determination on whether to make any award under the Act falls to claims examiners within the Office. In making findings of fact and applying the relevant legal principles, examiners consider the material submitted by the claimant, the official superior's report, the physician's report, "and [such] completion of [the] investigation as the Office may deem necessary".[13] The Director of the Office, however, has final authority over the initial decision to award or deny recovery. This stage entails no hearing, no evidentiary rules or procedures, and no requirement that a determination be made within any given period of time.[14] All that is demanded is that the decision be in writing, contain findings of fact and a statement of reasons, and be sent to the claimant's last known address together with information on the claimant's review and appellate rights.

Following an initial adverse determination, but within thirty days, the claimant may request a hearing at a convenient time and place before an Office representative designated by the Director for the purpose of presenting further evidence in support of the claim.[15] Though the presiding officer is not bound by common law or statutory rules of evidence and procedure -- but rather "may conduct the hearing in such manner as to best ascertain the rights of the claimant"[16] -- many features of a trial-type proceeding are present. Oral evidence, written statements and exhibits may be introduced; the hearing is recorded and the complete transcript made a part of the claims record; the presiding officer may issue subpoenas, administer oaths, examine witnesses, and require the production of documents;[17] and the claimant may be represented by an attorney.[18] A final reasoned decision must be mailed to the claimant no later than thirty days following the completion of the hearing. The Office may review an adverse determination at any time on its own motion, but as a practical matter a claimant should file a written request "stating reasons why the decision should be changed and accompanied by evidence not previously submitted to the Office."[19]

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[13] Id. § 10.130, in essence restating the statutory provision. 5 U.S.C. § 8124(a) (1980). The statute specifically requires that the claimant submit to as many physical examinations as may be necessary to evaluate the claim. Id. §8123. The regulations themselves call for the claimant to provide an affidavit or other report of his or her earnings, and failure to do so may result in forfeiture of his or her right to compensation. 20 C.F.R. § 10.110 (1983). More generally, however, the claimant may submit any evidence -- including documenatary materials and witness statements -- he or she deems pertinent to a determination of the claim. Id. § 10.111.

[14] Id. § 10.130.

[15] 5 U.S.C. § 8124 (b)(1)(1980); 20 C.F.R. § 10.131 (1983). A prehearing conference may be held to clarify the issues. Id. § 10.132(a).

[16] 5 U.S.C. § 8124 (b)(2)(1980); 20 C.F.R. § 10.133(a)(1983). The regulations recite that since the procedures "are intended to be nonadversary in character," the employing agency shall not have a right to participate actively in the process, though it may submit relevant evidence. Id. § 10.140.

[17] 5 U.S.C. § 8126 (1980); 20 C.F.R. § 10.133 (1983).

The remaining avenue of appeal from a still adverse decision is an application for review by the three-member Employees' Compensation Appeals Board (ECAB), located in Labor Department headquarters in Washington. The Board makes its decision, by simple majority, on the basis of the record compiled below, supplemented only by such oral argument as either the claimant or the Director may request.[20] In any proceeding before the Board the parties may appear by counsel or in person.[21] The Board's written reasoned decision, which "may review all relevant questions of law, fact and discretion,"[22] is truly final and not subject to further review, except by the Board itself, and may consist of an affirmance, a reversal, or a remand to the Office for further proceedings.[23]

The Federal Employees' Compensation Act squarely makes the administrative framework I have described the exclusive remedy for claims covered by it, specifically barring any administrative or judicial proceeding under a federal tort liability statute like the FTCA.[24] And, as in the case of other statutory entitlements, Congress has declared Labor Department determinations under the Act "final and conclusive for all purposes and with respect to all questions of law."[25] The courts have consistently enforced the bar to judicial review, upholding it as constitutional in the rare instance where it has been challenged.[26] The completeness of the administrative framework, and particularly the strong trial-type features of the optional hearing, have defused the constitutional due process criticisms which its preclusion of judicial review might have generated.

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[18] 5 U.S.C. § 8127(a)(1980). However, attorneys' fees are subject to approval by the Office. Id. § 8127(b). For rules on this, see 20 C.F.R. § 10.145 (1983).

[19] 5 U.S.C. § 8128(a)(1980); 20 C.F.R. § 10.136 (1983).

[20] 20 C.F.R. §§ 10.137, 501.4-.5 (1983). The Director is represented before the ECAB by attorneys from the Office of the Solicitor of Labor.

[21] Id. § 501.11.

[22] Id. § 501.2(c).

[23] Id. § 501.6.

[24] 5 U.S.C. § 8116(c)(1980). See infra note 72.

[25] The statute adds for good measure that determinations are "not subject to review by another official of the United States or by a Court by mandamus or otherwise." 5 U.S.C. § 8128(b)(1980).

A quite different procedure has been put in place for making determinations under the more recent Military Personnel and Civilian Employees' Claims Act.[27] The statute essentially allows heads of agencies to settle and pay claims of up to $25,000 for loss of or damage to personal property incident to service,[28] though it specifically conditions recovery on the claimant's having shown himself or herself to be entirely free of contributory negligence, and on a finding by the agency head that possession of the property was "reasonable or useful under the circumstances."[29] It also expressly confines attorneys' fees to ten percent of any amount recovered.[30]

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[26] Blanc v. United States, 244 F. 2d. 708, 710 (2d Cir.), cert. denied, 355 U.S. 874 (1957); Hancock v. Mitchell, 231 F. 2d 652 (3d Cir. 1956); Calderon v. Tobin, 187 F.2d 514, 516 (D.C. Cir,), cert. denied, 341 U.S. 935, reh'g denied, 342 U.S. 843 (1951). See also DiPippa v. United States, 687 F. 2d 14, 17 (3d Cir. 1982).

[27] Act of Aug. 31, 1964, Pub. L. No. 88-558, 78 Stat. 767-68 (1964), as amended, 31 U.S.C. § 3721 (1983). Prior to 1964, similar authority existed for the military departments alone.

On whether the statute creates a true statutory entitlement, see infra note 36. At any event, recovery under the statute is not conditional on a showing of fault. Anton v. Greyhound Van Lines, Inc., 591 F. 2d 103, 109 (1st Cir. 1978).

[28] Compensation may be made in money or in kind and is payable out of agency appropriations made for the purpose.

The prior ceiling of $15,000 was increased to its present amount in 1983. Act of Jan. 12, 1983, Pub. L. No. 97-452, 96 Stat. 2474 (1983). For legislative history and purpose, see 1983 U.S. CODE CONG. & AD. NEWS 4301. Up to $40,000 may be paid on a claim for loss in a foreign country incurred after December 30, 1978 in connection with certain evacuation operations in the wake of political unrest or hostile acts abroad or as a result of hostile acts against the United States or its personnel. The provision was prompted by the then recent events in Iran.

[29] 31 U.S.C. § 3721(f)(1983). Excluded also are claims for losses at quarters not assigned or provided in kind by the government. Id. § 3721(e). On the other hand, the statute specifically contemplates payments to survivors in the event of an employee's death. Id. § 3721(h). Substantiation of a claim by the claimant is a statutory requirement for recovery. Id. § 3721(f).

[30] Id. § 3721(i). A violation is punishable by a fine of up to $1000.

On procedural matters the statute is virtually silent, apart from its two-year statute of limitations on the filing of a written claim. Each agency has issued its own regulations and established its own procedures for implementing the compensation program. Though they differ in detail,[31] the regulations uniformly establish a simple written procedure for the filing of a claim. The claimant generally must furnish on a form provided for that purpose a statement of the circumstances surrounding the property loss, specific information and documentation whose details will vary with the particular kind of loss claimed, and receipts, repair bills and the like, as appropriate. The form is generally submitted to the claimant's immediate supervisor who in turn forwards it to the agency claims officer specifically designated to handle personnel property claims. Conversations with such officers confirm the impression that claims are handled on a purely written investigatory basis without a hearing or even a personal appearance, though often enough upon a firsthand inspection of the property. The armed services, whose volume of personnel property claims far exceeds that of the other agencies, have jointly developed a schedule of values and depreciation for most kinds of goods that form the object of such claims; their schedule, which generally operates as a ceiling for valuation purposes, is used by virtually all other departments of the federal government.

A finality clause in the statute[32] has been read to bar judicial review of the merits of any determination,[33] though claimants might conceivably secure access to the courts in order to raise questions of statutory interpretation.[34] The combined absence of any real administrative hearing with the statutory preclusion of judicial review, however, might be thought to invite a challenge to the statute on procedural due process grounds. So far as I can tell, no such challenge has been made,[35] but other provisions of law less clearly in the nature of a statutory entitlement than this Act[36] have recently been held to trigger application of the due process clause and in fact to require full-scale evidentiary hearings at the agency level.[37] As we leave this cursory view of selected procedures for handling monetary claims by federal employees -- and move to government tort claims more generally -- suffice it to say that simple property loss claims of agency personnel do not entail very much by way of procedural formality when they occur incident to service.[38]

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[31] By way of example, see 31 U.S.C. §§ 4.1-.12 (1983) (Treasury Department).

[32] 31 U.S.C. § 3721(k)(1983). In addition, the FTCA is necessarily inapplicable to service-related claims of military personnel due to the implied FTCA exemption recognized in Feres v. United States, 340 U.S. 135 (1950), which in fact was predicated in part precisely on the existence of a framework of administrative remedies like this personnel property claims provision. See Barr v. Brezina Constr. Co., 464 F. 2d 1141, 1143 (10th Cir. 1972), cert. denied, 409 U.S. 1125 (1973); Preferred Ins. Co. v. United States, 222 F. 2d 942, 945-46 (9th Cir.), cert. denied, 350 U.S. 837 (1955), reh'g denied, 351 U.S. 990 (1956); Zoula v. United States, 217 F. 2d 81, 84-85 (5th Cir. 1954).

[33] Macomber v. United States, 335 F. Supp. 197, 199 (D. R.I. 1971). The court construed the term "settlement" in the finality clause to include disallowance of a claim, as the definitions in the Act clearly require. It relied on the construction of similar language in veterans' benefits legislation. Cf. Milliken v. Gleason, 332 F. 2d 122, 123 (1st Cir. 1964), cert. denied, 379 U.S. 1002 (1965) (forfeiture of pension benefits for fraud).

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[34] See infra notes 144 and 196. Under predecessor statutes, the Court of Claims would review determinations of whether the damage or loss occurred incident to service. Brabson v. United States, 95 Ct. Cl. 187 (1943); Regnier v. United States, 92 Ct. Cl. (1941). Today, the General Accounting Office is likely to make such determinations on referral by an agency. E.g., 60 Comp. Gen. 633 (1981).

[35] In Macomber v. United States, supra note 33, the court emphasized that the plaintiff raised no constitutional grounds in his challenge to the agency's denial of his claim. Except for property loss claims of military personnel incident to service, which fall within the Feres doctrine, supra note 32, both the administrative and judicial remedies of the Federal Tort Claims Act presumably remain available to a claimant, but they require a showing of fault.

[36] The Comptroller General recently ruled that agencies do not have discretion under the Military Personnel and Civilian Employees' Claims Act to refuse to consider all claims submitted to them under the Act, but must exercise their discretion either by the issuance of regulations or by case by case adjudication. Op. Comp. Gen. No. B-209721 (Sept. 2, 1983). However, in reaching that conclusion, the Comptroller General also emphasized that the statutory language "may" implies discretion and therefore "does not create a legal entitlement." Id. at 4.

[37] See infra note 155 and cases cited therein, holding that the Constitution requires evidentiary hearings at the agency level for claims under the Federal Prison Industries Act, and this despite the fact that the statute, unlike the Military Personnel and Civilian Employees' Claims Act, does not specifically preclude judicial review and has been found to permit review on an "arbitrary and capricious" standard under the Administrative Procedure Act. See also Gerritson v. Vance, infra note 143, which addressed the constitutional adequacy of State Department procedures for handling claims under its highly discretionary authority to settle tort claims arising abroad, but on the merits found oral hearings not to be constitutionally required.

D. Tort and Tort-Like Claims Against the Government

After the rather special cases of statutory entitlements, on the one hand, and contract and employment-related claims, on the other, have been stripped away, there remains a largely undifferentiated mass of monetary claims assertable by members of the general public who regard themselves as having been injured in some fashion by the government and deserving of compensation for their losses. Such claims, for lack of a better term, may be identified simply as "tort and tort-like." But, as the discussion to follow makes plain, I mean to use this term to encompass an exceedingly broad range of theories upon which the government might be asked to answer for the losses of others. In virtually all these cases, the government is alleged to be the cause of the harm suffered, but the commonality ends there. Upon examination, the claims can usually be translated into one or more of several reasonably distinct legal theories of liability. The following list, without purporting to exhaust the possibilities or to set up watertight analytic categories, suggests some of these sorts of claims:

(1) claims in damages based on tort, that is, the negligent or otherwise wrongful infliction of loss or injury;

(2) claims in damages based on some notion of strict liability, that is, liability without fault for loss or injury arising from activity that may be characterized as especially hazardous or otherwise appropriately made subject to risk-based liability;

(3) claims for just compensation for the actual or constructive taking of private property by the government for a public purpose, which claims have a constitutional anchor in the Fifth Amendment;

(4) claims in damages for the breach of a fiduciary duty owed by the government to a specific claimant or class of claimants;

(5) claims in damages based on a theory of contract implied in law, of unjust enrichment, of restitution, or of estoppel;

(6) claims in damages against the government based upon a cause of action expressly or impliedly provided for by statute.

Though widely disparate, all these theories (with the exception of the third) borrow principles primarily developed to govern the noncontractual liability relations between private persons, and state causes of action that might plausibly be asserted in a court of law. Indeed, to the extent that sovereign immunity allows, a court is their natural forum. In this way, they differ from claims based upon statutory entitlement, which are peculiarly public in nature and for which typically some sort of administrative procedure has been specially designed. They are also unlike contractual and personnel-related claims which, though not peculiarly public in nature, have been made subject by statute to a conventional dispute resolution mechanism of sorts at the agency level.

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[38] The Federal Tort Claims Act, however, provides civilian employees with fuller procedural rights, though again it requires a showing of fault. See supra note 35.

Two sets of questions naturally arise with respect to agency handling of monetary claims of a tort and tort-like variety that were relatively easily answered for the kinds of claims I discussed at the outset of this chapter. First, do federal administrative agencies indeed have the authority to entertain and act favorably on them? Second, if the agencies do have such authority, by what procedural format do they exercise it?

My research strongly suggests that, for better or for worse, the courts rather than the agencies are regarded as having primary authority to dispose of such claims. This seems to be so, even though action of the agencies gave rise to the grievances and even though the agencies may be prepared to concede their merit. In the absence of express statutory authority to afford relief,[39] the agencies often can in effect do nothing about such claims. Suppose, for example, someone demands damages from a government agency on the ground that it has reaped financial benefit from information he or she provided, where no such windfall to the government was anticipated and where it may be regarded as unjust. Suppose, to take another example, someone seeks damages for violation of a statute expressly providing a judicial remedy in damages in that event, or fairly interpreted to imply such a remedy. The situation clearly has the makings of eventual litigation, but whether it has the makings of a prior administrative claim amenable to serious dispute resolution at the agency level is more doubtful. Notice how far removed we are from the world of statutory entitlements in which substantial doubt may exist over an individual's eligibility or over questions of valuation, but practically none over the relevant agency's authority to entertain and pay a valid claim or over the character of the administrative process by which those determinations are to be made.

Among the most striking conclusions to emerge from my interviews with agency claims officers, who, it should be remembered, are mostly associated with the legal departments of the agencies, is the degree of uncertainty over the amenability of many of these monetary claims to administrative dispute resolution. What I have heard would suggest that unless a given monetary claim can fairly be assimilated to a statutory entitlement, a government contract or an employment claim, on the one hand, or can be fit within the terms of some express statutory settlement authority of the agency, on the other, the agency often can do little more than invite the claimant to bring suit against the government for monetary relief.[40]

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[39] The existing grant of specific statutory authority that comes foremost to mind, and whose implementation is treated in detail in this report, is that conferred on the agencies by the Federal Tort Claims Act, _infra_ note 69.

[40] For an exceptionally rare instance of a compensation program knowingly instituted by an agency without express statutory support, _see_ Department of Defense Directive No. 5220.6 (Dec. 20, 1971)

(Footnote Continued)

I say often, because the agency, even without monetary settlement authority as such, may still be in a position to remedy a claimant's legitimate grievances by exercising other authority it does possess. Most obviously, it can roll back the specific action (from a complex regulatory action to a simple encroachment on land) that gave rise to the objection in the first place. If it has statutory authority to condemn property, it can exercise it so as to give the claimant in effect what an inverse condemnation suit would have achieved. I am told that agency real estate departments may actually negotiate after the fact with private parties over a sum of money to be paid for the unplanned use of real property and call upon general operating funds as a source of payment. This procedure has been formalized by the Army.[41] Agency contracting officers may use funds appropriated for a contract, or seek a contract modification, in order to cope with claims for damage to or loss of property in connection with the performance of a contract,[42] and reportedly have done so to pay what might fairly be regarded as claims for unjust enrichment. If one were to canvass the full range of specific statutory authorities at the agencies' disposal, and consider the scale of available appropriations under each, one would probably find that agencies are not quite as disarmed in the face of appealing claims for monetary redress as may at first appear. But obviously agencies do not in all circumstances have the authorization that would enable them to satisfy a deserving monetary claim by other available means and they may be unwilling, in the larger public interest, to roll back the action they have taken, even assuming they can do so and that doing so would make the claimant whole.

That a claimant should have to bring suit in order to get a ruling on a clear or even a colorable monetary claim falling within this residual category may or may not be desirable, but such does appear to be the case. Yet, Congress has on occasion decided otherwise. It evidently chose to give agencies express settlement authority -- to be sure, very modest at first, but dramatically enlarged since -- over claims that might otherwise go to district court litigation under the Federal Tort Claims Act. It has given them authority to settle administratively otherwise litigable claims under a variety of narrower statutes such as the Suits in Admiralty Act, Public Vessels Act,

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(reimbursement for loss of earnings from the suspension, revocation or final denial of an industrial security clearance). Claims are processed and settled by the General Claims Division, United States Army Claims Service, and paid from Army Claims appropriations. Department of Army Regulation No. 27-20, Legal Services: Claims § 13.11e (Sept. 1970).

[41] Department of Army Regulation No. 405-15 (Sept. 6, 1967), also referred to in Department of Army Regulation No. 27-20, supra note 40, § 13-11. The procedure is evidently contemplated in connection with military maneuvers, training exercises and emergency situations.

[42] Department of Army Regulation No. 27-20, supra note 40, §§ 13-9f, 13-10.

Copyright Infringement Act, Trading with the Enemy Act, and Swine Flu Immunization Act.[43] As already noted, most government contract and employment claims are meant to be ventilated fully and, if possible, resolved at the agency level before proceeding to court, assuming a judicial remedy is available at all. Ample precedent thus exists for authorizing agencies to entertain monetary claims arising out of their actions.

The fact remains that even among the numerous categories of monetary claims on which the government may be sued many have no identifiable administrative settlement counterpart. This is true of a good many of the claims upon which suit may be brought in the United States Claims Court. Take, for example, statutory causes of action in damages for unjust conviction and imprisonment,[44] for patent infringement,[45] for damages to oyster growers arising from dredging operations or other river and harbor improvements,[46] or for claims of Indian tribes.[47] In fact, the Claims Court entertains a much broader range of cases than these relatively narrow waivers of immunity would suggest. Its jurisdiction, as amplified and clarified by the Tucker Act of 1887, reaches to claims against the United States "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."[48] The Tucker Act, as amended, additionally grants the

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[43] See text at notes 98-140, infra. See also The Federal Fire Prevention and Control Act of 1974, Pub. L. No. 93-498, 88 Stat. 1535 (1974), 15 U.S.C. § 2210 (1982), authorizing the Administrator of the United States Fire Administration to award payments to local fire services for direct losses suffered in fighting a fire on property under the jurisdiction of the federal government. The Act also vests jurisdiction over disputes in connection with such a claim in the Claims Court. Id. § 2210(d) (Supp. 1983). For legislative history and purpose, see 1974 U.S. CODE CONG. & AD. NEWS 6191.

[44] 28 U.S.C. §§ 1495, 2513 (Supp. 1983).

[45] 28 U.S.C. § 1498(a) (Supp. 1983).

[46] 28 U.S.C. §§ 1497, 2501 (Supp. 1983).

[47] 28 U.S.C. § 1505 (Supp. 1983).

[48] 28 U.S.C. §§ 1346(a)(2), 1491(a)(1)(Supp. 1983). The Court of Claims, as established in 1855, could only find and report facts and opinions to Congress, its original purpose being to relieve congressional claims committees from the press of private relief bills. The same 1855 statute gave the court jurisdiction over "all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the

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district courts jurisdiction concurrent with that of the Claims Court over claims not exceeding $10,000.[49]

The substantive reach of the Tucker Act obviously lies beyond the scope of this report, but the statute clearly creates broad opportunities for recovering against the government in the courts as opposed to the agencies. The boundary between tort claims and the host of not altogether dissimilar kinds of claims -- express or implied contract, takings, and breach of fiduciary duty -- that may be encompassed by the Tucker Act is notoriously elusive.[50] A good example is the problem of inverse condemnation[51] or of contract claims sounding

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government of the United States." Not until 1863, however, did Congress make the court's judgments final, subject to appeal to the Supreme Court. It was the Tucker Act that added jurisdiction over claims "founded . . . upon the Constitution" and "for liquidated or unliquidated damages in cases not sounding in tort."

The Court of Claims was reorganized and renamed the Claims Court as part of the Federal Court Improvements Act of 1982, Pub. L. No. 97-164, 96 Stat. 40 (1982).

[49] 28 U.S.C. § 1346(a)(2) (Supp. 1983). However, the district courts no longer share jurisdiction with the Claims Court over claims subject to the Contract Disputes Act of 1978.

[50] For a discussion, *see* 1 L. JAYSON, HANDLING FEDERAL TORT CLAIMS, §§ 53, 166.03 (1984).

[51] *E.g.*, Sanborn v. United States, 453 F. Supp. 651, 655 (E.D. Cal. 1977) (inverse condemnation claim in Claims Court unaffected by pendency in district court of tort claim arising out of same facts, since claims are distinct.) The number of inverse condemnation or constructive taking claims brought under the Tucker Act is legion. *E.g.*, United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950); United States v. Dickinson, 331 U.S. 745 (1947); United States v. Willow River Power Co., 324 U.S. 499 (1945); United States v. Cress, 243 U.S. 316 (1917); Lenoir v. Porters Creek Watershed Dist., 586 F.2d 1081 (6th Cir. 1978); NBH Land Co. v. United States, 576 F.2d 317 (Ct.Cl. 1978); Benenson v. United States, 548 F.2d 939 (Ct.Cl. 1977).

The prevailing test seems to turn on whether the loss constitutes a simple indirect injury to property, such as a trespass or conversion (actionable under the FTCA), or a permanent or inevitably recurring invasion (actionable under the Tucker Act). United States v. Cress, *supra*; Branning v. United States, 654 F.2d 88, 101-02 (Ct. Cl. 1981); Accardi v. United States, 599 F.2d 423, 429 (Ct.Cl. 1979); Benenson v. United States, *supra*; Barnes v. United States, 538 F.2d 865, 870 (Ct. Cl. 1976); Hartwig v. United States, 485 F.2d 615, 619-20 (Ct. Cl. 1973); Wilfong v. United States, 480 F. 2d 1326, 1328-30 (Ct. Cl. 1973); Fromme v. United States, 412 F.2d 1192, 1196 (Ct. Cl. 1969).

in tort.[52] The sole point I wish to make in this regard, however, is that the same agencies that enjoy sweeping claims settlement authority in the tort area may enjoy none in other closely related ones, and this regardless of how clear the government's liability under the applicable legal standards.

I discern just two formal means by which claims of this sort may be disposed of short of litigation. First, the General Accounting Office has statutory authority to "settle all claims . . . against the United States Government."[53] Where a monetary claim rests on recognized legal grounds, but the agency responsible for the loss lacks authority to satisfy it, the GAO is presumably an available forum for relief.[54] This forum is even available where an agency does have authority, but its determinations are not generally regarded as final and conclusive.[55] The Comptroller General has also had authority since 1928 to "report to Congress on a claim against the Government . . . that may not be adjusted by using an existing appropriation, and that [he] believes Congress should consider for legal or equitable reasons."[56]

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[52] A good illustration is the possible coexistence of a contract claim and a tort claim in conversion. Compare Aleutco Corp. v. United States, 244 F.2d 674, 678-79 (3d Cir. 1957) (existence of a valid Tucker Act claim does not bar an FTCA cause in tort for conversion), with Woodbury v. United States, 313 F.2d 291, 295-96 (9th Cir. 1963) (claim for violation of breach of fiduciary duties based on contract, even though incidentally tortious, is essentially a contract claim cognizable only under the Tucker Act). See generally 1 L. JAYSON, supra, note 50, at pp. 9-15 - 9-28, and cases cited therein.

Most recently, the Supreme Court has lent support to the view that FTCA and Tucker Act claims are not mutually exclusive. Hatzlachh Supply Co., Inc. v. United States, 444 U.S. 460 (1980), rev'g 579 F.2d 617 (Ct. Cl. 1978).

It has been held that once a claimant elects to pursue a remedy under the contract, it may not thereafter pursue a remedy in tort. United States v. Peter Kiewit Sons' Co., 345 F. 2d 879, 885-86 (8th Cir. 1965).

[53] 31 U.S.C. § 3702 (a) (1983). The statute requires that the Comptroller General receive the claim within six years after it accrues.

[54] See GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW pp. 11-5 - 11-10 (1982), for a discussion of the nature of this authority and the limitations the GAO has placed on its exercise. See also text at notes 785-88, infra.

[55] See infra notes 777-79.

[56] 31 U.S.C. § 3702(a) (1983). The purpose of the provision was to facilitate congressional consideration of private relief bills by giving it the benefit of the views of a body with expertise in investigating

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Evidently this mechanism is seldom invoked,[57] not only because the GAO itself has used its recommending authority sparingly, but also because the statutory framework for agency and court consideration of monetary claims has become so much more complete since 1928. In the final analysis, too, recommendation by the GAO is simply not necessary for the enactment of a private relief bill. Nevertheless, the General Accounting Office could conceivably entertain, in support of a monetary claim, some of the theories of relief -- unjust enrichment or estoppel, for example -- set out earlier in this section.[58]

The other formal avenue of redress lies with the Attorney General who has long enjoyed authority to settle claims referred to him under the rubric of defense of imminent litigation.[59] Presumably by this

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and adjudicating monetary claims. S. REP. NO. 684, 70th Cong., 1st Sess. 3-4 (1928). A six-year statute of limitations applies to the Comptroller General's meritorious claims authority. For a full discussion of the standards the GAO has developed for exercising this authority and for certain statistics on its use, see GENERAL ACCOUNTING OFFICE, supra note 54, at pp. 11-137 - 11-163. See also Holtzoff, The Handling of Torts Claims Against the Federal Government, 9 L. & CONTEMP. PROB. 311, 321 (1942).

[57] GENERAL ACCOUNTING OFFICE, supra note 54, at p. 11-139.

[58] The GAO does not view its meritorious claims authority as applicable to claims sounding in tort. GENERAL ACCOUNTING OFFICE, supra note 54, at pp. 11-143 - 11-145, and decisions of the Comptroller General cited therein. Where Congress has enacted legislation providing relief for a certain type of claim, like tort, the GAO presumes it intended that legislation to set the limits on available relief. By this token, the GAO will not entertain under the meritorious claims heading claims for which agencies possess their own meritorious claims settlement authority or might otherwise afford an appropriate remedy such as veterans' benefits or payments under the Military Personnel and Civilian Employees' Claims Act. Id. at pp. 11-149 - 11-150.

[59] 28 U.S.C. § 2414 (1978). Settlements made pursuant to this authority are paid, like judgments and compromise settlements, out of the Permanent Indefinite Appropriation, established by 31 U.S.C. § 1304(a) (1983). The Deputy Attorney General may exercise this authority for the Attorney General. 28 C.F.R. § 0.161(b) (1983). Furthermore, authority to accept settlement offers of up to $750,000 in compromise of claims against the United States has been delegated to the Assistant Attorneys General of the litigating divisions, except that referral to the Deputy Attorney General is required when a compromise will practically control or influence the disposition of claims totalling more than $750,000, or where the presence of a question of law or policy or opposition by the agency involved suggests that the Deputy Attorney General be consulted. Id. § 0.160. The authority of the Assistant
(Footnote Continued)

route agencies might help see to it that legally founded claims arising out of their activities, but for which they themselves can offer no immediate redress, do not in fact end up in court. Examples of claims that might be handled this way are causes of action in damages expressly or impliedly provided for by statute,[60] where the government is prepared to acknowledge actual or potential liability under the circumstances.

Finally, one rather less regular avenue of disposing of awkward claims deserves mention. Three chief agency claims officers with whom I spoke alluded to the possibility that a rare meritorious claim for which no agency-level redress exists might be paid, at the direction of the agency head, from a contingency (or "slush") fund to which only he or she, through the agency's chief fiscal officer, has access. I am led by one officer to believe that this happens in his agency as often as four or five times a year, though rarely for sums of money exceeding more than a few thousand dollars at a time. Another of the officers who reported the existence of a contingency fund mentioned no such informal ceiling, but supposed that only a politically well-connected claimant would have any realistic chance of collecting from it, and even then only under highly unusual circumstances or ones that constitute a source of real embarrassment to the agency. Significantly, access to a contingency fund may apparently be had only through strictly political channels; the agency's chief claims attorney and possibly even the General Counsel may be entirely unaware of the transaction and its documentation may be slight. Quite clearly, an agency's contingency fund cannot properly be looked to as a source for any systematic compensation of claimants. Whether it should be used at all for these purposes, given the risk of political favoritism and the absence of any real accountability, is highly questionable.

On the other hand, the Chief of the General Claims Division of the Army Claims Service believes that agency operating divisions tend to underestimate the extent to which program-related appropriations are legitimately available for making monetary payments to claimants, and that too many matters come to the Judge Advocate's Office in the form of tort claims that could and should be otherwise handled at the agency level.[61] His office reportedly spends considerable resources trying to

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Attorneys General is not limited by any monetary ceiling when it comes to rejecting compromises or administrative settlements though the exceptions for questions of law or policy or for cases of agency opposition still apply. Id. § 0.162. There has been further limited redelegation to subordinate division officials such as the Torts Branch Director and to United States Attorneys. Id. § 0.168. See also id. pt. 0, Subpt. Y, App., for details of the delegations and the requirement of action memoranda for the closing of a claim.

[60] See text at notes 38-39, supra.

[61] Personnel in the Claims Division of the GAO lend support to the
(Footnote Continued)

identify sources of authority upon which program officers might, but for some reason do not, legitimately draw for satisfying valid monetary demands that then must come in for treatment as tort claims. Claims units of other agencies, with assistance from other divisions of their offices of general counsel and possibly from the General Accounting Office, might usefully follow his lead in preparing an inventory of legal means apart from the Federal Tort Claims Act available for responding to monetary claims.[62]

All in all, the question whether agencies have adequate means at their disposal to entertain the full range of monetary claims with which they are presented -- or whether they, the claimants and the courts would benefit from their having more direct and explicit authority than they now enjoy -- calls for further investigation. Surely two issues that surfaced in my discussions -- the reported use of contingency funds for the payment of claims and the reported underuse of agency program authority for that purpose -- bear close scrutiny, though not necessarily by the Administrative Conference.

This report, by contrast, designedly focuses on the procedural handling of tort and tort-like claims for whose disposition the agencies do have express statutory authority. The reason for this is two-fold. In the first place, though governmental tort liability by its very nature may fairly be viewed as a problem of administrative procedure, the question of how agencies that uncontrovertibly possess settlement authority go about exercising it seems to me of more immediate concern to the Administrative Conference than the question whether agencies should possess a broader range of substantive settlement authority than they now do. Second, one can reasonably assume -- and my conversations with agency claims officers strongly bear this out -- that even if agencies were given or asserted a broader range of substantive settlement authority, they would be inclined to exercise it along the same general procedural lines that guide their exercise of the statutory authority they now have. Thus, concentration on tort and tort-like matters falling within existing agency settlement authority seems entirely appropriate. This emphasis should not obscure the more substantive dimension of agency claims authority to which the procedural dimension, as this study will time and again show, is closely tied; it is simply meant to sharpen the focus on procedure.

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suspicion that some payments are being processed as tort claims -- and drawn from the judgment fund -- when they should properly be charged to agency appropriations as a program-related or general operating expense.

[62] Department of Army Regulation No. 27-20, supra note 40, ch. 13.

Chapter Two

AGENCY AUTHORITY TO ENTERTAIN TORT AND TORT-LIKE CLAIMS

This chapter more closely sets the stage for a study of the way federal agencies handle tort and tort-like claims by examining more directly the nature of their authority to do so. The fact that Congress has troubled itself to give agencies express statutory settlement authority is taken by virtually all agency claims officers to imply that they would not otherwise have it. Is that necessarily the case?

A. Do Agencies Have Inherent Authority to Settle Tort Claims?

The question whether agencies have inherent authority to settle tort claims arising out of their activities, it appears, has never as such been the subject of a judicial ruling; a claimant, after all, is unlikely to challenge an agency's willingness to exercise it. But if the courts have not squarely addressed the issue, the General Accounting Office has. And it has unhesitatingly and unfailingly taken the view that agencies lack inherent authority to entertain and satisfy tort claims, however fair and equitable it might seem to do so. This view has been described repeatedly by the GAO as "but a corollary of the principle that no one is authorized to give away government money or property."[63]

In practice, the federal agencies plainly do not regard themselves as free, absent affirmative statutory authority, to compensate those they may have injured, even wrongly. No claims officer I met, however generally sympathetic to claimants, seems to question the legal correctness of this notion or is prepared to adopt any other as his or her working assumption. The universality of this belief is striking in itself.

Universally held though it may be, this belief is not self-evident either as a matter of law or of policy. To a surprising extent, it has been traced to the doctrine of sovereign immunity, which seems to me misguided. Properly understood, sovereign immunity bars suit against the sovereign without its consent.[64] True, this immunity can be waived only by Congress, not by an officer or employee of the United States;[65] such waivers as are made are subject to the conditions Congress chooses to attach to them[66] and are to be strictly construed.[67]

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[63] GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW p. 11-17 (1982). E.g., Op. Comp. Gen. No. B-201054 (Apr. 27, 1981). Cf. 31 U.S.C. § 1301(a) (1983) ("Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law"). See also id. § 1532. If an account is disallowed by the GAO, the responsible officer may be held personally liable to the United States for the amount of any improper payment already made. Id. § 3528. See generally D. SCHWARTZ & S. JACOBY, LITIGATION WITH THE FEDERAL GOVERNMENT 162 (1970); Baer, The General Accounting Office: The Federal Government's Auditor, 47 A.B.A.J. 359 (1961); Keller, The Role of the General Accounting Office, 21 BUS. LAW. 259 (1965).

But the fact that the federal government may not be sued except on the basis of a legislative waiver of sovereign immunity does not necessarily mean that the government may not pay a just claim administratively. Put differently, sovereign immunity -- whose reasons, we are told, "partake somewhat of dignity and decorum, somewhat of practical administration, somewhat of the political desirability of an impregnable legal citadel where government . . . may operate undisturbed by the demands of litigants"[68] -- may bar courts from compelling the government to satisfy monetary claims, but it would hardly seem to bar government from paying those claims of its own accord. If the government is barred from doing so, the rationale must lie elsewhere.

In fact, nothing in the Constitution or in federal legislation explicitly bars agencies from compensating persons they have harmed, and for agencies to consider payment of such claims a cost of doing business and, as such, an ordinary operating expense chargeable to general agency appropriations would be well within the realm of reason. So far as one can judge, payment of similarly just claims by private enterprise is commonly regarded as a legitimate business expense. To the extent that fair and efficient risk allocation justifies treating victim compensation as a cost incident to the doing of business in the private sector, it would seem to justify treating it that way in the public sector as well.

The ultimate rationale for the reported reluctance must lie in the belief that the authority to spend the public's money is too easily abused when guided only by the very general purpose of making whole those persons whom the agency may have injured (or, to put it differently, whom individual claims officers fancy the agency may have injured). Visions of collusion and corruption, not to mention gross waste of agency resources, come naturally to mind. In all fairness, however, vague statutory mandates and the risk of unaccountability are endemic to the life and work of the administrative agencies. They already characterize many daily activities in which agencies engage in pursuit of their primary missions, activities implicating far greater sums of money than a normal exercise of inherent claims settlement authority. Unbridled discretion can be channeled by standards; actual exercises of discretion, especially in the claims area, can be audited and reviewed by independent personnel within the agencies and without. An agency could probably fashion a reasonably principled system of its own for handling tort claims against it if encouraged to do so.

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[64] United States v. Testan, 424 U.S. 392, 399 (1976); United States v. Sherwood, 312 U.S. 584, 586 (1941); United States v. Shaw, 309 U.S. 495, 500-01 (1940); Holloman v. Watt, 708 F. 2d 1399, 1401 (9th Cir. 1983).

[65] United States v. Shaw, supra note 64, at 501; Munro v. United States, 303 U.S. 36, 41 (1938).

[66] Glidden Co. v. Zdanok, 370 U.S. 530, 572 (1962); Soriano v. United States, 352 U.S. 270, 276 (1957); United States v. Sherwood, supra note 64, at 587.

[67] United States v. King, 395 U.S. 1, 4 (1969); McMahon v. United States, 342 U.S. 25, 27 (1951); United States v. Sherwood, supra note 64, at 586-87.

[68] United States v. Shaw, supra note 64, at 501.

The fact remains that agencies simply do not assert an inherent right to compensate for government-inflicted injury to person or property. Congress, then, clearly bears the burden of defining the authority if any that the agencies enjoy to entertain tort or tort-like monetary claims. It has done so over the years in what can only be described as a patchwork manner. Alongside the Federal Tort Claims Act (FTCA) may be found a disparate collection of narrow authorizations, many of them agency-specific, all legislated on a piecemeal basis, and together establishing no discernible overall design. I would find it highly artificial to pass to the question of administrative procedure in claims disposition without having some sense of the configuration and content of these various provisions. They can conveniently be surveyed in two parts: first, the Federal Tort Claims Act itself whose workings will be examined in detail in chapters three, four and five; second, other special tort claims legislation, including what may conveniently be grouped together as "meritorious claims" statutes, whose workings will not be closely examined in this report. This chapter concludes with the most preliminary of inquiries into the question whether the Constitution by itself, more particularly the due process clause, ever requires administrative claims procedures beyond those that exist.

B. The Federal Tort Claims Act: Overall Design

The Federal Tort Claims Act[69] is singular among claims statutes in its generality of application. Confined neither to specific agencies nor to specific categories of claimants, it contemplates virtually all situations marked by a "negligent or wrongful act or omission" on the part of a federal officer or employee, and an open-ended category of losses. For these and related reasons, the FTCA is foremost among existing statutory vehicles for agency disposition of tort and tort-like monetary claims.

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[69] The Federal Tort Claims Act was enacted as title four of the Legislative Reorganization Act of 1946, §§ 401-24, Pub. L. No. 79-601, 60 Stat. 812-44, codified in 1948 as 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-80.

The FTCA subjects the federal government to liability without limit for personal injury, death or property damage resulting from the negligent or otherwise wrongful acts or omissions of federal employees acting within the scope of their employment.[70] Liability follows the same principles as govern the liability of private persons under the law of the place where the alleged tort occurred, except that prejudgment interest and punitive damages are disallowed.[71] The Act, however, subjects this waiver of immunity to thirteen categorical exemptions.[72] A claimant may bring suit in the federal district court for the district where either the alleged tort occurred or the plaintiff has his or her residence,[73] provided he or she filed a prior administrative claim with the appropriate federal agency for its consideration within two years of the claim's accrual and instituted suit within six months from the mailing by that agency of a final denial.[74] The 1966 amendments to the Act, treated in detail in chapter three, greatly broadened the agencies' statutory authority to settle claims cognizable under the Act, and that phase has now become a virtual prerequisite to suit.

At the time the FTCA was enacted, federal agencies had precious little opportunity to entertain and pay tort and tort-like claims against them. The then Court of Claims[75] and the Supreme Court[76] had consistently declined to read the Court of Claims Act itself as embracing tort claims, a view that finally received legislative endorsement in the Tucker Act.[77] Since the agencies were deemed to lack settlement authority even over claims that did fall within Tucker Act jurisdiction unless some statute expressly gave it to them, they could hardly be expected to entertain the payment of claims sounding in tort. Apart from a number of tort claim statutes covering narrow fields of activity (some of which survive and are outlined shortly), significant tort legislation preceding the FTCA consisted of (a) the patent infringement statute of 1910, (b) the admiralty statutes of 1920 and 1925, broadly encompassing maritime torts, and (c) the Small Claims Act of 1922. I briefly discuss the patent infringement and admiralty statutes at a later point.

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[70] 28 U.S.C. § 1346(b) (1976), § 2674 (1965).

[71] Id. § 2674.

[72] 28 U.S.C. § 2680 (Supp. 1983).

The FTCA is subject, apart from the express statutory exceptions, to two other sets of exemptions. First, an occasional statute may recite that it constitutes the exclusive remedy for a certain category of claims, or simply immunize the government from liability altogether. E.g., Federal Civil Defense Act of 1951, 50 App. U.S.C. § 2294 (1951) (terminated by own terms on June 30, 1974) (government immunity in connection with a civil defense emergency); Federal Employees' Compensation Act, 5 U.S.C. § 8116 (c) (1980) (FECA is the exclusive remedy against the United States for the injury or death of a federal employee in the course of duty); Flood Control Act, 33 U.S.C. § 702c (1970) (no government liability for damage from or by floods or flood waters); Panama Canal Act, 22 U.S.C. § 3761 (e) (Supp. 1983) (FTCA inapplicable to claims arising from operation of the Canal or related facilities). Exceptionally, other exemptions have been inferred by the courts on the basis of available alternative remedies. See infra notes 234-35.

[73] 28 U.S.C. § 1402(b) (1976).

[74] 28 U.S.C. § 2401(b) (1978).

[75] E.g., Dykes v. United States, 16 Ct. Cl. 289 (1880); Dennis v. United States, 2 Ct. Cl. 210 (1865); Pitcher v. United States, 1 Ct. Cl.

(Footnote Continued)

The Small Claims Act,[78] enacted in the wake of unprecedented numbers of private relief bills in the years following World War I,[79] was designed to relieve the pressures of claims matters on Congress, and more particularly on the Committees on Claims, as well as to assist those claimants unable effectively to present their case to Congress. Though small tort claimants might have been given access to the Court of Claims, Congress thought that litigation entailed greater expense and inconvenience than such claims generally warranted and preferred a purely administrative remedy.

(Footnote Continued)
7 (1863).

[76] E.g., Langford v. United States, 101 U.S. 341 (1879); Morgan v. United States, 14 Wall. (81 U.S.) 531 (1871); Gibbons v. United States, 8 Wall. (75 U.S.) 269 (1868). The Court opined in Morgan that "Congress has wisely reserved to itself the right to give or withhold relief where the claim is founded on the wrongful proceedings of an officer of the government." 14 Wall. (81 U.S.) at 534.

[77] In fact, the original version of what was to become the Tucker Act did provide a general tort remedy. According to the report accompanying the House Judiciary Committee bill, enactment of the Court of Claims Act did not affect the "large class of cases in equity, in admiralty, and in tortious acts of the Government through its agents which are left to Congress, [but] for which a court of justice is better fitted to attain the right between the litigants." H.R. REP. NO. 1077, 49th Cong., 1st Sess. 3-4 (1886), quoted in 1 L JAYSON, HANDLING FEDERAL TORT CLAIMS p. 2-17 (1984). As enacted however, the legislation expressly excluded cases "sounding in tort." See Schillinger v. United States, 155 U.S. 163, 168 (1894).

[78] 42 Stat. 1066 (1922), codified at 31 U.S.C. § 3723 (1983). See generally, Gottlieb, The Federal Tort Claims Act: A Statutory Interpretation, 35 GEO. L.J. 1, 13 n. 42 (1946).

[79] Reportedly, nearly one-third of these bills were for amounts
(Footnote Continued)

The legislation was narrow in scope: confined essentially to timely property damage claims,[80] not in excess of $1000, arising out of the negligent acts of government employees acting within the scope of their employment. It authorized the head of each executive department or other independent establishment of the government to consider and adjust any such claim and to certify it to Congress as a legal claim for payment out of appropriations to be made for that purpose. A claimant's acceptance of the amount determined to be due was deemed to be in full settlement of the claim. The Act provided no judicial review or other judicial remedy.

Due in part to its stringent limitations on recovery, the Small Claims Act did not succeed in stemming the tide of private bills, particularly in the Thirties and Forties, a period of expanding federal governmental activity.[81] No sooner was the Small Claims Act in place than Congress felt pressure to provide a less restrictive but procedurally more defined remedy for tort claims against the government. The years 1925 through 1946 saw no fewer than thirty different bills introduced in Congress with a view to providing a more sweeping measure of liability and at the same time a more uniform substantive and procedural framework for the handling of claims.[82] The formula ultimately landed upon in 1946 has been largely retained in the Federal Tort Claims Act as we know it today.[83]

(Footnote Continued)
under $1000 and arose out of accidents involving government vehicles. H.R. REP. NO. 342, 67th Cong., 1st Sess. 1-2 (1921).

[80] Personal injury and death claims were thought to be unusually susceptible to fraud, collusion and excessive compensation. 62 CONG. REC. 2297 (1922). Claims had to be filed within one year of their accrual.

[81] The institution of private relief legislation is venerable and has itself been the subject of close and usually critical examination. Gellhorn & Lauer, Congressional Settlement of Tort Claims Against the United States, 55 COLUM. L.REV. 1 (1955); Holtzoff, The Handling of Tort Claims Against the Federal Government, 9 L. & CONTEMP. PROB. 311, 321-26 (1942); Comment, Administrative Claim and the Substitution of the United States as Defendant under the Federal Drivers Act: The Catch 22 of the Federal Tort Claims Act?, 29 EMORY L.J. 755, 757 (1980); Note, The Federal Tort Claims Act, 56 YALE L.J. 534, 535-36 n.9 (1947). See generally United States v. Yellow Cab Co., 340 U.S. 543, 549-50 (1951).

[82] McGuire, Tort Claims Against the United States, 19 GEO. L.J. 133, 141 (1931).

[83] S. REP. NO. 1400, 79th Cong., 2d Sess. (1946), accompanying S. 2177, discussing the limitations of the Small Tort Claims Act.

The purposes of the Federal Tort Claims Act were set forth by the Supreme Court in Feres v. United States, 340 U.S. 135, 140 (1950):

(Footnote Continued)

Unknown to a surprising number of claims officers with whom I spoke, the Small Claims Act remains very much on the books, the later enactment of the FTCA notwithstanding. The statute has been slightly modified, but only to facilitate the payment of claims settled under its authority; rather than having to report to Congress for special appropriations, agencies may now pay settlements out of the permanent indefinite appropriation, otherwise known as the judgment fund, in just the same way as judgments, litigation settlements, and most administrative settlements under the FTCA.[84] Far from wholly repealing the Small Claims Act, the FTCA expressly saved the Act as to claims not cognizable under its own provisions.[85] Thus, theoretically, agencies may make payments of up to $1000 on claims for property damage negligently caused by their employees acting within the scope of their employment whenever those claims fall within one of the FTCA's several exclusions. Arguably, FTCA-exempt claims are precisely those for which the Small Claims Act has been saved.[86] One could further speculate that a claim not cognizable under the FTCA because it fails to state a cause of action acknowledged by the law of the particular state where the negligence occurred might still be compensable under the earlier statute. Certain tort defenses recognized at state law, like contributory negligence or assumption of risk, as well as certain more or less technical bars to recovery, might also thereby be avoided. I do not mean to suggest more here than that within its confines -- the low ceiling on recovery, the required showing of negligence within the scope of employment, and the one-year statute of limitations -- the Small Claims Act gives agencies modest possibilities for extending the bounds of recovery under the FTCA, possibilities that would be less modest if the $1000 figure fixed upon in 1922 when the Act was passed were adjusted to today's standards. Admittedly, the occasions are probably

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(Footnote Continued)

> Relief was often sought and sometimes granted through private bills in Congress, the number of which steadily increased as Government activity increased. The volume of these private bills, the inadequacy of a congressional machinery for determination of facts, the importunities to which the claimant subjected members of Congress, and the capricious results, led to a strong demand that claims for tort wrongs be submitted to adjudication. Congress already had waived immunity and made the Government answerable for breaches of its contracts and certain other types of claims. At last, in connection with the Reorganization Act, it waived immunity and transferred the burden of examining tort claims to the courts.

[84] 28 U.S.C. §§ 1304(a)(3)(B), 3723(c) (1983).

[85] Legislative Reorganization Act of 1946, supra note 7, § 424(b). See also 31 U.S.C. § 3723(a)(2)(1983). But see the discussion of the meaning of cognizability under the FTCA, text at notes 213-22, infra.

[86] The Comptroller General has taken this view, at least with respect to tort claims falling within the FTCA exemption for claims arising abroad. See infra note 217.

few when an agency disposed to pay a claim essentially as a matter of grace under the Small Claims Act would be unable as a practical matter to do so under the FTCA. My surprise stems less from the disuse into which the statute has fallen than from the extent to which it is simply not known.

One last preliminary word about the Federal Tort Claims Act. The statute essentially represents a waiver of sovereign immunity to suit,[87] and the agencies' administrative settlement authority under it remains acutely dependent upon the government's exposure to liability in litigation. As shown in the next chapter, which examines the administrative claim process under the FTCA in greater detail, the statutory grant of settlement authority to the agencies was at first extremely modest. Initially, the filing of an administrative claim was entirely optional with the claimant, and in fact permissible only for the smallest of claims. Though the ceiling on administrative settlement was lifted in 1966, and filing with the agency made mandatory, governance of the administrative claims procedure to this day remains largely outside the Act.

Most fundamental of all, however, the FTCA continues to define agency settlement authority in terms of litigation exposure. By coupling the language of settlement to the language of liability, the statute strongly suggests that the only claims amenable to administrative settlement are those as to which the United States surrendered its sovereign immunity to suit:

> The head of each Federal agency or his designee... may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[88]

Admittedly, the language just quoted does not itself put the issue entirely to rest. If, on the one hand, it conditions settlement, like suit, on the commission of a tortious act within the definition of applicable state law by a federal employee acting within the scope of office, it does not, on the other hand, expressly bar agencies from settling a claim that falls within one of the Act's thirteen exemptions or that is brought to their attention more than two years after accrual. Thus, a decent theoretical argument could be made that agencies may settle administratively an otherwise eligible tort claim, even though a lawsuit on the claim would be barred by the statute of limitations or by an exemption to the waiver of sovereign immunity to suit. Interestingly, the House and Senate Reports on the 1966 amendments described the settlement authority thereby broadly conferred on the agencies as confined to claims "aris[ing] out of the negligent or wrongful act of an employee . . . acting within the scope of his employment at the time."[89] They made no mention of existing exemptions to the government's waiver of immunity. In fact, sound policy reasons exist for setting aside the exemptions when it comes to agency-level settlement. The point can best be made by reference to the discretionary function exemption, whose legislative history suggests a desire to keep the courts from second-guessing the agencies on matters of policy or judgment.[90] That particular concern pales when an agency chooses of its own accord to compensate a government tort victim. Likewise, the rationale behind the so-called intentional torts exemption -- namely, avoiding the embarrassment and difficulty of defending that category of claims in litigation and the likelihood that inflated judgments will result[91] -- recedes to the vanishing point when an agency rather than a court is the forum for resolving them. In fact, similar arguments could be made with respect to virtually every exemption, except perhaps those whose rationale is the availability of entirely adequate administrative remedies apart from the FTCA.

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[87] Gottlieb, supra note 78, at 16, describing the waiver of immunity to suit, rather than the opportunity for administrative settlement, as "the heart of the bill."

[88] 28 U.S.C. § 2672 (Supp. 1983). The original version of the FTCA contained substantially the same language. Gottlieb, supra note 78, at 14 (liability in agency settlement, as in litigation, predicated on lex loci delicti); Note, The Federal Tort Claims Act, 56 YALE L.J. 534, 537 n.23 (1947) ("the jurisdiction granted courts and administrative agencies is identical").

The case for permitting waiver of the statute of limitations is equally strong. On a textual level, Congress placed the limitations period in the section of the Act governing access to the courts, not in the section authorizing agency settlement. Clearly, no claim may ever be sued upon unless first presented to the agency within two years of its accrual,[92] but does an agency have no right whatsoever to consider a claim filed somewhat later? That the government might pay an otherwise just and meritorious tort claim on which the statute of limitations on suit happens to have run strikes me as quite conceivable. Might not a private party compensate another for wrongfully inflicted injuries, though a lawsuit based on the incident is defeasible as time-barred or otherwise technically defective?

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[89] S. REP. NO. 1327, 89th Cong., 2d Sess. (1966), quoting from H.R. REP. NO. 1532, 89th Cong., 2d Sess., and reprinted in 1966 U.S. CODE CONG & AD. NEWS 2518.

[90] Gottlieb, supra note 78, at 44.

[91] Note, The Federal Tort Claims Act, 56 YALE L. J. 534, 547 (1947).

[92] 28 U.S.C. § 2401(b) (Supp. 1983).

Notwithstanding these arguments, Congress almost certainly did not mean by the Federal Tort Claims Act to authorize the administrative settlement of either time-barred or exempt claims, any more than it meant to authorize settlement under the FTCA of strict liability claims or claims arising out of employee conduct outside the scope of employment. Most likely Congress thought that claims over two years of age should as a policy matter be considered stale for all purposes. Strong textual support also exists for barring settlement of claims on account of which one or more of the exemptions protects the government from suit. By its very terms, the exemptions section of the FTCA makes the statute inapplicable to exempt claims.[93] As part of the statute, the agency settlement provision is no more applicable than any other.

But the agencies are right to construe their settlement authority under the Act narrowly, not so much on textual grounds as in terms of legislative intent. Congress took action in 1966 to expand agency settlement authority and to make the prior administrative claim a prerequisite to suit so that agencies might entertain and pay meritorious tort claims without awaiting litigation. On that rationale, Congress would have no reason to extend agency settlement authority to time-barred claims, claims categorically exempted from the government's waiver of sovereign immunity, or claims that could not successfully be prosecuted in court.

As a practical matter, agency claims officers uniformly take their settlement authority as coextensive with the government's exposure to legal liability,[94] not that too many of them have given serious thought to the possibility of construing the Act any differently. Except to acknowledge that even doubtful claims legitimately command a certain, albeit reduced, settlement value, they disavow any authority or willingness to settle a claim that is truly exempt, time-barred or otherwise infirm.

Clearly, Congress must expressly authorize broader settlement authority of tort and tort-like claims if it truly means to do so. To an extent, it has done just that, either by legislating narrow extensions of the Federal Tort Claims Act in selected areas or by enacting what I loosely call meritorious claims statutes in others. As a matter of fact, many claims officers apparently would welcome having such statutes at their disposal or, if they already have them, seeing them made more generous. The question whether Congress should go further, or more systematically, along this route than it already has, is worth asking, but essentially lies beyond the scope of this procedure-oriented study.

C. Special Tort Claims Legislation

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[93] *Id.* § 2680.

[94] Williams, *The $2500 Limitation on Administrative Settlements Under the Federal Tort Claims Act*, 1960 INS. L. J. 669, 672 (1960).

If the FTCA constitutes the centerpiece of agency authority to entertain tort and tort-like claims, the rest of the arrangement is in a state of utter disarray. One can scarcely even begin to typologize the multitude of ancillary statutes that afford agencies additional opportunities to satisfy monetary claims. The leading authority on the FTCA reports no fewer than some forty,[95] but the number far exceeds that if one construes the term monetary claim broadly enough. Some predate the FTCA and have survived it, a good many others having been repealed or allowed to lapse.[96]

These ancillary statutes defy generalization. Most are agency-specific, some covering only certain kinds of incidents and activities; but others, including some of the most significant, cut completely across agency lines. A few, like the FTCA, condition claims payment on a showing of fault; others evidently do not. Some require that a federal officer or employee acting within the scope of his or her office or employment have caused the injury, while others require no more than injury in connection with a government program and not necessarily one of that particular agency. Only a few deal specifically with the claimant's contributory negligence. Most, but not all, place fixed monetary ceilings on the amount of recovery and, rarely, on the amount of allowable attorneys' fees. They carry varying statutes of limitations on the filing of a claim. Almost all preclude or are assumed to preclude judicial review of the disposition of a claim; a few, however, do not. In some cases, the agency may not only determine the claim, but also pay it; in others, it has authority only to recommend to Congress that the claim be paid. A few purport to be the exclusive remedy for any covered claim, while most do not, thereby leaving open the question whether exclusiveness, or at least a requirement of prior exhaustion of remedies, should be inferred.[97] What most all of them show is virtual inattention to questions of claims procedure.

I do not mean to examine any of these specific pieces of legislation in detail. A simple listing of the most prominent among them, however, should suggest their idiosyncratic character. I present them in a way that indicates whether they are best understood, on the one hand, as complementing the FTCA, for example by addressing claims likely to be exempt from that act, or, on the other hand, as true "meritorious claims" statutes requiring no predicate of fault on the part of the government.

(i) Tort Claim Statutes Ancillary to the FTCA:

Department of Health and Human Services

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[95] 1 L. JAYSON, supra note 77, at p. 1-11.

[96] Id. § 55.

[97] See text at notes 165-190, infra.

Authority to settle claims for personal injury or death arising out of administration of the national swine flu immunization program, based on any theory of liability that would govern a comparable action against the program participant under the law of the place where the act or omission occurred, "including negligence, strict liability in tort, and breach of warranty." [formerly 42 U.S.C. § 247b(k)(2)(1976), 90 Stat. 1113 (1976)][98]

- * administrative claims authority and liability to suit governed by FTCA, except not limited to acts of federal employees acting within the scope of employment and not limited by the FTCA discretionary acts exemption
- * 2-year statute of limitations[99]
- * no ceiling on recovery
- * exclusion where claimant has an exclusive compensatory remedy for benefits from the United States under some other statute,[100] but limitation period for such remedy suspended during pendency of Swine Flu Act proceeding[101]
- * United States has right of recovery against program participants, state law notwithstanding
- * judicial remedy available, again as under the FTCA, except not limited to acts of federal employees acting within the scope of employment and not limited by the FTCA discretionary acts exemption
- * detailed semi-annual reports due from Secretary to Congress on settlement and litigation under this section.

Department of Justice

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[98] The exclusive liability provision, an important feature of the statute, distinguishes it sharply from the existing FTCA. The availability of an action against the United States for a covered claim displaces any claim against manufacturers or distributors of the vaccine or against any agency, organization or personnel administering it. 42 U.S.C. § 247b(k)(3)(1976). Procedures for substitution of the United States as exclusive defendant mirror those of the Federal Drivers Act, 28 U.S.C. § 2679(b)-(e) (Supp. 1983).

For legislative history of the National Swine Flu Immunization Program of 1976, see 1976 U.S. CODE CONG. & AD. NEWS 1987.

[99] The period of limitations is the same as under the FTCA, except that if suit is dismissed for failure to file a prior administrative claim, claimant has 30 days from the date of dismissal or 2 years from the date of accrual of the claim, whichever is later, to file a claim. 42 U.S.C. § 247b(k)(2)(A)(iii) (1976). See Ducharme v. Merrill-Nat'l Laboratories, 574 F.2d 1307, 1311 (5th Cir. 1978).

[100] However, the Feres doctrine, barring recovery for injuries to military personnel incident to service (see infra note 234), is not a bar. Hunt v. United States, 636 F.2d 580, 595 (D.C. Cir. 1980).

[101] 42 U.S.C. § 247b(k)(5)(C) (1976).

Authority of the Attorney General (as successor to the Alien Property Custodian) to issue order directing the payment of money or delivery of property of a person who is not an enemy or ally of an enemy which has been seized by or turned over to the Alien Property Custodian or his successor under the Trading with the Enemy Act [50 U.S.C. App. § 9 (1968), 40 Stat. 419 (1917), as amended]

* claims arising under this statute expressly excluded from the FTCA[102]
* filing of an administrative claim is not a prerequisite to suit against the Alien Property Custodian, or the Attorney General as his successor, in United States district court
* administrative and judicial remedies constitute the exclusive remedy
* 2-year statute of limitations

Panama Canal Commission

Authority to settle and pay claims for property damage or personal injury or death arising from operation of the Panama Canal or related facilities [22 U.S.C. §§ 3761, 3771-78 (Supp. 1983), 93 Stat. 484-87 (1979)][103]

* FTCA expressly made inapplicable to claims cognizable under this act[104]
* no specified statute of limitations
* ceiling of $50,000
* payment of claims for damage to vessels, cargo, crew or passengers of vessels arising out of passage through canal locks under the control of United States personnel is reduced by the comparative negligence of the vessel, master, crew or passengers[105]
* such claims for damage arising outside the locks payable only if proximately caused by the negligence or fault of federal personnel acting within the scope of employment and line of duty, subject to reduction for comparative negligence[106]
* specific rules on measurement of damages for injuries to a vessel and exclusion of liability for delays under stated circumstances[107]

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[102] 28 U.S.C. § 2680(e)(1965).

[103] For legislative history and purpose, see 1979 U.S. CODE CONG. & AD. NEWS 1034.

[104] 22 U.S.C. § 3761(e) (Supp. 1983).

[105] Id. § 3771. Also excluded are claims for injuries to objects protruding beyond any portion of the hull of a vessel. Id.

[106] For other limitations on liability for such claims, and the possibility of recovering up to $120,000 (or more, upon special recommendation to Congress), see id §§ 3772, 3775(b).

[107] Id. §§ 3773-74.

* Board of Local Inspectors established to conduct mandatory investigation, prior to a vessel's departure from the Canal, of any incident giving rise to vessel (or vessel cargo, crew or passenger) claims, and to report to the Commission[108]
* claims payable out of any moneys appropriated for the Commission or, in certain cases, for maintenance and operation of the Canal
* acceptance by claimant deemed to be in full and final satisfaction of the claim
* judicial review of claims for injuries to vessels, cargo, crew or passengers of vessels arising out of passage through canal locks under the control of United States personnel available in a suit against the Commission in federal district court for the Eastern District of Louisiana[109]

Department of State

Authority to settle, in conformity with the provisions governing administrative settlement under the FTCA, and pay claims for property damage or personal injury or death arising in foreign countries from State Department operations abroad [22 U.S.C. § 2669f (1979), 70 Stat. 890 (1956) as amended][110]

* administrative claims authority parallel to that under the FTCA, except limited to tortious acts occurring abroad
* claims procedure set out in 22 C.F.R. §§ 31.1-.10, 31.18 (1983).
* claims payable from appropriated funds
* no judicial review available[111]

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[108] Id. §§ 3777-78. The Board is expressly authorized to summon witnesses, administer oaths and require the production of documents. Id. § 3778(b).

[109] Id. § 3776. Such actions are heard without a jury and proceed as if a case between a private party and a federal administrative agency. Any judgment is payable out of moneys appropriated for maintenance and operation of the Canal. No such damage action may otherwise be brought against the United States or the Commission, or against any of their officers or employees. Id.

No claim other than for damage to vessels, cargo, crew or passengers of vessels arising out of passage through canal locks under the control of United States personnel may be brought against the United States, the Commission or any federal officer or employee, except that the latter may be sued for acts outside the scope of their employment, not in the line of duty, or taken with an intent to injure. Id. § 3761(d).

[110] For legislative history and purpose, see 1956 U.S. CODE CONG. & AD. NEWS 4017.

[111] 22 C.F.R. § 31.18 (1983). The preclusion of judicial review, as well as the constitutionality of the State Department's administrative claims procedures, was sustained in Gerritson v. Vance, 488 F. Supp. 267 (D. Mass. 1980).

Tennessee Valley Authority

Authority to settle and pay claims for damages arising from the torts of TVA employees [implied by the courts from TVA's statutory authority to sue and be sued in its corporate name, 16 U.S.C. § 831c (b) (1974), 48 Stat. 58 (1933)][112]

- * certain FTCA exemptions applied analogously[113]

United States Information Agency

Authority to settle, in conformity with the provisions governing administrative settlement under the FTCA, and pay tort claims arising in foreign countries in connection with United States government information and educational exchange programs conducted abroad [22 U.S.C. § 1474(5), 86 Stat. 493 (1972)][114]

- * administrative claims authority parallel to that under the FTCA, except limited to tortious acts occurring abroad
- * subject to agency regulations set out in 22 C.F.R. §§ 511.1-.12 (1983)

Veterans Administration

Authority to settle, in conformity with the provisions governing administrative settlement under the FTCA, and pay claims for property damage or personal injury or death arising in foreign countries from Veterans Administration operations abroad [38 U.S.C. § 236 (1979), 79 Stat. 1110 (1965)][115]

- * administrative claims authority parallel to that under the FTCA, except limited to tortious acts occurring abroad
- * claims procedure set out in 38 C.F.R. § 14.615-.617 (1983)
- * 2-year statute of limitations
- * no judicial review available

Claims in Admiralty

Mention should be made, in connection with this category of special claims settlement authority, of the Suits in Admiralty Act[116] and the Public Vessels Act.[117] While these statutes long predate the FTCA, they retain full force since the FTCA expressly excludes from its coverage claims against the United States for which a remedy is provided by either of them.[118] The Suits in Admiralty Act covers damage caused by vessels owned, possessed or operated by or for the United States generally, while the Public Vessels Act covers damage caused by public vessels of the United States.[119] Both waive sovereign immunity from in personam suit in admiralty and make the government liable substantially to the same extent as any private shipowner or operator. They essentially borrow the concept of maritime tort. Any remedy provided is exclusive of any other action on the claim against an agency or employee of the United States.[120]

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[112] *E.g.*, Brewer v. Sheco Constr. Co., 327 F. Supp. 1017 (W.D.Ky. 1971).

[113] Pacific Nat'l Fire Ins. Co. v. TVA, 89 F. Supp. 978, 979 (W.D. Va. 1950) (exemption for discretionary acts).

[114] For legislative history and purpose of the basic statute, including the agency's authority to pay tort claims, see 1972 U.S. CODE CONG. & AD. NEWS 2861.

[115] For legislative history and purpose, see 1965 U.S. CODE CONG. & AD. NEWS 3811.

[116] 46 U.S.C. §§ 741-52 (Supp. 1983), 41 Stat. 525, 527 (1920).

[117] 46 U.S.C. §§ 781-90 (1975), 43 Stat. 1112 (1925).

Both statutes, whose precise substantive relationship in the field of torts to one another and to the FTCA lie beyond the scope of this study,[121] specifically contemplate administrative settlements. The Suits in Admiralty Act gives the Secretary of the department having control of the possession or operation of the vessel in question authority to settle any claim within the coverage of the Act, but only until such time as a libel based on the claim has been filed; thereafter settlement authority apparently passes to the Department of Justice.[122] Claims cognizable under the Public Vessels Act rest exclusively, for settlement purposes, with the Justice Department both before and after a libel has been filed.[123] Settlements under both statutes, like judgments, are paid out of any appropriations available for that purpose,[124] and must be reported to Congress on an annual basis.[125]

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[118] 28 U.S.C. § 2680(d) (1965); 46 U.S.C. § 740 (1975).

[119] 1 L. JAYSON, supra note 77, § 7.01. Until amended in 1960, the Suits in Admiralty Act applied only to vessels employed as merchant vessels. Suits involving public vessels may only be brought under the Public Vessels Act. United States v. United Continental Tuna Corp., 425 U.S. 164 (1976); CIVIL ACTIONS AGAINST THE UNITED STATES, ITS AGENCIES, OFFICERS AND EMPLOYEES (Shepard's/McGraw-Hill) 115-17 (1982). The Public Vessels Act bars suit by a foreign national unless reciprocity by the foreign government is shown. 46 U.S.C. § 785 (1975).

[120] 46 U.S.C. §§ 745, 782 (1975).

[121] For a good illustration of the persistent uncertainties, see McCormick v. United States, 680 F.2d 345, 349 (5th Cir. 1982) (en banc), vacating 645 F. 2d 299 (1981) (1960 amendments to Suits in Admiralty Act intended to bring all maritime torts against the United States within the scope of that act and, to that extent, to oust the FTCA). Accord Patentas v. United States, 687 F.2d 707, 713 (3d Cir. 1982); Estate of Callas v. United States, 682 F.2d 613, 619 n.7 (7th Cir. 1982); Dick v. United States, 671 F.2d 724, 726 (2d Cir. 1982).

The Feres doctrine, infra note 234 and accompanying text, appears to be applicable to claims under the admiralty statutes. Beaucoudray v. United States, 490 F.2d 86 (5th Cir. 1974); Seveney v. United States, 550 F. Supp. 653, 657 (D. R.I. 1982).

[122] 46 U.S.C. § 749 (Supp. 1983).

Like the FTCA, the admiralty statutes carry two-year statutes of limitations on the bringing of suit[126] and make the presentation of an administrative claim a prerequisite.[127] However, even though suit may not be brought until six months after the administrative claim has been filed, such filing does not necessarily toll the statute of limitations.[128]

Apart from settlement authority in connection with liability under the Suits in Admiralty and Public Vessels Acts, the Secretaries of the military services have substantial authority to settle and pay admiralty claims of the same general type as are cognizable under the Public Vessels Act.[129] The relevant statutes cover damage caused by a vessel or other property of or in the service of the particular military service, in connection with an "admiralty claim" or "maritime tort."[130] Although the statutes contain no limitations period, the military services have borrowed the two-year period of the Suits in Admiralty Act and Public Vessels Act. Settlement amounts differ among the services. The Secretary of the Navy may settle and pay up to one million dollars for an authorized claim. Larger claims must be certified by him to Congress for payment.[131] The Secretaries of the Army and Air Force also have unlimited settlement authority, but their payment authority is limited to $500,000; payment in excess of that requires certification to Congress.[132] As to admiralty claims based on Coast Guard activity, the Secretary of the Treasury operates under a payment ceiling of $100,000.[133] All settlements, upon acceptance of payment, are final and conclusive.[134]

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[123] 46 U.S.C. § 786 (1975).

[124] Id. §§ 748, 787. The Suits in Admiralty Act adds that if no appropriations are available, a sum sufficient to cover the award will automatically be appropriated out of any money in the Treasury not otherwise appropriated. Id. § 749.

[125] Id. §§ 752, 790.

[126] 46 U.S.C. §§ 745, 782.

[127] Id. § 740.

[128] For citations reflecting a split among the courts on the tolling question, see McCormick v. United States, supra note 121, at 349-50. In McCormick, the Fifth Circuit held, en banc, that tolling is appropriate where it would not defeat the basic purpose of the statute of limitations and would avoid injustice to the plaintiff. Id. at 351.

[129] This authority has been described as predicated strictly on legal liability and thus available only for claims on which court action could be maintained. Dick v. United States, 671 F.2d 724, 727 (2d Cir. 1982).

[130] 10 U.S.C. §§ 4801-06 (Supp. 1983) (Army); 10 U.S.C. §§ 7621-23 (Supp. 1983) (Navy); 10 U.S.C. §§ 9801-06 (Supp. 1983) (Air Force); 14 U.S.C. § 646 (Supp. 1983) (Coast Guard). For implementing regulations, see 32 C.F.R. §§ 536.45 (1982) (Army), 752 (1983) (Navy), 842.90-.99 (1983) (Air Force). The Army and Air Force regulations enumerate categories of claims that will not be allowed even though apparently within the settlement authority conferred.

Claims for Patent or Copyright Infringement

Unlike the admiralty statutes, which form the basis of express exclusions from the FTCA, the statutes conferring a remedy in the Claims Court for patent[135] or copyright infringement[136] pass unmentioned in the FTCA. Nevertheless, these statutes have been construed as the exclusive remedy against the United States for claims of this kind.[137]

The patent infringement statute, which predates the FTCA by thirty-six years, provides that the United States shall be liable for "reasonable and entire compensation" whenever a patented invention is used by or for the United States, or is manufactured by or for the United States, without the license of the owner. It also makes the government liable, and exclusively so, when the invention is used or manufactured by a contractor or subcontractor or any person for the Government, with the Government's consent. The statute contains an express exclusion for claims of persons whose invention or discovery was made while they were employed by or serving the United States and related to the employee's official functions, as well as of persons who used government time, materials, or facilities in making the invention or discovery. Claims arising in a foreign country are likewise excluded. However, no limitation attaches to the amount of recovery or to attorneys' fees.

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[131] 10 U.S.C. § 7622 (Supp. 1983).

[132] Id. §§ 4802, 9802.

[133] 14 U.S.C. § 646 (Supp. 1983).

[134] 10 U.S.C. §§ 4806 (1959), 7622(d) (Supp. 1983), 9806 (1959); 14 U.S.C. 646(b) (Supp. 1983).

[135] 28 U.S.C. § 1498(a) (Supp. 1983).

[136] Id. § 1498(b).

[137] 1 L. JAYSON, supra note 77, § 9.01.

A parallel copyright infringement statute, enacted in 1960, provides an exclusive remedy in the Claims Court for copyright infringement by the United States or by a contractor, subcontractor or any person acting for the United States with the latter's consent. Similar exclusions apply. In addition to their discrepant limitation periods, the two statutes differ curiously on the question of administrative settlement. Only the copyright infringement statute authorizes the head of the government agency involved to compromise, settle in full satisfaction and pay out of agency appropriations an administrative claim prior to suit;[138] the patent infringement statute does not.[139] During the pendency of an administrative claim, which is not a prerequisite to suit, the three-year period of limitations on copyright infringement suits in the Claims Court is tolled.[140]

This first category of legislation ancillary to the FTCA obviously groups a wide assortment of statutes. They differ in such respects as breadth of coverage, ceilings on recovery, exclusiveness as remedy, source of payment, and so on. Some, like the admiralty, patent infringement, or Swine Flu statutes, prescribe essentially judicial remedies with some sort of agency-level claims procedure beforehand. Others contemplate a purely administrative remedy. Not only do the latter provide claimants no new cause of action, but they appear to foreclose judicial review of most any agency action taken under them.

The case of Gerritson v. Vance[141] illustrates well this last point. There, the plaintiff had filed an administrative claim with the State Department arising out of a personal injury sustained on the grounds of the United States Embassy in Zambia. The claim having been denied initially and upon reconsideration, plaintiff brought suit challenging the denial as both lacking in substantial evidence and based on claims procedures that deprived her of due process of law. The court dismissed the action, insofar as the substantial evidence issue was concerned, on jurisdictional grounds; the exemption for torts arising abroad clearly deprived the court of jurisdiction under the FTCA. But it also declined to review the State Department's exercise of settlement authority under the ancillary statute on tort claims arising abroad. For this proposition, the court cited chiefly the State Department's own implementing regulations providing that settlement decisions on foreign claims shall not be subject to judicial review.[142] Since, however, agencies cannot on their own preclude judicial review where it is otherwise available, the court shored up its position by making an undocumented reference to "clear and convincing Congressional intent" to bar access to the courts on the merits of a claim.[143]

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[138] 28 U.S.C. § 1498(b) (Supp. 1983). For legislative history generally of the copyright infringement statute, see 1960 U.S. CODE CONG. & AD. NEWS 3444.

[139] However, the Foreign Assistance Act of 1961, which permits suit against the United States in district court or Claims Court for patent infringement in connection with the furnishing of foreign assistance under the Act, and makes this the exclusive remedy, does give the relevant agency head such authority, provided claimant accepts payment in full satisfaction of the claim. 22 U.S.C. § 2356(b) (1979). The six-year statute of limitations on suit is tolled during pendency of the administrative claim. For legislative history and purpose of the 1961 Act, see 1961 U.S. CODE CONG. & AD. NEWS 2472.

[140] 28 U.S.C. § 1498(b) (Supp. 1983).

[141] 488 F. Supp. 267 (D. Mass. 1980).

(ii) "Meritorious Claims" Statutes:

The statutes just canvassed complement the FTCA in the sense of affording an administrative and/or judicial remedy for tort and tort-like claims that happen to fall outside the coverage of that Act. However, Congress occasionally has given an agency authority to entertain claims arising out of its activities in the absence of any showing of fault. Enactments of this sort might be described as "meritorious claims" provisions to signify that the claims payable thereunder have "merit," if not a firm legal basis. Significantly, to a one, they furnish a strictly administrative remedy; agency action or inaction under this claims authority, like the State Department determination of the foreign tort claim in Gerritson v. Vance, also lies essentially beyond judicial review.[144] Though Congress may lodge authority to settle meritorious claims in the annual appropriations act for a given agency (sometimes renewing it in an uninterupted succession of such acts[145]), putting settlement authority of this sort on a more permanent and codified footing would seem preferable. Among the codified meritorious claims statutes are the following:

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[142] 22 C.F.R. § 31.18 (1983). See Op. Comp. Gen. No. B-199449-OM (Aug. 7, 1980).

[143] 488 F. Supp. at 268. However, the court did address plaintiff's due process allegations, presumably on the theory that the implied statutory preclusion does not extend to constitutional issues. On the constitutional merits, it was not convinced. See infra note 615, and accompanying text.

In Towry v. United States, 459 F. Supp. 101, 104-08 (E.D. La. 1978), aff'd, 620 F. 2d 568 (5th Cir. 1980), cert. denied, 449 U.S. 1078 (1981), the court considered the Military Claims Act, text at notes 177-206, infra, a statute containing a finality clause, and concluded that preclusion of review did not violate due process. Cf. LaBash v. Department of Army, 668 F.2d 1153 (10th Cir.), cert. denied, 456 U.S. 1008 (1982) (express preclusion of review in Military Claims Act not a violation of due process where agency not alleged to have violated claimant's constitutional rights).

[144] LaBash v. Department of Army, supra note 143 (Military Claims Act); Towry v. United States, supra note 143 (same). But a court may well review an adverse determination under a meritorious claims statute where the challenge goes to the agency's interpretation of the statute. See infra note 196.

Department of Agriculture

Authority to reimburse owners for the damage or destruction of private property as a result of action by federal employees in connection with the protection, administration or improvement of the national forests [16 U.S.C. § 574 (1974), 46 Stat. 387 (1930), as amended]

* since predates FTCA, only available for claims not cognizable under that act
* no specified statute of limitations
* ceiling of $2500[146]
* does not cover personal injury or death
* payment out of any funds appropriated for the protection, administration or improvement of the national forests

Authority to reimburse owners for the loss, damage or destruction of horses, vehicles or other privately-owned equipment obtained by the Forest Service for use in connection with its work [16 U.S.C. 502(d) (1974), 37 Stat. 843 (1913), as amended]

* since predates FTCA, only available for claims not cognizable under that act
* no specified statute of limitations
* ceiling of $50 (where claimant is Forest Service employee), otherwise $2500,[147] absent a written contract; no ceiling where equipment used for emergency fire-fighting situations
* payment out of Forest Service appropriations

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[145] Holtzoff, The Handling of Federal Tort Claims Against the Federal Government, supra note 81, at 318. An example is the frequently extended authority of the Secretary of the Interior to compromise claims for damages by owners of private property in connection with the survey, construction, operation or maintenance by the government of irrigation works. Act of Mar. 3, 1915, 38 Stat. 859 (1915). The continuation of the Department's authority depends on its inclusion in successive annual public works appropriation acts. Op. Comp. Gen. No. B-199449-OM (Aug. 7, 1980). Implementation of this Interior Department authority is discussed in Gellhorn & Lauer, Federal Liability for Personal and Property Damage, 29 N.Y.U. L. REV. 1325, 1344-49 (1954). Responsibility for administering this particular program has recently been shifted from the headquarters of the Office of the Solicitor to its field offices.

[146] The ceiling, originally set at $500, was increased to $2500 in 1962. Pub. L. No. 87-869, 76 Stat. 1157 (1962). For legislative history and purpose, see 1962 U.S. CODE CONG. & AD. NEWS 3980.

[147] The provision of a higher recovery for nonemployees was added in 1958. Pub. L. No. 85-464, 72 Stat. 216. For legislative history and purpose, see 1958 U.S. CODE CONG. & AD. NEWS 2691.

Federal Bureau of Investigation

Authority in the Attorney General to settle claims for property damage or personal injury or death arising out of actions of Director, Assistant Director, inspector or special agent of the FBI where not amenable to settlement under the FTCA [31 U.S.C. § 3724 (1983), 49 Stat. 1184 (1936)]

- since predates FTCA, only available for claims not cognizable under that act
- 1-year statute of limitations
- ceiling of $500
- covers only activities within the scope of employment
- exclusion of claims by federal officers or employees arising during the scope of employment
- payment cannot be made by the Department; the claim, accompanied by a report, must be certified to Congress for appropriations out of which payment may be made[148]
- acceptance by claimant deemed to be in full and final settlement of the claim

Department of Health and Human Services

Authority to settle claims for damages caused by collision with or otherwise incident to the operation of Public Health Service vessels, where such vessels are responsible for the damages [42 U.S.C. § 223 (1982), 58 Stat. 710 (1944)][149]

- since predates FTCA, only available for claims not cognizable under that act
- 1-year statute of limitations
- ceiling of $3000
- payment cannot be made by the Department; the claim, accompanied by a report, must be certified to Congress for appropriations out of which payment may be made
- acceptance by claimant deemed to be in full and final settlement of the claim

Department of Interior

Authority to reimburse owners for the loss, damage or destruction of horses, vehicles, or other privately-owned equipment while in the custody of the National Park Service or the Department, where custody is had under some authorization, contract or loan, and for the purpose of fire-fighting, trail or other official business [16 U.S.C. 17f (1974), 46 Stat. 382 (1930)]

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[148] The General Accounting Office reports that an arrangement has been worked out whereby the FBI pays these claims out of current operating appropriations. GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW p. 11-121 (1982). See Op. Comp. Gen. No. B-115234 (Feb. 24, 1981).

[149] For legislative history and purpose, see 1944 U.S. CODE CONG. SERV. 1211.

- since predates FTCA, only available for claims not cognizable under that act
- no specified statute of limitations
- no ceiling on recovery
- agency employees may be eligible as claimants
- payment made from appropriations available for the rental of such equipment

Authority to settle and pay claims for damages to owners of private property resulting from government operations in the survey, construction, operation or maintenance of Indian irrigation projects [25 U.S.C. § 388 (1983), 45 Stat. 1252 (1929)]

- claims payable out of funds available for Indian irrigation projects
- settlement total for the fiscal year not to exceed 5 percent of the funds available that year for the project out of which the claims arise

Department of Justice

Authority to settle and pay claims for damage or loss of personal property of employees of federal penal and correctional institutions incident to their employment [31 U.S.C. § 3722 (1983), 63 Stat. 167 (1949), as amended]

- 1-year statute of limitations and requirement of a claim in writing
- ceiling of $1000
- limited to property found to be reasonable or useful under the circumstances
- no requirement of negligence or causation by a prisoner or federal employee
- total exclusion where damage or loss results from contributory negligence of the claimant or of an agent of the claimant
- exclusion if loss occurred at quarters not assigned or provided by the government
- authorization of appropriations for payment of claims
- acceptance by claimant deemed to be in full and final satisfaction of the claim

Authority to settle and pay claims of federal prisoners or their dependents for personal injury sustained in any industry or in any work activity in connection with the maintenance or operation of the institution to which they are confined [18 U.S.C. § 4126 (1969), 62 Stat. 852 (1948), as amended][150]

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[150] For legislative history and purpose, see 1949 U.S. CODE CONG. SERV. 1248; 1961 U.S. CODE CONG. & AD. NEWS 3028.

The Supreme Court has determined that this remedy, if available, is exclusive of any under the Federal Tort Claims Act. United States v. Demko, 385 U.S. 149 (1966). See also Sturgeon v. Federal Prison Indus., 608 F. 2d 1153, 1154 (8th Cir. 1979); Thompson v. United States, 495 F. 2d 192, 193 (5th Cir. 1974).

* claims procedure set out in 28 C.F.R. §§ 301.1-.26(1983)[151]

* regulations provide that claims may be filed within thirty days prior to the date of release or transfer from the institution, but allow them to be filed within sixty days after release or transfer when circumstances preclude doing so beforehand; claims may also be allowed within one year of release from the institution or from a community treatment center for good cause shown[152]

* regulations bar recovery if injury is sustained willfully or with intent to injure someone else or in willful violation of rules, in any activity not directly related to work assignment, in connection with institutional programs or maintenance of own quarters, or while away from work location[153]

* regulations place burden of proof of causation on the claimant

* regulations provide for an on-the-record hearing on appeal from the initial decision of the claims examiner[154]

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[151] The regulations require an immediate investigative report of any known incident that may give rise to a claim, and review by an institutional safety manager. A physical examination is compulsory in the event of a claim. Id. §§ 301.3-.6. Claims examiners make their determinations on the basis of all available evidence, and give a written notification with reasons and notice of appeal rights. Id. § 301.12(a). For appeal procedures, see infra note 92. Claims examiners are directed to follow the compensation schedule of the Federal Employees' Compensation Act and to use minimum wage standards where applicable. 28 C.F.R. § 301.21 (1983).

[152] Id. § 301.5(a). No award may be had if full medical recovery, without residual impairment, occurs while the inmate is in custody.

[153] Id. § 301.9. The regulations, however, contemplate payment of lost-time wages and cover occupational disease or illness proximately caused by work conditions. Id. § 301.1. Section 301.10 contains rules for computing lost-time wages.

[154] Id. §§ 301.13-.19. The regulations, introduced in 1981, were doubtless prompted by judicial holdings that prisoner compensation under the statute is an entitlement and that procedural due process requires a full adversarial hearing. See infra note 155.

Under the regulations, a claimant has thirty days, or longer in case of good cause, to request an appellate hearing before the Inmate Accident Compensation Committee. Alternatively, he or she may request that the Committee simply reconsider the decision. Upon such request, the claimant is entitled to a copy of the information on which the initial decision was made. Hearings, conducted at the Central Office of the Bureau of Prisons, are basically trial-type. Provision is made for oral testimony by witnesses as well as documentary submissions, questioning by the Committee, and questioning by the claimant of the Committee or of witnesses on behalf of the government. The hearing is recorded and copied or transcribed, and the claimant may be represented

(Footnote Continued)

- no fixed ceiling on damages, but recovery may not exceed that provided by the Federal Employees' Compensation Act
- claims payable from funds of Federal Prison Industries, a government corporation set up to provide employment, vocational training and rehabilitation for federal inmates
- accounts of all disbursements to be rendered to the GAO for settlement and adjustment
- limited judicial review deemed available[155]

Job Corps

Authority to settle claims for damage to person or property resulting from operations of the Job Corps where not cognizable under the FTCA [29 U.S.C. § 926(b) (1974), 87 Stat. 872 (1973),[156] repealed, 92 Stat. 1993 (1978)]

- former agency regulations excluded claims covered by FECA or Military Personnel and Civilian Employees' Claims Act[157]
- former agency regulations narrowed scope to claims (i) entailing the tortious act or omission of a Job Corps enrollee or the good

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(Footnote Continued)
by an attorney. However, the Committee is not bound by any rules of evidence or formal rules of procedure, and may not compel the attendance of witnesses.

The Committee is required to notify the claimant of its determination with a statement of reasons. Further appeal, on the record established below, may be had to the Associate Commissioner of Federal Prison Industries.

[155] The courts have permitted review only under the Administrative Procedure Act and on the basis of the arbitrary and capricious standard. Thompson v. Federal Prison Indus., 492 F. 2d 1082, 1084 n. 5 (5th Cir. 1974); Owens v. Department of Justice, 537 F. Supp. 373, 375 (N.D. Ind.), aff'd, 673 F.2d 1334 (7th Cir. 1981); Saladino v. Federal Prison Indus., 404 F. Supp. 1054, 1056 (D. Conn. 1975). However, exhaustion of the administrative remedies provided by the regulations is a prerequisite to suit. Sturgeon v. Federal Prison Indus., supra note 150, at 1155; Thompson v. Federal Prison Indus., supra, at 1084 n. 6.

The courts have also held that an award coming within the terms of the statute and implementing regulations is in the nature of an entitlement. Davis v. United States, 415 F. Supp. 1086, 1091-92 (D. Kan. 1976); Saladino v. Federal Prison Indus., supra, at 1057. And they have required, as a matter of constitutional due process, that an inmate be afforded a full evidentiary hearing on his or her claim and access to relevant portions of his or her file prior to such a hearing. Davis v. United States, supra, at 1097-1101; Saladino v. Federal Prison Indus., supra, at 1057-58. Revised regulations now reflect these demands. See supra note 154.

[156] For legislative history and purpose of the statute establishing the Job Corps program, see 1973 U.S. CODE CONG. & AD. NEWS 2935.

[157] 45 C.F.R. § 1013.2-.3 (repealed).

faith efforts of the claimant or another to assist an enrollee in danger, (ii) where the enrollee was outside the geographic limits of his or her hometown when the incident occurred, and (iii) where the incident occurred at the center to which the enrollee was assigned, within 100 miles of the center, or while the enrollee was on authorized travel to or from the center[158]

- no specified statute of limitations
- ceiling of $500
- former agency regulations bar claims by the Job Corps enrollee[159]

National Aeronautics and Space Administration

Authority to settle and pay claims for property damage or personal injury or death arising out of NASA activities[160] [42 U.S.C. § 2473 (c)(13) (Supp. 1983), 72 Stat. 429 (1958)][161]

- 2-year statute of limitations
- ceiling of $25,000,[162] though claims in excess may be reported by NASA to Congress for its consideration if meritorious and otherwise covered by this provision
- amounts in excess of that payable from agency appropriations to be paid from permanent judgment fund[163]
- acceptance by claimant deemed to be in full and final satisfaction of the claim

National Oceanic and Atmospheric Administration (formerly Coast and Geodetic Survey)

Authority in Secretary of Commerce to settle claims for property damage or personal injury or death by acts for which the National Ocean Survey is responsible [33 U.S.C. 853 (Supp. 1983), 41 Stat. 929, 1054 (1920), as amended]

- since predates FTCA, only available for claims not cognizable under that act
- ceiling of $500[164]

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[158] *Id.* § 1013.2-.4 (repealed).

[159] *Id.* § 1013.2-.3 (repealed).

[160] NASA functions are identified in 42 U.S.C. § 2473(a) (1973).

[161] For legislative history and purpose, see 1958 U.S. CODE CONG. & AD. NEWS 3160.

[162] The ceiling was raised from $5000 in 1979. Pub. L. No. 96-48, 93 Stat. 349 (1979). For legislative history and purpose, see 1979 U.S. CODE CONG. & AD. NEWS 829.

[163] 31 U.S.C. § 1304(a)(3)(D) (1983).

[164] In 1975, Congress eliminated the original requirement that amounts found due be reported to Congress through the Treasury

(Footnote Continued)

Nuclear Regulatory Commission

Authority to settle and pay claims for property damage or personal injury or death resulting from explosion or radiation in connection with the detonation of explosive devices [42 U.S.C. 2207 (1973), 68 Stat. 952 (1954), as amended][165]

- * 1-year statute of limitations
- * ceiling of $5000, though claims in excess may be reported by the Commission to Congress for its consideration if meritorious and otherwise covered by this provision[166]
- * exclusion where damage caused in whole or in part by the negligent or wrongful act of the claimant or his or her agents or employees
- * acceptance by claimant deemed to be in full and final satisfaction of the claim

Authority to settle and pay claims for property damage or personal injury or death resulting from a nuclear incident involving the nuclear reactor of a United States warship [42 U.S.C. § 2211 (1974), 88 Stat. 1611][167]

- * exclusion where loss caused by the act of an armed force engaged in combat or results from civil insurrection
- * President may authorize payment of claims from any available contingency funds or may certify them to Congress for appropriations[168]

Peace Corps

(Footnote Continued)
Department for special appropriations. Pub. L. No. 93-608, 88 Stat. 1967 (1975). For legislative history and purpose, see 1974 U.S. CODE CONG. & AD. NEWS 7159.

[165] For legislative history and purpose of the Atomic Energy Act of 1954, see 1954 U.S. CODE CONG. & AD. NEWS 3456.

[166] The provision for claims in excess of $5000 was added in 1961. Pub. L. No. 87-206, 75 Stat. 478 (1961). For legislative history and purpose, see 1961 U.S. CODE CONG. & AD. NEWS 2591.

[167] For legislative history and purpose, see 1974 U.S. CODE CONG. & AD. NEWS 6363; 1975 U.S. CODE CONG. & AD. NEWS. 2251.

[168] Pursuant to this authority, President Ford delegated to the Secretary of Defense responsibility for authorizing payment of such claims, on such terms and conditions as he might direct, from contingency funds available to the Defense Department, or for certifying claims to the Director of the Office of Management and Budget with a recommendation for additional appropriation by Congress. Consultation with the Secretary of State is required in the case of claims by a foreign country or foreign national. Exec. Order No. 11,198, 41 Fed. Reg. 22,329 (1976), reprinted in 42 U.S.C. § 2211 at 96-97 (Supp. 1983).

Authority to settle and pay claims of a person not a U.S. citizen or resident for property damage or personal injury or death arising abroad from the act or omission of any Peace Corps employee or volunteer [22 U.S.C. § 2509(b) (1979), 75 Stat. 617 (1961), as amended][169]

- 1-year statute of limitations
- ceiling of $20,000[170]
- exclusion of claims by U.S. citizens or residents
- acceptance by claimant deemed to be in full and final satisfaction of the claim

Postal Service

Authority to settle claims for property damage or personal injury or death resulting from the operations of the Postal Service where "a proper charge against the United States" and not cognizable under the FTCA [39 U.S.C. § 2603 (1980), 84 Stat. 745 (1970), reenacting the substance of 43 Stat. 63 (1921), as amended, 48 Stat. 1207 (1934)]

- provisions of FTCA apply to tort claims arising out of Postal Service activities[171]
- no specified statute or limitations (except through incorporation of FTCA period)
- no ceiling on recovery[172]
- claims payable from postal revenues[173]

Department of State

Authority to settle and pay meritorious claims for property damage or personal injury or death suffered by a foreign national resulting from any U.S. government activity, where the claim is presented by the government of the foreign country and the claim is not cognizable under any other statute or international agreement [22 U.S.C. § 2669(b) (1979), 76 Stat. 263 (1962)][174]

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[169] For legislative history and purpose of the Peace Corps Act, see 1961 U.S. CODE CONG. & AD. NEWS 2842.

[170] The original ceiling of $10,000 was raised to its present level in 1978. Pub. L. No. 95-331, 92 Stat. 414, 415. For legislative history and purpose, see 1978 U.S. CODE CONG. & AD. NEWS 1092.

[171] 39 U.S.C. § 409(c) (1980). For regulations jointly governing FTCA claims and claims under this provision, see 39 C.F.R. §§ 912.1-.14 (1983).

[172] The original grant of authority in 1921, to the then Post Office Department, carried a $500 ceiling, which was eliminated as part of the Postal Reorganization Act of 1970, Pub. L. No. 91-375, 84 Stat. 719, 745 (1970).

[173] Pub. L. No. 89-57, § 201, 79 Stat. 200 (1965). A 1982 statute adds that judgments against the United States arising out of Postal Service activities shall be paid by the Postal Service from funds available to it. Pub. L. No. 97-258, § 2(k), 96 Stat. 1062. For legislative history and purpose, see 1982 U.S. CODE CONG. & AD. NEWS 1895.

* no specified statute of limitations
* ceiling of $15,000, or its equivalent in foreign currency
* claim must be espoused by a foreign government on behalf of one of its nationals
* claims payable from appropriated funds

Authority to settle and pay claims for property damage arising from operations of the United States or its personnel in connection with any project of the International Boundary and Water Commission[175] [22 U.S.C. § 277(e) (1979), 53 Stat. 841 (1939)]

* since predates FTCA, only available for claims not cognizable under that act
* 1-year statute of limitations
* ceiling of $1000
* claim must be substantiated by a report of a board appointed by the American Commissioner
* claims procedure set out in 22 C.F.R. §§ 31.1-.10, 31.19-.23 (1983).
* claims payable from funds appropriated for the project in connection with which the loss occurred

Authority to settle personal injury and death claims of non-U.S. nationals arising in foreign countries where the United States exercises privileges of extraterritoriality, provided the injury or death results from acts or omissions of a federal officer, employee or agent [31 U.S.C. § 3725 (1983), 49 Stat. 1138 (1936)]

* no requirement that action be negligent or otherwise wrongful, or taken within the scope of employment
* 1-year statute of limitations
* ceiling of $1500
* no liability for acts of military personnel
* exclusion of claims for injury or death of U.S. nationals or U.S. government employees
* claims to be certified to Congress, accompanied by a report, for payment out of appropriations to be made for that purpose
* acceptance by claimant deemed to be in full and final settlement of the claim

Veterans Administration

Authority to reimburse veterans in Veterans Administration hospitals and domiciliaries for the loss of personal effects sustained by fire, earthquake or other natural disaster while stored there [38 U.S.C. § 626 (1979), 72 Stat. 1144 (1958), as amended][176]

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[174] For legislative history and purpose, see 1962 U.S. CODE CONG. & AD. NEWS 2028.

[175] The Commission carries out certain flood control, conservation, sanitation and related projects on the international boundary between the United States and Mexico.

* claims procedure set out in 38 C.F.R. §§ 17.75-.77 (1983)

The Military, Foreign and National Guard Claims Acts

The Military Claims Act authorizes the Secretary of each military department to settle and pay claims against the United States for death, personal injury or property damage caused by civilian or military personnel of the departments, including the Coast Guard, either while acting within the scope of their employment or incident to noncombat activities.[177] The statute, originally enacted in 1943, on the eve of the Federal Tort Claims Act,[178] was meant to consolidate and expand a somewhat disorganized set of miscellaneous prior statutes authorizing administrative settlements of tort and tort-like claims by the military departments under different kinds of circumstances, and it did introduce a considerable measure of uniformity into their settlement standards and practices. With the passage in 1946 of the FTCA, the Military Claims Act was expressly made inapplicable to claims cognizable under that new Act.[179]

The Military Claims Act would seem to be an excellent example of an expansive meritorious claims statute. On the one hand, it might conceivably cover any tort claim that happens not to be cognizable under the FTCA, subject of course to its own limitations.[180] In fact, its first branch reads broadly enough to allow the settlement of claims arising out of any action taken within the scope of employment even if not wrongful. But the military services have used their policymaking authority under the Act to confine this branch to tort-based claims and to preserve virtually every FTCA exemption apart from that for torts committed abroad;[181] moreover, in the absence of any statutory reference to the applicable law, they tend to apply the law of the place where the claim arose.[182] At the same time, claims arising out of nonwrongful acts may qualify for statutory coverage under the rubric of claims "otherwise incident to noncombat activities,"[183] even when those acts occurred outside the scope of employment or fall within a certain FTCA exemption.[184] Though the Military Claims Act leaves the definition of noncombat activities entirely wide open, the services agree that the term covers "activities essentially military in nature, having little parallel in civilian pursuits and which historically have been considered as furnishing a proper basis for payment of claims."[185]

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[176] For legislative history and purpose of the 1973 amendment extending reimbursement provisions to earthquakes and other natural disasters, see 1973 U.S. CODE CONG. & AD. NEWS 6355.

[177] 10 U.S.C. § 2733 (1983). Presumably all that is necessary for noncombat activity to come within the scope of the Act is a causal relationship to the injury. Scope of employment is not a requirement. The regulations expressly take this view. E.g., 32 C.F.R. §§ 842.42(b)(1983) (Air Force).

The statute contains an express statutory exclusion for reimbursement of medical, hospital or burial services furnished at the expense of the United States, 10 U.S.C. § 2733 (c) (1983), and for personal injury or death of military department personnel incident to service, id. § 2733(b)(3).

[178] Act of July 3, 1943, 57 Stat. 372 (1943). The Act was comprehensively revised in 1956. Act of Aug. 10, 1956, 70A Stat. 153 (1956).

[179] 10 U.S.C. § 2733(b)(2)(1983).

[180] See 32 C.F.R § 536.14 (1983) (Army). For example, the statute would not cover a claim falling outside the FTCA due to the doctrine of Feres v. United States, 340 U.S. 135 (1950), since by its own terms it does not cover claims for personal injury or death of military

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department personnel incident to service. 10 U.S.C. § 2733 (b)(3). Cf. United Services Auto. Ass'n v. United States, 285 F. Supp. 854, 856 (S.D. N.Y. 1968) (claim for property damage rather than personal injury suffered incident to service, though barred by Feres, is not within the Military Claims Act exclusion).

[181] E.g., 32 C.F.R. § 842.42(d)(1983)(Air Force). Thus, the Military Claims Act has been read as virtually inapplicable to domestic claims sounding in tort.

[182] 10 U.S.C. § 2733(b)(4)(1983). The statute was amended in 1968 to provide expressly for application of the local law of contributory or comparative negligence. Act of Sept. 26, 1968, Pub. L. No. 96-522, 82 Stat. 875.

[183] See 32 C.F.R. § 536.14(a)(1983)(Army). For support for the view that relief under the Military Claims Act is not contingent on a showing of fault, see Ward v. United States, 331 F. Supp. 369, 374-75 (W.D. Pa. 1971), rev'd on other grounds, 471 F. 2d 667 (3d Cir. 1973); Lundeen v. Department of Labor & Indus., 78 Wash. 2d 66, 469 P. 2d 886 (1970). Of course, the presence of fault does not bar treating a claim as one arising incident to noncombat activities. 32 C.F.R. § 536.14(d) (1983)(Army).

[184] See supra note 177 and infra note 197.

[185] 32 C.F.R. § 536.14(e)(1983)(Army). The regulations provide as illustrations "practice firing of missiles and weapons, training and field exercises, and maneuvers, including in connection [with them] the operation of aircraft and vehicles, and the use and occupancy of real estate, and movement of combat or other vehicles designed especially for military use." The Navy Regulations add naval exhibitions, operations of antiaircraft equipment, sonic booms, explosions of ammunition and,
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A claim arising abroad is presumptively within the coverage of the Military Claims Act since by definition it falls outside the FTCA.[186] However, if the claimant is an inhabitant of a foreign country at the time of the incident, his or her exclusive administrative remedy arises under a separately enacted Foreign Claims Act,[187] a statute whose procedures differ somewhat from those of the Military Claims Act but whose coverage is basically the same.[188] Any statute such as the

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most general of all, "use of instrumentalities having latent mechanical defects not traceable to negligent acts or omissions." Id. § 750.55(b). The Air Force regulations are somewhat more conceptual:

> The . . . noncombat activities ground . . . has no precise common law analogue. In some respects, the noncombat activities concept is more limited than common law absolute liability theories, yet more extensive than the ordinary res ipsa loquitur doctrine. It provides a means of compensation for damage that results from certain authorized military activities of U.S. forces . . .. In general, the events that are properly considered under the noncombat activities provision of the Act relate to actions that are peculiarly military in character.

32 C.F.R. § 842.42(a)(1983)(Air Force).

[186] 28 U.S.C. § 2680(k)(1965).

[187] 10 U.S.C. § 2734(1983). The Military Claims Act by its own terms is inapplicable to claims covered by the Foreign Claims Act. Id. § 2733(b)(2). American tourists and business people on travel abroad are not inhabitants of a foreign country, but United States nationals residing abroad are.

[188] The Foreign Claims Act covers property damage, personal injury or death occurring outside the United States where caused by civilian or military personnel of the armed forces or otherwise incident to their noncombat activities. Therefore, as under the Military Claims Act, negligence is not in all cases a necessary element. However, the Foreign Claims Act was amended specifically in 1968 to cover claims arising from an accident in the operation of military aircraft indirectly related to combat or occurring while preparing for or in transit to or from combat. 10 U.S.C. § 2734(b)(3)(1983). For legislative history and purpose, see 1968 U.S. CODE CONG. & AD. NEWS 3617.

For Air Force regulations under the Act, see 32 C.F.R. §§ 842.50-.54 (1983).

The American Battle Monuments Commission has separate but related statutory authority to settle and pay out of its appropriations claims for property damage, personal injury or death resulting from the negligent or wrongful acts or omissions of Commission personnel acting within the scope of their office or employment in connection with the Commission's activities abroad. Procedures of the Foreign Claims Act are incorporated by reference. Act of July 25, 1956, 70 Stat. 640,
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Military or Foreign Claims Act that permits an agency to consider claims arising abroad raises interesting questions of applicable law. In the absence of legislative guidance, the services have adopted the practice of applying "general principles of American law as stated in standard legal publications,"[189] where the Military Claims Act governs, and the local law of the foreign country, where the claimant is an inhabitant of the foreign country and proceeds under the Foreign Claims Act.[190]

A claim under either the Military or the Foreign Claims Act must be presented in writing within two years of its accrual.[191] The agencies are authorized to make an advance "emergency" payment of up to $1000 even before the formal filing of a claim, to be deducted from the ultimate settlement.[192] Payments of up to $25,000 may be made directly out of agency appropriations,[193] but anything beyond that comes out of

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641(1956), codified as 36 U.S.C. § 138b (1968). For legislative history and purpose, see 1956 U.S. CODE CONG. & AD. NEWS 3492.

[189] 32 C.F.R. §§ 536.21(b)(1983)(Army), 842.47(b)(1983)(Air Force). However, the local law will be applied in determining the effect of the claimant's own negligence on his or her right to recover damages. Id. Under Army regulations, general principles of American law also govern the measure of damages in claims arising abroad. Id. § 536.21(c). However, in the Air Force, the law of claimant's domicile may be used. Id. § 842.47(c).

[190] 32 C.F.R. § 842.52(d)(1983)(Air Force). The handling of contributory or comparative negligence follows the local law of the foreign jurisdiction. Id. § 842.52(c). My impression from conversations with Air Force attorneys is that the substantive nuances of foreign law may be overlooked, and that emphasis will be placed on proof of causation and on valuation under local standards. See infra note 147.

[191] 10 U.S.C. §§ 2733(b)(1), 2734(b)(1)(1983). The Foreign Claims Act does not appear to require a writing. Under the Military Claims Act, the period may be extended if war or armed conflict has taken place during the normal limitations period.

[192] Id. § 2736. The provision was originally limited to accidents involving an aircraft or missile operation, but made more general in 1968. Act of Sept. 26, 1968, Pub. L. No. 90-521, 82 Stat. 874 (1968). For legislative history and purpose, see 1968 U.S. CODE CONG. & AD. NEWS 3617. Pending legislation would raise the emergency payment ceiling to $10,000. H.R. 597, 98th Cong., 1st Sess. § 3 (1983).

[193] 10 U.S.C. §§ 2733(a), 2734(a)(1983). The original ceiling of $5000 was raised to $15,000 in 1970 (Pub. L. No. 91-312, 84 Stat. 412) and to its current level in 1974 (Pub. L. No. 93-336, 88 Stat. 291). For legislative history and purpose of the increases, see 1970 U.S. CODE
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the judgment fund.[194] Whatever the source, payment must be accepted in full satisfaction of the claim.[195] And lastly, the Military and Foreign Claims Acts specifically declare any action taken under them final and conclusive, meaning that it lies generally beyond judicial review.[196]

Each of the armed services has promulgated extensive regulations, both procedural and substantive, governing claims under the Military and the Foreign Claims Acts, as well as the FTCA. For example, Army regulations provide specific rules for the filing, investigation, processing and settlement of claims under the Military Claims Act that supplement general Army claims procedures. More interestingly, they recite twenty-nine widely different categories of claims not payable under the Military Claims Act. The list borrows most but not quite all the FTCA exemptions,[197] and amplifies them with a series of exemptions based on the existence of some other remedy deemed exclusive;[198] however, a few of the regulatory exemptions to the Military Claims Act reflect original policy-oriented considerations.[198a] Air Force

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CONG. & AD. NEWS 3427; 1974 U.S. CODE CONG. & AD. NEWS 3438. Pending legislation would raise the ceiling to $100,000. H.R. 597, 98th Cong., 1st Sess. (1983).

[194] 31 U.S.C. § 1304(a)(3)(D)(1983). Previously, sums in excess of $25,000 had to be reported to Congress for its consideration.

[195] 10 U.S.C. §§ 2733(e), 2734(e)(1983).

[196] Id. § 2735. See LaBash v. Department of Army, 668 F.2d 1153, 1155 (10th Cir.), cert. denied, 456 U.S. 1008 (1982); Bryson v. United States, 463 F. Supp. 908, 910 (E.D. Pa. 1978); Towry v. United States, 459 F. Supp. 101, 104-08 (E.D. La. 1978), aff'd, 620 F. 2d 568 (5th Cir. 1980), cert. denied, 449 U.S. 1078 (1981). See supra notes 81-82 and accompanying text. While claim determinations on the merits as such are not reviewable, the courts have reviewed an agency denial where based upon an issue of statutory interpretation. Welch v. United States, 446 F. Supp. 75, 78 (D. Conn. 1978) (review not precluded on question whether death occurred incident to service). See also Hudiburgh v. United States, 626 F.2d 813 (10th Cir. 1980).

[197] 32 C.F.R. §§ 536.15 (a)-(m). The foreign claims exemption, notably, is not asserted.

[198] E.g., the doctrine of Feres v. United States, 340 U.S. 135 (1950), claims compensable under FECA or other workmen's compensation statutes, taking claims, flood damage claims, and claims in contract or copyright or patent infringement. 32 C.F.R. §§ 536.15 (n)-(t), (w), (z).

[198a] Id. §§ 536.15(u)(complete contributory negligence), (y)(claim based solely on compassion), (cc) claims not in the best interest of the
(Footnote Continued)

regulations under the Military Claims Act do not contain any formal list of exemptions, but they do give a few guidelines on when certain kinds of claims -- bailments, lost or damaged mail, for example -- may be covered by the Act,[199] and lay down detailed rules on the internal delegation of original and appellate settlement authority.[200]

The National Guard Claims Act[201] is, for all practical purposes, identical to the Military Claims Act, except that it covers losses caused by personnel of the Army and Air National Guard who, as such, would not normally be considered federal employees.[202] Their actions come within the settlement authority conferred by the National Guard Claims Act if they were engaged at the time in training or certain other duties imposed by federal law or in noncombat activity defined in much the same way as the Military Claims Act defines it.[203]

Finally, the Secretaries of Defense, of the military services and of the Treasury (with respect to the Coast Guard) enjoy specific authority to settle and pay claims up to the modest limit of $1000 for property damage, personal injury or death caused by military department personnel in the use of government vehicles at any location or in the use of other government property at a government installation.[204] For the most part, this authority does not differ in important substantive or procedural respects from the military claims statutes already

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United States, contrary to public policy, or filed by inhabitants of unfriendly foreign countries).

[199] Id. § 842.46.

[200] Id. § 842.49.

[201] Act of Sept. 13, 1960, Pub. L. No. 86-740, 74 Stat. 878 (1960), codified as 32 U.S.C. § 715 (Supp. 1983). For legislative history and purpose of the Act, see 1960 U.S. CODE CONG. & AD. NEWS 3492.

[202] Only in 1981 was the Federal Tort Claims Act amended to bring members of the National Guard engaged in certain functions within the definition of a federal employee for whose tortious acts the federal government is vicariously liable. Act of Dec. 29, 1981, Pub. L. No. 97-124, 95 Stat. 1666 (1981), amending 28 U.S.C. § 2671 (Supp. 1983). Until 1981, the National Guard Claims Act was the only significant federal remedy in damages for losses caused by National Guard activities. Now the FTCA, both in its administrative and judicial remedies, is also available.

[203] For regulations on the handling of National Guard claims, see 32 C.F.R. §§ 536.140-.152 (1983)(Army), §§ 842.130-.135 (1983)(Air Force).

[204] Act of Oct. 9, 1962, Pub. L. No. 87-769, 76 Stat. 767 (1962), codified as 10 U.S.C. § 2737 (1983).

examined,[205] but legislative history makes it reasonably clear that Congress specifically contemplated the settlement of claims based on the tortious acts of government personnel even while acting outside the scope of employment.[206]

Obviously, this category of meritorious claims statutes, like the ancillary tort claims statutes complementing the FTCA, represents an awkward collection of piecemeal authorizations for agencies to satisfy monetary claims. The limitations of this study do not permit a careful examination of the legislative history of each statute to discern precisely what may have prompted its enactment. Those that predate the Federal Tort Claims Act naturally broke new ground; apart possibly from the Small Claims Act, they may have represented a claimant's only alternative to private relief legislation. No less revealing, though, are the meritorious claims statutes enacted after 1946, for they reflect a deliberate purpose to expand settlement authority in selected areas beyond the fault-oriented borders established by the FTCA. In many instances, however, a stringent ceiling on the amount that may be recovered practically confines the remedy to the very smallest of claims.

Short of a statute-by-statute look at legislative history, one can only hazard an educated guess as to what may account for Congress' singling out a handful of agencies for meritorious claims settlement authority. One or more of the following elements appear to characterize the meritorious claims provisions: unusually hazardous or sensitive activities [military claims, admiralty claims, administration and protection of the national forests, FBI activities, detonation of explosive devices, NASA operations, operations of Public Health Service vessels],[207] the destruction of private property in use for a public purpose [destruction of private property in work of Forest Service and

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[205] For regulations implementing this particular authority, see 32 C.F.R. §§ 536.161-.171(1983)(Army), §§ 842.80-.84(1983)(Air Force).

[206] See 1962 U.S. CODE CONG. & AD. NEWS 2833. This is doubly clear from the fact that the statute only covers claims not cognizable under any other provision of law. The statute contains exclusions for insured claims, for subrogated claims, for damages resulting in whole or in part from the claimant's own negligence, and for medical, hospital or burial expenses paid for by the government. These exemptions are largely mirrored in the regulations. 32 C.F.R. §§ 536.165(Army), 842.82(Air Force)(1983). There is a two-year statute of limitations and a requirement that payment be accepted in full satisfaction of the claim. 10 U.S.C. § 2737(c)-(g)(1983).

[207] Into this class of claims would fall a number of meritorious claims statutes that have been repealed or allowed to lapse: claims for damage caused by vessels belonging to or employed by the United States engaged in river and harbor work, for damage due to gunfire and military maneuvers, and for damage due to aircraft.

National Park Service], the promotion of foreign relations [tort claims presented by foreign governments on behalf of their nationals, Peace Corps activities, operations of International Boundary and Water Commission, and the Foreign Claims Act generally[208]]. But, to attribute too orderly a rationale to the totality of meritorious claims statutes would be foolish. Some simply cannot be explained on grounds of general principle,[209] but rather better, perhaps, as a response to a concern over liability and litigation spontaneously voiced at the time a new government program is being considered, as an immediate reaction to a particular incident, or indeed as the product of lobbying. More importantly, the government activities chosen for coverage by meritorious claims statutes cannot all be regarded as uniquely suited to that treatment. Many equally deserving activities remain outside their reach.

Without examining the legislative purpose of meritorious claims statutes now on the books, or the use to which agencies actually have put them over the years, one cannot recommend that they be extended to a greater number of agencies. Conceivably, authority to settle meritorious claims ought to be given to all agencies, a result easily achieved by amending the still extant Small Claims Act to include personal injury and death claims and to eliminate the required showing of negligence. On the one hand, the great majority of tort claims officers with whom I spoke would like their agencies to enjoy more spacious meritorious claims authority than they now do. For example, the Assistant Legal Advisor of the State Department regrets that his agency has meritorious claims authority essentially over foreign claims only. An Agriculture Department attorney reluctantly concludes that state recreational use statutes effectively bar him from making awards under the FTCA for injuries to children caused by various hazards in the national parks. A third opined that only broad meritorious claims authority can finally put an end to the inequities of private relief bills in tort. The Chief of the FBI Civil Litigation Unit believes that the five hundred dollar ceiling on his ability to pay just claims renders it all too often an inadequate remedy under the circumstances. On the other hand, some agency officials who enjoy very generous meritorious claims authority at the present time feel quite uncomfortable with it and use it rarely.[210] Certainly, Congress should view sympathetically requests for a higher ceiling on meritorious claims authority coming from agencies that have made principled use of that authority in the past, for inflation has done violence to many a monetary limit. But much more needs to be known about the utility of these provisions to those agencies that have them -- and of the safeguards that might advantageously be put in place for their use -- before suitably informed recommendations of any sort can be made.

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[208] The Foreign Claims Act states in so many terms that its purpose is "[t]o promote and maintain friendly relations through the prompt settlement of meritorious claims." 10 U.S.C. § 2734(a)(1983). Air Force regulations emphasize the importance to our foreign relations of construing the Act broadly. "[T]he United States must accept responsibility for almost all damage caused by members and employees of its armed forces . . .. Cause and merit are the primary criteria in determining applicability of the Act. Proof of fault is required only to the extent necessary to show that the claim is meritorious." 32 C.F.R. § 842.52(a)(1983). Air Force claims attorneys confirmed in personal interviews that they "bend over backwards" under the Foreign Claims Act, demanding little more than a showing of but-for causation of damage.

[209] E.g. National Oceanic and Atmospheric Administration; Postal Service; Job Corps. The patent and copyright infringement claims statutes, not properly speaking meritorious claims statutes, may be necessitated by the constitutional guarantee against the taking of private property for public use without just compensation.

D. The Relation of the FTCA to Other Settlement Authority

Given the proliferation of ancillary claims statutes, meritorious and otherwise, the question of their relationship to one another and above all to the FTCA is of obvious importance. The FTCA itself provides an answer with respect to administrative claims statutes that predate it, by expressly repealing all provisions of law in effect at the time of its enactment that authorize the adjustment of claims based on "the negligent or wrongful act or omission of an employee of the Government while acting within the scope of his office or employment . . . in respect of claims cognizable under [the Act]."[211] Otherwise, they expressly remain in effect.[212] Thus, a claim that could have been settled administratively under prior existing law can still be settled under that law after the FTCA, provided the claim is not covered by the FTCA and the law in question is otherwise still in force.

Unfortunately, some ambiguity still surrounds the notion of cognizability under the FTCA.[213] If by a cognizable claim is meant simply one that is based on tortious acts of federal officers within the scope of their office, a tort claim falling within one of the FTCA exemptions remains cognizable under the Act and therefore no longer amenable to settlement under some earlier statute. This interpretation -- which the courts, incidentally, have given to the FTCA's explicit bar against tort actions under a particular agency's statutory authority to sue and be sued in its own name[214] -- has the virtue of promoting a uniform government-wide framework for the disposition of tort claims. Agencies might use their additional settlement authority to satisfy "meritorious" claims not sounding in tort, but not tort claims that happen to be exempt under the FTCA.[215]

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[210] *See* text at notes 688-89, *infra*.

[211] Legislative Reorganization Act of 1946, *supra* note 7, § 424(a), not codified in the United States Code. The section gives a nonexhaustive enumeration of statutes so repealed, including the Small Claims Act and the Military Claims Act.

[212] *Id.* § 424(b). *See* S. REP. NO. 1400, 79th Cong., 2d Sess. 30 (1946); S. REP. NO. 1196, 77th Cong., 2d Sess. 8 (1942); 26 Comp. Gen. 149 (1946).

[213] Note, *The Federal Tort Claims Act*, 56 YALE L.J. 534, 550-51 (1947).

On the other hand, a cognizable claim might be understood more narrowly as a tort claim arising out of acts within the scope of office that also does not fall within any of the FTCA exemptions. In fact, commentators commonly describe an exempt tort claim as simply not cognizable under the Act. The language of the FTCA's repealer clause -- terminating agency settlement authority over torts committed by a federal employee acting within the scope of his office "in respect of claims cognizable under [the FTCA]" -- strongly implies that there indeed are some such tort claims not cognizable under the Act, presumably the exempted ones.

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[214] Legislative Reorganization Act of 1946, supra note 7, § 423, 28 U.S.C. § 2679a (Supp. 1983). See CIVIL ACTIONS AGAINST THE UNITED STATES, ITS AGENCIES, OFFICERS AND EMPLOYEES (Shepard's/McGraw-Hill) 343 (1982). By judicial interpretation, the limitation on use of agency "sue and be sued" authority has been construed to bar any action in tort against the agency, even on a claim exempt from coverage of the FTCA. Peak v. SBA, 660 F.2d 375, 377-78 (8th Cir. 1981); FDIC v. Citizens Bank & Trust Co., 592 F.2d 364, 371 (7th Cir.), cert. denied, 444 U.S. 829 (1979). In fact, legislative history of the FTCA strongly supports the view that the Act was meant to displace entirely any "sue and be sued" clause in tort matters so as to "place torts of 'suable' agencies of the United States upon precisely the same footing as torts of 'nonsuable' agencies." H.R. REP. NO. 1287, 79th Cong., 1st Sess. 6 (1945); S. REP. NO. 1400, 79th Cong., 2d Sess. 33-34 (1946).

This wider interpretation of the exclusion was made explicit in the drafting of the Postal Service's "sue and be sued" clause in the Postal Reorganization Act of 1970, 39 U.S.C. §§ 401(a), 409(c) (1980). See Insurance Co. of North America v. USPS, 675 F.2d 756 (5th Cir. 1982); Sportique Fashions, Inc. v. Sullivan, 597 F. 2d 664 (9th Cir. 1979).

[215] An attorney in the United States Postal Service Law Department reads the term cognizable just this way for purposes of limiting his use of the Service's meritorious claims statute. By considering any claim involving fault and scope as a cognizable claim, he has reduced the reach of that statute. It is some measure of the ambiguity of the term that the Assistant General Counsel of the Law Department is inclined to read the term cognizable more narrowly to require not only fault and scope, but also the nonapplicability of any FTCA exemption. In view of the Postal Service's scant use of its meritorious claims statute under either version, the disagreement is of more theoretical than practical interest.

All in all, one should probably not attempt to decide the issue in terms of plain meaning, because there simply is none. Policy considerations, however, strongly favor the second view. Congress enacted the FTCA chiefly to broaden the government's accountability in tort, but not necessarily to force its response to tort claims into a single standardized mold. Therefore, to deprive those agencies that previously had broad administrative settlement authority of the right to exercise it over the tort claims that Congress in 1946 chose to exempt from its general waiver of immunity would be wrongheaded. I argued earlier (largely on the theory that the FTCA exemptions seek to avoid dangerous interventions by the courts, not action by agencies to right their own wrongs) that agencies might be allowed to use their FTCA settlement authority to entertain tort claims which, on account of their exempt character, fall outside the Act's waiver of immunity to suit, though I concluded that such most likely was not Congress' intent.[216] But settlement authority found in statutes other than the FTCA stands on a quite different and more independent footing. Leaving pre-FTCA settlement authority intact would preserve the liberalizing purposes of those earlier statutes, without in the least ignoring the litigation-oriented concerns that inform the FTCA's own exemptions.[217]

Whatever view governs agency settlement authority predating the FTCA should also guide the interpretation of subsequent claims legislation. Obviously, the meaning of any such statute depends primarily on its own language. Some post-1946 enactments -- the

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[216] See text at notes 88-94, supra. Another relevant issue I raised in that connection is the statute of limitations. Might one argue that a claim otherwise cognizable under the FTCA ceases to be cognizable once it becomes time-barred, and at that point may be settled under pre-FTCA settlement authority? The question may be wholly theoretical since most specific claims statutes have their own statutes of limitations. Even where they do not, an agency is unlikely, except in special circumstances, to look with favor in the excercise of its discretion on a claim brought more than two years from the time it is taken to have accrued.

[217] The leading authority on the FTCA, without directly addressing the problem, appears to conclude with me that exempt claims should not be considered cognizable under the FTCA for these purposes. 1 L. JAYSON, supra note 77, at p. 2-75. The Comptroller General has ruled to the same effect, at least so far as the foreign claims exemption goes. Op. Comp. Gen. No. B-123479-OM (June 21, 1955)(Small Claims Act remains in effect for claims arising in a foreign country); Op. Comp. Gen. No. B-120773 (Mar. 22, 1955)(same).

My narrow interpretation of cognizability under the FTCA is easily squared with the broad interpretation given to the exclusion of tort suits under agencies' "sue and be sued" clauses. See supra note 214. Those clauses were the predicate for judicial determination of tort claims; the statutes here discussed mostly entail administrative settlement by the agencies themselves.

NASA,[218] Peace Corps,[219] and Nuclear Regulatory Commission statutes,[220] for example -- make no reference at all to the FTCA. The agencies should not therefore feel bound by its exemptions, though they are properly influenced by the sound policy considerations discernible in those exemptions when they come to exercise the discretionary settlement authority their own statutes give them.[221] On the other hand, where a subsequent statute refers to the FTCA, the situation is more problematic. For the reasons I advanced earlier, however, I would not strain to interpret a statute allowing an agency to settle claims not cognizable under the FTCA,[222] without more, as disallowing the settlement of a tort claim exempt under the FTCA.

Some post-1946 claims statutes take a distinctly different shape in their reference to the FTCA. The State Department[223] and Veterans Administration,[224] among others, now may, in conformity with the provisions of the FTCA, settle a tort claim arising abroad. When it conferred that authority, Congress quite clearly meant only to allow the named agencies to disregard the foreign claims exemption[225] in acting upon a tort claim under the FTCA; their statutes do not plausibly entitle them to disregard any or all of the other exemptions. The fact remains, however, that Congress did not make its intention explicit.

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[218] See text at note 160, supra.

[219] See text at note 169, supra.

[220] See text at note 165, supra.

[221] Thus, the easy availability of postal insurance -- said to explain in part the FTCA's exemption for loss of postal matter -- has led the Postal Service to deny claims for loss of simple postal matter under its own claims statute as well.

[222] Examples include the Job Corps statute, text at note 156, supra, and the State Department statute governing claims by foreign nationals, text at note 174, supra, as well possibly as the Military and Foreign Claims Acts, text at notes 177-206, supra, comprehensively revised in 1956. The meritorious claims statute of the Postal Service, however, may present a different picture. While it speaks only of claims not cognizable under the FTCA, another statute directs the Service to apply the provisions of the FTCA to all tort claims presented to it. See supra note 171 and accompanying text. This may rule out payment of an FTCA-exempt claim.

[223] See text at note 110, supra.

[224] See text at note 115, supra.

[225] 28 U.S.C. § 2680(k) (1965).

Generally speaking, Congress should take greater care in enacting legislation that would enlarge an agency's authority to satisfy claims for loss or injury -- whether those claims are "meritorious" or sound in tort -- to clarify the scope of that authority especially in relationship to the agency's existing authority under the FTCA. The viability and meaning of pre-1946 settlement statutes has been clouded by a combination of their own vagueness and the ambiguity of the FTCA's saving and repealer clauses. Now that each agency has a reasonably well-defined baseline settlement authority under the FTCA, Congress has every reason to use the utmost of precision whenever it means to extend it. An example of legislative drafting success in this regard is the Swine Flu Immunization Act of 1976, in which Congress made it clear beyond doubt that it was enlarging the bases of recovery under the FTCA to include strict liability and breach of warranty, was assuming vicarious liability for the acts of drug manufacturers and distributors as well as its own employees, and was waiving the discretionary function exemption and that exemption alone.[226]

E. Does the Existence of Another Remedy Actually Bar an FTCA Claim?

The discussion in the last section asked in effect what bearing the availability of an FTCA remedy should have on the interpretation of more specific statutes conferring claims settlement authority on particular agencies. But that discussion also in effect masked an underlying problem of deciding how far the FTCA itself reaches. Both claims officers and claimants, for procedural and substantive reason alike, need to know as a threshold matter whether the FTCA has any application to the kind of claim before them. This section will explore the problem in no greater detail than is necessary to show that the frontier between the FTCA and other monetary remedies, again from both a substantive and procedural point of view, stands in considerable disarray.

Conceptually, the simplest situation is that in which Congress builds an express exemption into the FTCA for claims as to which "adequate remedies are already available."[227] This rationale in fact explains a fair number of the existing FTCA exemptions: claims arising out of the assessment or collection of taxes and customs duty,[228] administration of the Trading with the Enemy Act,[229] activities of the Tennessee Valley Authority[230] and the Panama Canal Company,[231] and, of course, claims cognizable under the admiralty statutes.[232] In such cases, the categorical inapplicability of the FTCA dispels any problem of competition among remedies. The same result should obtain with respect to statutes outside the FTCA that by their own terms purport to constitute an exclusive remedy for a designated category of claims.[233] The courts have inferred from the availability of alternative remedies a few additional exclusions from the FTCA -- notably claims for personal injury or death or property damage of servicemen incurred as an incident to service,[234] and prisoner claims for which a fair, reasonable and comprehensive remedy exists[235] -- but far more often than not they decline to do so.[236]

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[226] See text at note 101, supra.

[227] S. REP. NO. 1400, 79th Cong., 2d Sess. 33 (1946).

[228] 28 U.S.C. § 2680(c)(1965).

[229] Id. § 2680(e).

[230] Id. § 2680(l).

[231] Id. § 2680(m). See supra note 104 and accompanying text.

In this more usual situation, claimants appear to have parallel remedies at their disposal. They have recourse to the FTCA, notwithstanding the fact that their claims may be compensable, for example, under the Court of Claims Act,[237] the Military Claims Act,[238] certain servicemen's[239] or veterans' benefits laws,[240] or the meritorious claims statute of the Nuclear Regulatory Commission,[241] to name a few enactments whose impact on the FTCA actually has been an issue in litigation. They are not even required at any point to make an election of remedies.[242]

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[232] Id. § 2680(d).

[233] See supra note 72, and examples cited therein. However, Congress would do well to add these exclusions specifically to the FTCA's own section on exemptions.

[234] Feres v. United States, 370 U.S. 135 (1950); Preferred Ins. Co. v. United States, 222 F.2d 942 (9th Cir.), cert. denied, 350 U.S. 837 (1955). Another consideration in Feres was the distinctly federal relationship of the soldier to his supervisors which the Supreme Court thought should not be disturbed by the application of substantive state law. The Court was also troubled by the effect of tort litigation on military discipline.

[235] United States v. Demko, 385 U.S. 149 (1966), relying in part on Johansen v. United States, 343 U.S. 427 (1952) (comprehensive workmen's compensation scheme for federal employees bars suit under Public Vessels Act).

[236] E.g., United States v. Muniz, 374 U.S. 150 (1963) (no exclusion of prisoner claims); United States v. Brown, 348 U.S. 110 (1954) (no exclusion of veterans' claims); Brooks v. United States, 337 U.S. 49 (1949) (no exclusion of non-service-connected injuries of servicemen).

[237] E.g., Aleutco Corp. v. United States, 244 F.2d 674, 678-79 (3d Cir. 1957).

[238] United States v. Gaidys, 194 F.2d 762, 764 (10th Cir. 1952); United States v. Wade, 170 F.2d 298, 301 (1st Cir. 1948); Arkwright Mut. Ins. Co. v. Bargain City, U.S.A., Inc., 251 F.Supp. 221, 227-28 (E.D. Pa. 1966).

The law does not even appear to require the exhaustion of available administrative remedies, apart of course from the FTCA's own administrative claim procedure, prior to filing suit under the Act. The leading expert on the FTCA has defended this view as consistent with Congress' purpose of providing simple and direct access to the federal courts.[243] Further, assuming a claimant has prior recourse to a parallel remedy, though not required to do so as a prerequisite to filing under the FTCA, the pendency of that claim does not even temporarily bar the FTCA proceeding.[244] In fact, claimants' counsel have been specifically cautioned, in order to avoid the expiration of the statute of limitations on any potentially applicable remedy, to pursue all of them concurrently.[245] Finally, administrative findings

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[239] Brooks v. United States, 337 U.S. 49 (1949).

[240] United States v. Brown, 348 U.S. 110 (1954).

[241] Bulloch v. United States, 133 F. Supp. 885, 893 (D. Utah 1955). The question of FTCA preclusion was not raised by the parties, but by the court sua sponte.

[242] Arkwright Mut. Ins. Co. v. Bargain City, U.S.A., Inc., supra note 177, at 227. See also United States v. Huff, 165 F. 2d 720, 725-26 (5th Cir. 1948); Bird & Sons, Inc. v. United States, 420 F. 2d 1051, 1057 (Ct. Cl. 1970); Lundeen v. Department of Labor & Indus., 78 Wash. 2d 66, 469 P. 2d 886 (1970). The result is different if acceptance of payment is deemed by statute to be in full and final satisfaction of the claim, or a release is actually entered into.

It has also been held that an FTCA claim arising out of allegedly invalid administrative action may go forward even though the action is appealable to other administrative bodies or even to the courts under the Administrative Procedure Act. Beins v. United States, 695 F.2d. 591, 596-99 (D.C. Cir. 1982).

[243] 2 L. JAYSON, supra note 77, at p. 11-18.

[244] Id. at p. 5-255.

[245] Id. at pp. 5-258, 15-12. That the FTCA statute of limitations is not tolled by the filing of a claim or suit under some other remedy is firmly established. E.g., Beins v. United States, supra note 242, at 599 (appeals under Federal Aviation Act); Mendiola v. United States, 401 F.2d 695, 697 (5th Cir. 1968) (state workmen's compensation); Winston Bros. Co. v. United States, 371 F. Supp. 130, 134-35 (D. Minn. 1973)

(Footnote Continued)

made in connection with a prior claim have no binding effect in a subsequent FTCA proceeding, at least at the litigation stage,[246] except that monetary recovery under the FTCA presumably will be reduced by the amount of any prior award for essentially the same loss.[247]

The question whether Congress or the courts, as a policy matter, should oust the FTCA remedy where a narrower statutory remedy exists has no single answer. Both ousting it and not ousting it have their inconveniences. Certainly, where Congress has stated that the availability of another remedy bars resort to the FTCA, the practical problem has arisen of first determining whether that remedy in fact covers the particular claim in question. The courts generally have stayed the FTCA suit in the face of a substantial question of coverage under the exclusive remedy, and remitted that question to the persons primarily responsible for that determination;[248] if there is no such question, the tort claim goes forward.[249] This procedure works effectively only where the exclusive remedy is an administrative one;

(Footnote Continued)
(contract claim in Court of Claims); Dancy v. United States, 668 F.2d 1224, 1228 (Ct. Cl. 1982) (appeal of separation from service before Merit Systems Protection Board).

[246] Joseph v. United States, 505 F.2d 525, 527 (7th Cir. 1974), holding that a Veterans Administration finding that a serviceman's injury was not service-related is not res judicata for purposes of a later FTCA claim, even though decisions on VA benefits are not as such judicially reviewable. Accord Bryson v. United States, 463 F. Supp. 908, 910 (E.D. Pa. 1978)(Military Claims Act); Ward v. United States, 331 F. Supp. 369 (W.D. Pa. 1971), rev'd on other grounds, 471 F. 2d 667 (3d Cir. 1973)(same).

[247] United States v. Brown, 348 U.S. 110, 113 (1954); Brooks v. United States, 337 U.S. 49, 53-54 (1949). Should, however, the claimant have executed a release of the United States upon accepting payment under the first remedy, or should the applicable statute provide that acceptance constitutes a release, no subsequent recovery may be possible.

[248] The question arises most frequently in connection with FECA or related workmen's compensation claims. E.g., DiPippa v. United States, 687 F. 2d 14, 16-17 (3d Cir. 1982); Hudiburgh v. United States, 626 F. 2d 813, 814 (10th Cir. 1980); Joyce v. United States, 474 F.2d 215, 219 (3d Cir. 1973); United States v. Charles, 397 F.2d 712, 714 (D.C. Cir.), cert. denied, 393 U.S. 897 (1968); Daniels-Lumley v. United States, 306 F.2d 769, 771 (D.C. Cir. 1962); Somma v. United States, 283 F.2d 149, 150-51 (3d Cir. 1960). See 2 L. JAYSON, supra note 77, at p. 11-16. This approach illustrates the administrative law doctrine of primary jurisdiction. Somma v. United States, supra, at 151.

[249] Wallace v. United States, 669 F. 2d 947, 951-52 (4th Cir. 1982); United States v. Udy, 381 F.2d 455, 458-59 (10th Cir. 1967).

where the exclusive remedy is judicial, the court can scarcely help but make the ultimate determination of coverage itself.

In theory, any question of the express or implied preclusion of the FTCA remedy deserves to be raised by the agency itself during the mandatory administrative claim phase, and presumably dealt with like any other issue going to the cognizability of the claim under the FTCA. Agency claims officers did not evoke this problem during our conversations, but it would seem to complicate their determination of a claim, as it clearly has that of the courts when the issue is put before them. Ideally, a claims officer would use the opportunity to apprise a claimant of any other potentially applicable administrative remedy of which he or she may be aware and actually entertain the claim under that rubric if personally authorized and otherwise in a position to do so.[250] Unfortunately, the practice presupposes a familiarity with the agency's overall inventory of claims authority that a given tort claims officer may or may not possess. Everyone's interest is best served when all available agency channels for satisfaction of a monetary claim are explored in the most expeditious and practical-minded way possible, and claims officers situated within the legal department of the agency out of whose activities such claims arise can best see to it that they are. A number of claims officers with whom I spoke seem disposed to play the role I envision; most do not, even though the role seems quite consistent with the informal, relatively open, and potentially nonadversarial character of the agency claims procedure under the FTCA. In any event, the notion that one administrative remedy necessarily excludes all others, or must be exhausted before any other is entertained, would tend to interfere with the flexible process I describe. I would prefer that agency tort claims officers be made familiar with the full range of available administrative channels and encouraged to explore them in any given case in the most sensible and orderly fashion that the particular circumstances suggest.[251]

The situation is different where Congress establishes a comprehensive framework for administrative relief intended -- for reasons of agency expertise, uniformity in results, a more orderly disposition of claims, or otherwise -- to constitute the exclusive remedy for a category of claims. Its intention must be respected. Deciding whether such is the case calls for a statute-by-statute determination, but as a general rule limitations on access to a remedy like the FTCA should not lightly be inferred.

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[250] See e.g., 32 C.F.R. § 536.6 (h)(1983)(Army) ("Prior to the disapproval of a claim under a particular statute, a careful review should be made to insure that the claim is not properly payable under a different statute or on another basis"). In addition, when it comes to notifying the claimant of his or her appeal rights, the Army suggests calling attention to all the alternatives. Id. § 536.11(e). The Army Claims Service has facilitated this process by compiling for the use of all claims officers an inventory of agency authority, and not only the Army's, to make monetary payment to claimants. See supra note 62.

[251] See supra note 62. A claims officer should in any event take care that claimants do not run afoul of the applicable statute of limitations on one potential remedy while another is being explored, especially where he or she is not personally in a position to deem all relevant statutes conclusively satisfied by the initial filing.

F. Does the Constitution Itself Require a Minimal Administrative Remedy for Tort and Tort-Like Claims?

Fundamental not only to the Federal Tort Claims Act, but also to other statutory authorizations to sue the government for monetary relief, is the notion that the United States may not be held liable in damages without its consent. On this premise, the courts have upheld as a valid limitation on the sovereign's waiver of immunity virtually every substantive and procedural condition Congress has placed on the right to sue the government. Sovereign immunity remains the relevant point of departure for analysis, however vigorously it is criticized as unjust and however often its harshness is invoked as a reason for legislating new and broader waivers.

Nevertheless, recent years have seen the notion of sovereign immunity pitted against constitutional values. Litigants have argued in effect that the Constitution requires that a damage remedy be available at least for certain governmental wrongs. In this final section, I mean only to articulate this far-reaching and interesting problem, recognizing that a full examination of its subtleties must await another day. I conclude with the modest observation that neither the handful of courts that have addressed the issue nor, by implication, Congress itself reads quite thac much in the Constitution.

At least so far as the demands of Section 1983 on officials acting under color of state law are concerned,[252] the Constitution has been held to require states to provide some sort of opportunity to be heard on claims of injury to person or property by state officials, or, as the Supreme Court put the matter in the seminal case of Parratt v. Taylor,[253] "the means by which [a claimant] can receive redress for the deprivation."[254] Though presented in constitutional garb, Parratt v. Taylor illustrates a classic common law tort, the negligent misplacement by state prison authorities of a prisoner's personal property, in the case a $23.50 hobby kit. In the end, the Supreme Court rejected the prisoner's Section 1983 claim for the value of the lost materials, predicated on the deprivation of property without due process of law in violation of the Fourteenth Amendment. But it did so not on the ground that the kit does not constitute property,[255] or that the unintended loss of property does not amount to a constitutional deprivation,[256] but on the ground that the dictates of procedural due process are satisfied when the state provides a means of redress which, despite certain limitations,[257] "could have fully compensated the respondent for the property loss he suffered."[258] Thus, recognizing the adequacy of existing administrative claim mechanisms has become an important means of ensuring that the Fourteenth Amendment through Section 1983 does not become "a font of the tort law to be superimposed upon whatever systems may already be administered by the states."[259]

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[252] 42 U.S.C. § 1983 (1981).

[253] 451 U.S. 527 (1981). The Supreme Court had twice before granted certiorari to decide whether mere negligence will support a claim for relief under Section 1983, but in both cases found it unnecessary to decide the issue. Baker v. McCollan, 443 U.S. 137 (1979); Procunier v. Navarette, 434 U.S. 555 (1978).

[254] 451 U.S. at 543.

If states must provide a procedurally adequate means of vindicating the losses to person or property caused by the negligence of their employees, what of a state that offers such procedures subject to certain categorical exemptions not unlike the FTCA's so-called intentional torts exemption or its exemption in relation to quarantines, to cite just two examples.[260] Neither Parratt v. Taylor nor any subsequent case, so far as I know, addresses the constitutional adequacy in the Section 1983 context of a state tort claims procedure, when the claim in question falls categorically outside its protections. Arguably, the reasonableness of the exemption itself justifies the lapse of otherwise constitutionally requisite procedures.

The question whether the constitutional right of a governmental tort victim to a minimally acceptable claims procedure is violated when his or her claim falls within a more or less artificial exception to that procedure does not seem to me entirely academic. It will inevitably arise in the context of one Section 1983 lawsuit or another, given the breadth and influence of the Parratt v. Taylor opinion. Of more immediate interest is the bearing of that question on the constitutionality of the Federal Tort Claims Act or, to be more precise, on the constitutionality of its limitations. A short answer is that its bearing can only be slight, not only because of the unique federalism aspects of Section 1983, but also because that provision has not been read to make claims for damages directly on the states, but only on officials acting under color of state law.[261] In short, its case law is a poor analogical predicate for anything on the federal level other than the personal liability of federal officials.

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[255] The Court conceded that under Nebraska law, respondent enjoyed a property interest in the materials. Id. at 529 n. 1.

[256] Id. at 536-37. Justice Powell, concurring in the result, took this position. Id. at 546-52.

[257] The limitations are the absence of punitive damages and jury trial, as well as the unavailability of an action against the offending state officers personally.

[258] 451 U.S. at 544. A predeprivation hearing was found to be impracticable in the case of a random and unauthorized act where the loss does not result from an established state procedure and the state cannot predict when it may occur. Id. at 541.

[259] Id., quoting Paul v. Davis, 424 U.S. 693, 701 (1976).

[260] I cite these two FTCA exemptions because they are among those not based on the existence of adequate administrative or judicial remedies.

The fact remains, however, that some wrongful conduct on the part of federal officers acting within the scope of their employment lies beyond the FTCA and all the meritorious claims statutes on the books. Does constitutional due process require at least some administrative channel of relief against them? That is the challenge posed by Parratt v. Taylor projected onto the federal level. Sovereign immunity is not an adequate answer, for while it may bar access to the courts on an FTCA-exempt claim, it says nothing about the existence of a constitutional right to an agency hearing on the claim. Yet, there is obviously no point in mandating a procedural due process hearing at the agency level when the agency has no authority to redress the claim even if it is founded.[262] In order to ensure a meaningful agency hearing on tort claims falling outside the scope of the FTCA, one would first have to assert that the Constitution requires the federal government to redress at the agency level, if not necessarily in court, all tortious injury it causes; only then might one ask whether under the circumstances the relevant agency-level procedures, if any, meet minimal due process standards. Not too many years ago, one could scarcely imagine calling into question the constitutionality of the FTCA, given its sweeping definition of tortious conduct based on state law, its broad combination of administrative and judicial redress for torts committed by the government, its generous statute of limitations, and the absence of any fixed ceiling on damages. Parratt v. Taylor and other developments in the Section 1983 context have changed this, at least so far as agency-level due process is concerned. Still, the Constitution does not unquestionably require the federal government to answer for its torts or to do so in a way that satisfies administrative due process.

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[261] Quern v. Jordan, 440 U.S. 332, 341-45 (1979); Alabama v. Pugh, 438 U.S. 781, 782 (1978); Edelman v. Jordan, 415 U.S. 651, 675-77 (1974).

[262] The situation may be different where Congress specifically authorizes an agency of the federal government to entertain certain monetary claims. In such instances, the courts have addressed the question whether the agency's claim procedures are consonant with procedural due process. E.g., Gerritson v. Vance, supra note 143 (State Department foreign tort claims procedures are constitutionally adequate). In fact, where they view a particular claims statute as conferring an entitlement, the courts may impose far-reaching procedural constraints in the name of due process. See supra note 155 and cases cited therein (Federal Prison Industries Act confers on federal prisoners an entitlement to compensation for their work-related injuries secured by a procedural due process right to a trial-type hearing).

I am aware of no serious challenge to the constitutionality of the FTCA's various exemptions as such, but the claim has been made that federal government liability for constitutional torts is itself a substantive constitutional imperative. Jaffee v. United States[263] represents such a claim. The petitioner there asserted that the government deliberately violated rights guaranteed by the First, Fourth, Fifth, Eighth and Ninth Amendments when it ordered him and other soldiers to stand in an open field near the site of a nuclear blast without the benefit of any protection against the resulting radiation. Alleging that his exposure to radiation caused him to develop inoperable cancer, Jaffee sought money damages from the United States, as well as an order directing it to warn all persons like himself about the medical risks they face and to provide or subsidize their medical care.

Recognizing that the Feres doctrine bars an FTCA remedy, Jaffee argued as an alternative that the courts should create an exception to the doctrine of sovereign immunity for the deliberate violation of constitutional rights. He put the challenge to sovereign immunity squarely on constitutional terrain, as indeed he had to, contending that "the applicable common law doctrine of governmental immunity must yield to the paramount necessity of vindicating constitutional guarantees." But the court flatly declined to carve even so limited an exception to the doctrine of sovereign immunity to suit in tort. "We believe that power lies only with the Congress."[264]

To be sure, Jaffee did not basically allege a deprivation of due process in the procedural sense, as in Parratt v. Taylor. That is to say, he did not question the procedural adequacy of the administrative remedies at his disposal,[265] though in fact they most likely did not provide the relief he sought. Jaffee simply asserted the right to present his demands to a court of law. The opinion, however, still stands squarely for the proposition that constitutional considerations do not override Congress' discretion in deciding whether and upon what conditions to provide a damages remedy against the United States, and it probably means to pay no less respect to the administrative than to the judicial mechanism that Congress chose to establish when it enacted and amended the FTCA. In fact, virtually every court has concluded that Congress did not intend by enacting the FTCA to provide a remedy for the violation of federal constitutional rights,[266] and by implication was not obliged to do so.[267] In this respect, the FTCA differs from the Tucker Act, a statutory waiver of sovereign immunity commonly associated with the constitutional requirement of just compensation for the taking of private property for public use.[268] That courts and litigants have summoned extraordinary ingenuity in transforming constitutional into

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[263] 592 F.2d 712 (3d Cir.), cert. denied, 441 U.S. 961 (1979).

[264] Id. at 718. Every other court to address the question has likewise agreed that only Congress can waive the sovereign's immunity to claims of constitutional tort, and that the Constitution does not by its own force do so. E.g., Garcia v. United States, 666 F.2d 960, 966 (5th Cir. 1982); Brown v. United States, 653 F.2d 196, 199 (5th Cir. 1981), cert. denied, 456 U.S. 925 (1982); Francisco v. Schmidt, 532 F. Supp. 850, 855 (E. D. Wis. 1982); McKnight v. Civiletti, 497 F. Supp. 657, 660 (E. D. Pa. 1980); Thornwell v. United States, 471 F. Supp. 344, 348 (D. D.C. 1979).

[265] The court itself, however, referred to the "rather comprehensive system of benefits for military personnel and definite and uniform

(Footnote Continued)

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compensation for injuries or death of those in armed services, in addition to medical and hospital treatment." 592 F. 2d at 716.

[266] Brown v. United States, 653 F.2d 196, 201 (5th Cir. 1981), cert. denied, 456 U.S. 925 (1982) (arrest without probable cause and false testimony to grand jury); Contemporary Mission, Inc. v. USPS, 648 F.2d 97, 104-05 n. 9 (2d Cir. 1981) (harassment of members of charitable corporation due to their religious beliefs); Birnbaum v. United States, 588 F.2d 319, 327-28 (2d Cir. 1978) (CIA covert mail opening operations); Norton v. United States, 581 F.2d 390, 394 (4th Cir.), cert. denied, 439 U.S. 1003 (1978) (FBI search in alleged violation of 4th Amendment); Martinez v. Winner, 548 F. Supp. 278, 332 (D. Colo. 1982); Francois v. United States, 528 F. Supp. 533, 536 (E.D. N.Y. 1981); Barlow v. AVCO Corp., 527 F. Supp. 269, 272 (E.D. Va. 1981); Liuzzo v. United States, 508 F. Supp. 923, 933 (E.D. Mich. 1981). The usual reasoning is that the FTCA, by incorporating "the law of the place where the act or omission occurred" (28 U.S.C. § 1346(b)(1976)), necessarily excludes federal constitutional law as such. Socialist Workers Party v. Attorney General, 463 F. Supp. 515, 516, 519 (S.D. N.Y. 1978). Cf. Carlson v. Green, 446 U.S. 14, 23 (1980). Contra Founding Church of Scientology v. Director, FBI, 459 F. Supp. 748, 753 (D. D.C. 1978).

[267] Birnbaum v. United States, supra note 266, at 328 (reading the FTCA to encompass federal constitutional law "might be tantamount to a bypass of the sovereign immunity of the United States without the consent of Congress"). See also Norton v. United States, supra note 266, at 393.

[268] Montalvo v. Graham, 390 F. Supp. 533, 534 (E. D. Wis. 1975); Leesona Corp. v. United States, 599 F.2d 958, 964 (Ct. Cl. 1979).

common law torts, where useful for stating a cause of action cognizable under the FTCA,[269] does not affect the principle of the matter.

This is not to say that the Constitution furnishes no basis for a damage remedy in constitutional tort against a defendant other than the United States. Obviously, the entire Bivens[270] line of cases proceeds on this basis.[271] But, from a strictly theoretical point of view, a tort remedy in damages against federal officials, rather than the United States as such, can be derived from the Constitution without implicating sovereign immunity. In fact, a majority of the Supreme Court clearly believes that whatever deficiencies the Federal Tort Claims Act may present with respect to constitutional torts, the solution lies not in presuming to waive the sovereign's immunity to suit, but in insisting on the availability of a Bivens action against federal officials personally as an alternative remedy.[272] Judging by the steady succession of bills entertained by Congress over the last several sessions to expand the FTCA to encompass constitutional torts and thereby displace Bivens suits,[273] Congress itself evidently believes that neither the language of the FTCA as it now stands nor the bare force of the Constitution compels that result. If, as I expect, the FTCA amendments eventually will be enacted, the procedures that govern administrative settlement under the Act will become only that much more important. It is to those procedures that I now turn.

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[269] In Birnbaum, supra note 266, the court finally awarded damages under the FTCA for the CIA's mail opening activities on the basis of New York's common law protection against intrusion on personal privacy through the opening and reading of sealed mail.

[270] Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 395 (1971), holding that "damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials."

[271] "However desirable a direct remedy against the Government might be as a substitute for individual officer liability, the sovereign still remains immune to suit." Id. at 410 (Harlan, J., concurring). Compare Holloman v. Watt, 708 F. 2d 1399, 1402 (9th Cir. 1983) (sovereign immunity no defense to a Bivens suit). Accord Garcia v. United States, 538 F. Supp. 814, 816 (S.D. Tex. 1982).

[272] Carlson v. Green, supra note 266, at 20-23.

[273] See Administrative Conference of the United States, Recommendation 82-6, Federal Officials' Liability for Constitutional Violations. 1 CFR § 305.82-6 (1984).

Chapter Three

ADMINISTRATIVE SETTLEMENT UNDER THE FEDERAL TORT CLAIMS ACT: THE STATUTORY FRAMEWORK

Long before the Federal Tort Claims Act was enacted in 1946,[274] the notion of administrative settlement of tort claims already had gained a certain measure of legitimacy. Through a strikingly haphazard collection of statutes, the survivors among which are mostly mentioned in Chapter Two, Congress had authorized this or that agency to settle, and in some instances pay, a certain category of claims under a given set of conditions and circumstances. In 1922, the Small Claims Act gave settlement authority to all agencies, though its limitations were severe.[275] An early set of Federal Tort Claims bills in the Twenties and Thirties contemplated a predominantly administrative model for implementing the much more general liability in tort that Congress by that time had come to consider it only fair and just to assume.[276] One bill that actually passed both houses of Congress in 1929, but failed of executive approval, provided for a sharing of responsibility for the handling of tort claims among the General Accounting Office, the Employees' Compensation Commission and the agencies themselves; recourse to the Court of Claims was limited to property damage claims only and put squarely on a review rather than a de novo basis.[277] Every indication was that the eventual Federal Tort Claims Act would furnish an essentially administrative remedy.

This was not to be the case. A second series of bills leading up to the FTCA looked in a different direction. It contemplated a basically judicial model for the disposition of tort claims, with authority vested variously in the district courts and/or the Court of Claims;[278] the agencies received authority to dispose only of those tort claims that were judicially cognizable, and then only within the strictest of monetary limits. This litigation-oriented model was, of course, the shape that the FTCA eventually took.

In the end, the 1946 Act permitted the United States to be sued, without limitation as to amount, for the negligent or wrongful acts of its employees acting within the scope of their employment, and it authorized the Attorney General to compromise and settle such suits. For their part, the heads of federal agencies might only settle administratively those claims not exceeding $1000,[279] a figure later raised to $2500 to correct for inflation.[280] More important, the decision to submit to the agency a claim even within that limited category remained entirely optional with the claimant, and having done so, the claimant still might, on fifteen days' written notice, withdraw the claim from agency consideration and bring suit.[281] In that event, the only effect of having filed a prior administrative claim was to make the amount of that claim, barring special circumstances, a ceiling on the sum that might be sought in court -- a restriction that itself could scarcely help but discourage many a prudent claimant from turning to the agency in the first place. All in all, the final architects of the FTCA evidently had in mind a very modest role for administrative settlement in the larger scheme of things.

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[274] Legislative Reorganization Act of 1946, tit. 4, §§ 401-24, Pub. L. No. 79-601, 60 Stat. 812-44, codified in 1948 as 28 U.S.C. §§ 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-80.

[275] See text at notes 78-83, supra.

[276] See Gottlieb, The Federal Tort Claims Act: A Statutory Interpretation, 35 GEO. L. J. 1, 2 (1946).

[277] H.R. 9285, 70th Cong., 1st Sess. (1927). For greater detail on this and similar bills, see Borchard, The Federal Tort Claims Bill, 1 U. CHI. L. REV. 1 (1933).

[278] See Gottlieb, supra note 276, at 3.

Agency settlement authority under the FTCA was greatly expanded in 1966, when the statute underwent its only major amendment apart from passage of the Drivers Act and a rare alteration of the exemptions. The 1966 legislation, which governed only claims accruing on or after January 18, 1967, gave agency heads claims settlement authority without regard to amount (though subject to prior written approval by the Attorney General or his designee if in excess of $25,000),[282] and, no less important, made submission of claims to the agencies an absolute prerequisite to suit.[283] The previous $2500 ceiling had rendered satisfactory administrative settlement all but impossible except in modest property damage claims and exceptionally small personal injury claims; for larger claims, however valid, claimants had no choice but to bring suit, with a possibility of negotiated settlement thereafter. The decision to impose an exhaustion requirement, in turn, was based on evidence that claimants tended to bypass the agencies when the administrative settlement process was left optional.[284] Under the FTCA as amended, a claim brought to court safely within the period of limitations on its filing will still be dismissed as premature if not first presented to the responsible agency.[285]

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[279] Legislative Reorganization Act of 1946, supra note 274, § 403(a). The $1000 figure referred to the amount of the claim, not to size of any proposed settlement. Acceptance by the claimant of an administrative settlement constituted a complete release of both the United States and the employee. Id. § 403(d).

[280] Act of Sept. 8, 1959, Pub.L. No. 86-238, § 2, 73 Stat. 471, 472 (1959). The Senate Report had urged increasing the limit to $3000, still recognizing that by far most claims were in excess even of that amount. S. REP. NO. 797, 86th Cong., 1st Sess., reprinted in 1959 U.S. CODE CONG. & AD. NEWS 2272, 2273. The House Committee on the Judiciary thought $2000 adequate. The figure of $2500 was a compromise. See generally Williams, The $2500 Limitation on Administrative Settlements Under the Federal Tort Claims Act, 1960 INS. L.J. 669, 673 (1960).

[281] A claim rejected by the agency, or withdrawn from its consideration, could still be sued upon within the two-year limitations period. If the two-year period happened to expire during pendency of the administrative claim, an additional six months for filing suit became available, starting from the date of mailing of the agency denial or from the date the claim was withdrawn from the agency, as applicable. Legislative Reorganization Act of 1946, supra note 274, § 420. See Williams, supra note 280, at 670-71.

[282] Act of July 18, 1966, Pub. L. No. 89-506 §§ 1, 9(a), 80 Stat. 306 (1966), amending 28 U.S.C. § 2672.

Congress clearly intended by the 1966 amendments to encourage and facilitate disposition of tort claims against the government at the administrative level. Thus, if the original act was designed to ease the burdens of government tort claims on Congress by shifting primary responsibility for disposing of them to the courts,[286] the 1966 amendments sought to transfer much of the burden in turn to the agencies. Legislative history suggests, however, that the benefits of avoiding unnecessary litigation, with its attendant expense and delay, were also expected to flow to claimants, to the Department of Justice, and even to the agencies themselves.[287]

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[283] Id. § 2, amending 28 U.S.C. § 2675(a). The only exception to the exhaustion requirement is for the assertion of tort claims by way of third party complaint, cross-claim or counterclaim, all in deference to considerations of judicial economy. But the courts have limited the counterclaim exception to compulsory counterclaims (Northridge Bank v. Community Eye Care Center, Inc., 655 F. 2d 832, 836 (7th Cir. 1981); United States v. Chatham, 415 F. Supp. 1214 (N.D. Ga. 1976)), and the third party claim exception to claims by the principal defendant (Rosario v. American Export-Isbrandtsen Lines, Inc., 531 F.2d 1227 (3d Cir.), cert. denied, 429 U.S. 857 (1976)).

The constitutionality of the prior claim requirement was upheld in Montalvo v. Graham, 390 F. Supp. 533, 534 (E.D. Wis. 1975). A few state courts have invalidated notice of claim requirements in state tort claims legislation as violative of equal protection or lacking a rational relation to a valid public purpose. Note, Notice of Claims Provisions: An Equal Protection Perspective, 60 CORNELL L. REV. 417 (1975).

[284] Hearings on Improvement of Procedures in Claims Settlement and Government Litigation Before Subcomm. No. 2 of the House Comm. on the Judiciary, 89th Cong., 2d Sess. 18 (1966).

[285] Blain v. United States, 552 F.2d 289, 291 (9th Cir. 1977); Cummins v. Ciccone, 317 F. Supp. 342, 343 (W.D. Mo. 1970). Moreover, the premature filing of a complaint does not toll the statute of limitations on filing an administrative claim. Morano v. United States Naval Hosp., 437 F. 2d 1009, 1011 (3d Cir., 1971); Gutelius v. United States, 312 F. Supp. 51, 53 (E.D.Va. 1970).

[286] United States v. Yellow Cab Co., 340 U.S. 543, 549 (1951) (The FTCA "merely substitutes the District Courts for Congress as the agency to determine the validity and amount of the claims"); Feres v. United States, 340 U.S. 135, 140 (1950) (The Act "waived immunity and transferred the burden of examining tort claims to the courts").

The basic changes just outlined required an adjustment in the statute of limitations. The original act required that a claim be taken directly to court within one year of accrual. If a claimant chose first to present a claim, necessarily for $1000 or less, to the agency, that too had to be done within one year. If no administrative settlement was reached, the claimant had an additional six months from the mailing of the denial or withdrawal of the claim in which to sue, if the limitations period would otherwise have expired sooner.[288] With the 1966 amendments, the limitations period, extended as of 1949 to two years,[289] was made applicable to the mandatory administrative claim, subject to the additional requirement that suit, if any, be brought no later than six months following the agency's mailing of a written notice of final denial of the claim.[290] As before, failure to meet the FTCA's time limitations would deprive the federal courts of jurisdiction over any suit based on the claim.[291]

To help enforce the jurisdictional prerequisite, Congress retained the provision of the original act to the effect that no demand forming the subject of an administrative claim could be sued upon until the agency had taken action on it,[292] while dropping the provision that a claimant might, upon fifteen days' notice, absent prior agency disposition, withdraw a pending claim from agency consideration and commence suit.[293] Congress also dealt with a possible failure by the agency to dispose of a claim within six months after the administrative filing. Should that occur, a claimant might at his or her option either treat the failure as a final denial and proceed to litigation, or allow the agency to consider the claim further, without giving up the right to sue any time thereafter.[294]

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[287] S. REP. NO. 1327, 89th Cong., 2d Sess. 2-5 (1966), quoting from H.R. REP. NO. 1532, 89th Cong., 2d Sess. 6-10 (1966), and reprinted in 1966 U.S. CODE CONG. & AD. NEWS 2515-20; Hearings, supra note 11, at 12-15 (Statement of John W. Douglas, Assistant Attorney General).

[288] See supra note 281.

[289] Act of Apr. 25, 1949, 63 Stat. 62 (1949), amending 28 U.S.C. § 2401(b). Legislative history suggests the purpose of bringing the statute of limitations more closely in line with analogous state statutes of limitation on tort claims. H.R. REP. NO. 276, 81st Cong., 1st Sess. 2 (1949), reprinted in 1949 U.S. CODE CONG. & AD. NEWS 1226, 1227.

[290] Act of July 18, 1966, supra note 282, § 7, amending 28 U.S.C. § 2401(b).

[291] E.g., Stewart v. United States, 655 F.2d 741, 742 (7th Cir. 1981); Kielwien v. United States, 540 F.2d 676, 679 (4th Cir.), cert. denied, 429 U.S. 979 (1976); Best Bearings Co. v. United States, 463 F.2d 1177, 1179 (7th Cir. 1972). The requirement, being jurisdictional, is not waivable. Id.

[292] 28 U.S.C. § 2675(a) (Supp. 1983). The bar to suit during this
(Footnote Continued)

The amendment package contained a few additional elements designed to facilitate tort claim settlements in general. It conspicuously eliminated the original requirement of court approval of litigation settlements by the Attorney General.[295] More important though, for present purposes, were changes in allowable attorneys' fees. Specifically, the amendments raised the statutory ceiling on fees from ten to twenty percent of the amount recovered in the case of agency level settlements, and from twenty to twenty-five percent in judgments and litigation settlements.[296] Thus, while increasing allowable fees across the board, in order to bring them more in line with fees in

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period has been consistently enforced. E.g., Gregory v. Mitchell, 634 F.2d 199, 204 (5th Cir. 1981); Caton v. United States, 495 F.2d 635, 638 (9th Cir. 1974); Insurance Co. of North America v. United States, 561 F. Supp. 106, 117-18 (E.D. Pa. 1983); Nixon v. NLRB, 559 F. Supp. 1265, 1268 (W.D. Mo. 1983); Cooper v. United States, 498 F. Supp. 116, 118-19 (W.D. N.Y. 1980); Walley v. United States, 366 F. Supp. 268, 269 (E.D. Pa. 1973).

[293] Act of July 18, 1966, supra note 282, § 3.

[294] 28 U.S.C. § 2675(a) (Supp. 1983). See Mack v. USPS, 414 F. Supp. 504, 507-08 (E.D. Mich. 1976); Corboy, Shielding the Plaintiff's Achilles' Heel: Tort Claim Notices to Governmental Entities, 28 DE PAUL L. REV. 609, 638 (1979); Silverman, The Ins and Outs of Filing a Claim Under the FTCA, 45 J. AIR L. & COM. 41, 42 (1980).

A final denial, even if issued beyond the six-month period allotted the agency, presumably triggers a fixed six-month limitations period on suit. See Silverman, supra, at 42.

[295] Act of July 18, 1966, supra note 282, § 3, amending 28 U.S.C. § 2677. Justice Department determinations to settle were evidently rarely overruled. H.R. REP. NO. 1532, supra note 287, at 4, quoted in 1966 U.S. CODE CONG. & AD. NEWS 2521; Jayson, Federal Tort Claims Act Amendments: Trial Counsel Warns Problems Ahead, 2 TRIAL MAG. 19 (1966).

[296] Act of July 18, 1966, supra note 282, § 4, amending 28 U.S.C. § 2678. The increase was meant to help afford claimants competent representation and, a related matter, their attorneys reasonable compensation.

An unanswered question is the allowable fee in cases of no recovery. See text at notes 772-74, infra.

private tort litigation,[297] the reform also noticeably narrowed the gap in fees as between administrative and litigation channels, notwithstanding the generally much greater time and effort required by the latter. The increased incentive to settle prior to suit is obvious. As a related matter, fees were made "a matter for determination between the litigant and his attorney;"[298] agency approval of fees was no longer needed in administrative settlements, nor Justice Department or court approval in litigation settlements.

Probably no less important is the change brought about by the 1966 amendments in the source of payment of tort claim settlements. The FTCA originally provided that administrative settlements, then limited to claims not exceeding $1000 (later $2500), were to be paid out of agency appropriations, as indeed were settlements of larger claims to which only the Attorney General could consent after suit.[299] Under the amended act, agency-level settlements not exceeding $2500 continue to be so paid,[300] but larger ones (as well as all litigation settlements) come out of the so-called Permanent Indefinite Appropriation, otherwise also known as the judgment fund.[301] This seemingly curious situation -- agencies enjoying unlimited settlement authority, subject only to Attorney General approval of settlements upwards of $25,000, without having actually to pay for any but the very smallest among them -- was clearly calculated to strengthen the disposition of the agencies to settle.[302]

Finally, the amendments provided that the agencies' new and largely independent settlement authority should be exercised "in accordance with regulations prescribed by the Attorney General."[303] The genesis of this provision evidently was some concern expressed at hearings on the amendments that the government would not necessarily have legal representation during settlement proceedings, and some hope that the Attorney General, through the regulations he prescribed, would provide some substantive legal guidance.[304] In fact, the regulations actually promulgated do practically nothing of the kind; their answer, so far as substantive legal issues go, is to instruct the agencies to submit all proposed settlements in excess of $5000 to review by one of their legal officers.[305] A second underlying concern was that agency settlement policies and procedures might vary widely from one agency to the next. Again, contrary to expectations voiced by some at the time,[306] the Justice Department has not used its rulemaking authority under the amended FTCA to provide the agencies with guidance on substantive issues, but confined itself to largely procedural matters. However, considering the by now substantial body of judicial interpretation of the statute, and the effective incorporation of the local substantive law of torts, agency officials can scarcely be said to be without moorings.

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[297] H.R. REP. NO. 1532, supra note 287.

[298] Id.

[299] Legislative Reorganization Act of 1946, supra note 274, § 403 (c). The agencies thus paid all but actual judgments.

[300] However, the $2500 cutoff now refers to the size of the settlement rather than the amount of the claim.

[301] 28 U.S.C. § 2672 (Supp. 1983); 31 U.S.C. § 1304(a) (1983).

[302] This measure of fiscal irresponsibility on the part of the agencies -- the negative side of the coin, if you will -- has not apparently been a major cause of concern to Congress or to the General Accounting Office, more particularly. The question whether the heightened potential for collusion between agency and claimant has been exploited remains unexplored.

[303] Act of July 18, 1966, supra note 282, §§ 1, 9(a), amending 28 U.S.C. § 2672.

Even before the vast new settlement opportunities that came their way in the wake of the 1966 amendments, the agencies had played a crucial role in the investigation and initial evaluation of claims. Quite apart from the accident reports they routinely prepare in the event of a known mishap, whether a tort claim happens to come of it or not, they prepared detailed litigation reports on both the factual and legal dimensions of a claim, and consulted with the Justice Department on substantive aspects of the litigation and on the advisability of settlement at every stage. The fact remains, however, that the amendments brought the agencies a measure of autonomy in claims evaluation to which few were accustomed, and some critics at the time seriously questioned whether agency legal staffs were equipped to handle their new responsibilities.[307] The amendments brought a no less dramatic change for claimants and private practitioners handling federal tort claims. A claims officer attached to the agency, but often at a considerable geographic remove from the events, supplanted the local Assistant United States Attorney as their primary negotiating partner.

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[304] Hearings, supra note 284, at 14-15, 17.

[305] 28 C.F.R. § 14.5 (1983). Another regulation provides for prior consultation with the Justice Department even with respect to settlements not in excess of $25,000, where some other named element is present: a novel legal issue or policy question, a potential government claim to indemnity or contribution from a third party, the pendency of a related claim against the United States on which the amount to be paid might exceed $25,000, and the pendency of any litigation arising out of the same incident. 28 C.F.R. § 14.6 (b),(c) (1983).

[306] Jacoby, The 89th Congress and Government Litigation, 67 COLUM. L. REV. 1212, 1214 (1967).

[307] I GOTTLIEB, A NEW APPROACH TO THE HANDLING OF TORT CLAIMS AGAINST THE SOVEREIGN 28-29 (1967). See infra note 314.

The FTCA administrative claims process still betrays in many important ways its origins as a fundamentally judicial remedy in tort. As already noted,[308] the general consensus is that agencies enjoy no broader substantive authority under the FTCA to issue an award than Congress conferred on the courts. From a procedural point of view, Congress seems to have thought chiefly in terms of advancing the settlement of tort disputes in time from postlitigation to an earlier stage,[309] rather than establishing some entirely self-standing administrative process. Yet agency handling of tort claims has taken on since 1966 a substantial life of its own, at least in a procedural sense. It has become one of the conventional responsibilities of an agency's office of general counsel and, especially in agencies with a high claims volume, a highly professionalized and standardized operation. In both its conduct and its results, the administrative claims process has proven to be, as the Torts Branch Director within the Justice Department's Civil Division once put it, "more than a perfunctory exercise that serves merely as the necessary springboard for a judicial claim."[310]

Any precise assessment of the extent to which the 1966 amendments have achieved their goal of shifting disposition of government tort claims from court to agency would be difficult to make, though substantial gains have been widely reported.[311] A proper evaluation requires a clear sense of the drafters' purposes and expectations. Statistics made available by the Justice Department in connection with the 1966 hearings suggested that roughly eighty percent of all meritorious FTCA claims in litigation were in fact settled prior to trial.[312] The Department did not offer statistics on the incidence of prelitigation settlements, but given the then $2500 (previously $1000) ceiling on agency settlement authority, one can safely assume that all substantial settlements were being reached, at the earliest, only after suit had been begun.[313] In recommending passage of the 1966 amendments,

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[308] See text at notes 92-94, supra.

[309] See infra note 314 and accompanying text.

[310] Axelrad, Litigation under the Federal Tort Claims Act, 8 LITIGATION 22, 24 (1981).

[311] Id. at 24, 55; Pitard, Procedural Aspects of the Federal Tort Claims Act, 21 LOY. L. REV. 899 (1975).

[312] S. REP. NO. 1327, supra note 287, reprinted in 1966 U.S. CODE CONG. & AD. NEWS 2518. See also Laughlin, Federal Tort Claims Act Amendments: A New Charter for Injured Citizens, 2 TRIAL MAG. 18 (1966).

[313] However, in some agencies the volume and settlement rate of claims amenable to administrative settlement was impressive. In 1965, the Post Office processed over 5000 claims in the dollar range of $100 to $2500, allowing 3800 of them. (This does not take into account the

(Footnote Continued)

the Department clearly anticipated that many settlements reached only after litigation might be moved forward in time.[314] It adduced New York City statistics on private tort litigation showing that only forty percent of personal injury claimants actually proceed to litigation, the rest either settling or abandoning their claims at an earlier point.[315] Settlement at the administrative stage was expected to rid congested court dockets of many claims that, in the private tort claim sector, would not likely have gotten that far. The Department's immediate purpose may have been to husband its litigation resources, particularly the time of the United States Attorneys who most often represent the agencies in tort litigation;[316] but the advantages to deserving claimants in time and expense saved are no less obvious. What is more, the benefit cannot be measured entirely in terms of expedited settlement. It stands to reason that an ample agency claims process might also effectively demonstrate the weakness of a claimant's case, or the strength of the government's defense, and in that way cause many losing suits never to be brought.[317] Only slightly more questionable, from a factual and a policy point of view, is the possibility that more spacious settlement opportunities at the agency level actually encourage the filing of an additional quantity of meritorious claims which, if litigation were the only avenue, would not likely be pressed. Yet for all their enthusiasm over agency-level settlement, evidently neither the

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allowance by field officers of an additional 5200 claims of less than $100.) S. REP. NO. 1327, supra note 287, reprinted in 1966 U.S. CODE CONG. & AD. NEWS 2519.

[314] The stated prediction did not go undisputed. One insider, writing just after passage of the amendments, described the expected shift to agency level settlement as "the most fallacious of all sorcery since the volume of claims which will descend upon the agencies and their limited staffs will make effective settlement a literal or practical impossibility." I. GOTTLIEB, supra note 307, at 29 (1967).

[315] S. REP. NO. 1327, supra note 287, reprinted in 1966 U.S. CODE CONG. & AD. NEWS 2518. Note, however, that the New York City statistics did not distinguish meritorious from nonmeritorious claims, nor provide a breakdown as between abandonment and prelitigation settlement. Of the forty percent of claims litigated, less than ten percent went to trial and three percent actually to judgment. Id.

[316] It was hoped that Justice Department resources in the tort area might be devoted to cases involving difficult legal or technical questions in such areas as medical malpractice, products liability and aviation accidents. S. REP. NO. 1327, supra note 287, reprinted in 1966 U.S. CODE & AD. NEWS 2520. Of course, the Department fully expected to perform important advisory services to the agencies as they assumed their more substantial claims evaluation functions. Laughlin, supra note 312, at 38.

[317] Hearings, supra note 284, at 15 (Statement of John W. Douglas, Assistant Attorney General).

Justice Department nor Congress anticipated that all or even necessarily a substantial majority of claims could ever be disposed of short of litigation.[318]

To what extent have these expectations been met? Unfortunately, nowhere in government are there maintained the kind of tort claim filing and settlement statistics that would justify a precise appraisal. Whatever else they may state, the recommendations that come out of this report unquestionably should call for the development of much more complete and refined statistics than are now available.[319] In a nutshell, each agency should be able to tell for any given fiscal year the volume and dollar value of administrative tort claims filed, broken down as appropriate by type of claim and by the agency program or activity involved. They should then know the percentage, both in numbers and dollar values, of those same claims that in the course of the administrative process, however long it may have taken, were eventually settled (with amounts), were denied or deemed denied, or were abandoned, again with a breakdown by claim type and agency program or activity. No agency with which I am familiar has this kind of information on its own claims operations. Nor is it the kind of information that the Justice Department or even the General Accounting Office can possibly develop on a government-wide basis if the agencies do not furnish them with the underlying data. Without this information -- which should have a good deal of incidental interest for risk management and other purposes to the agencies that generate them[320] -- no agency can have a true sense of the efficacy of its claims processes; and it certainly cannot begin to correlate administrative with judicial outcomes for any given body of claims. To this end, I would urge that data be collected showing the percentage, again by number and dollar value and again broken down by category, of those administrative claims from each original universe of claims that were denied or deemed denied and that then went on to litigation, and of those the percentage that eventually ended up in compromise settlement or judgment, by amount. True, the inferences to be drawn from the resulting correlations may not always be obvious or unambiguous, but without correlations no inferences can be drawn at all.

At present, even agencies with the best documentation maintain operations data that are entirely segregated by fiscal year or other fixed time period, so that one cannot even begin to track and analyze over time the destiny of a given universe of claims. It may be interesting -- and from a fiscal point of view crucial -- to know how many claims were filed in a given fiscal year, how many claims were settled and how many denied in the same fiscal year, how many claims went to court, and how many to compromise settlement or to judgment, again in that same fiscal year -- and to have the corresponding dollar values -- but those data do not deal with a single set of original claims, but rather claims that had their genesis in filings spread out unevenly over that fiscal year and four or five earlier ones at least; and they ignore claims that, whatever their year of origin, did not happen to have their decisive moment in the fiscal year in question. The difference, in a word, is between a static and a dynamic picture of tort claims events. And in agencies with erratic yearly claim patterns, which to some extent is all of them, distortions inevitably result.

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[318] One reason for this prediction was that very large personal injury claims, involving difficult questions of fact and dubious assertions of damages, could not realistically be settled without use of the discovery devices provided by the Federal Rules of Civil Procedure. Laughlin, supra note 312, at 38. Also, some claimants will simply demand their day in court even if they have an agency offer in hand, whether in hopes of a more generous judgment or litigation settlement, or out of a litigious spirit.

[319] See also text at notes 719-724, infra.

[320] See text at note 719, infra.

Given the relatively unscientific character of the claims data that we do have, what are we to make of them? Let me give one example. The Air Force in fiscal year 1982 received 1727 administrative filings under the FTCA, totaling $741,319,922. In the same period it settled 1143 claims, totaling $17,544,161. Because the claims it settled in fiscal year 1982 were not all filed that year, and because not all claims filed in fiscal year 1982 could possibly have been settled before fiscal year 1983, we cannot properly speak of a fiscal year 1982 Air Force settlement rate. But assuming we could, the figures would be impressive: sixty-six percent of the number of claims filed were finally disposed of by payments representing a tiny fraction (barely over two percent) of the amounts initially sought.[321] As for a comparison with litigation settlements and judgments reached in fiscal year 1982, the impression is still very favorable. Some payment was made on a mere 89 claims at that stage, though the dollar value was disproportionately high: $113,178,587.[322] Similar logically flawed settlement rates could be contrived for several of the other agencies, with broadly similar results.[323] The evidence, for what it is worth,

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[321] By way of additional example, the Veterans Administration settled some 156 medical malpractice claims administratively in fiscal year 1982, paying out some $6.2 million. In the same period, it received claims totalling $775 million.

[322] Comparable Air Force claims data for the first six months of fiscal year 1983 reflect a similar pattern:
claims filed - 899, totalling $445,801,800.
claims paid administratively - 531, totalling $4,893,101.
claims paid after litigation - 21, totalling $2,169,188.

[323] For example, in calendar year 1982, the Postal Service received 9323 tort claims, while in the same period 435 FTCA lawsuits were filed arising out of Postal Service activities. That year, $7,878,444 was paid out in administrative settlement of tort claims, compared to $2,122,210 in litigation settlements (206 in number) and $873,201 in

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suggests that the administrative process resolves an extremely high proportion of claims worth paying,[324] one that compares very favorably with those New York City statistics apparently held up by the Justice Department in 1966 as a model to which the federal government should aspire.[325] The fact that the per claim dollar value of postlitigation settlements and judgments greatly exceeds the per claim dollar value of prelitigation settlements[326] is itself hardly surprising, since the larger the claim the more likely claimant and government alike (not to mention claimant's attorney) will view it as worth litigating. In any event, the more relevant figure, so far as the legislative purpose behind the 1966 amendments goes, is probably the number rather than the dollar value of claims, and in this respect the administrative process certainly appears to be vindicating itself handsomely.[327]

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judgments (32 in number). The Postal Service successfully defended to judgment 188 tort suits.

[324] The figure is even more impressive when one considers that constraints on litigation resources compel the Justice Department to settle a certain number of tort suits based on claims that were simply not strong enough to justify settlement at the agency level. See text at notes 522-23, infra.

[325] See supra note 315 and accompanying text. The Chief of the General Claims Division of the Army Claims Service guesses that of the roughly 5000 to 6000 tort claims filed with the Army annually in recent years only ten percent end up in court and, of course, many fewer in an actual judgment.

[326] In fact, government-wide statistics compiled by the General Accounting Office on tort payments from the judgment fund suggest that the dollar value of postlitigation tort payments far outstrips that of prelitigation payments. Thus for fiscal year 1983, GAO reports administrative settlements in tort totalling $32,416,118, but litigation settlements and judgments totalling $104,423,334. The disparity would be reduced by an uncertain figure if we added to the administrative settlement total the government-wide value of agency level settlements not in excess of $2500 none of which is reported by the agencies to the GAO. (An additional $4 million was paid out of the judgment fund in fiscal year 1983 in that portion of individual agency-level settlements under the Military, Foreign and National Guard Claims Acts in excess of $25,000.)

[327] In this respect, adding agency level settlements not in excess of $2500 to the numbers compiled by GAO would doubtless have a dramatic effect since, by all accounts, they are quite voluminous. Even without them, GAO records show a government-wide total of 1114 administrative settlements under the FTCA in fiscal year 1983 (not including 40 for amounts in excess of $25,000 under the Military, Foreign and National Guard Claims Acts), compared to 997 for litigation settlements and judgments.

What is more, the discussion thus far has not even begun to take into account the utility of the agency level claims process in exposing the more or less meritless character of most of the claims that are filed administratively, denied or deemed denied, and taken no further. Figures furnished me by a few agencies suggest that such claims represent a considerable percentage of all claims filed.[328] To what extent such claims might have fruitlessly clogged the courts if not for their ventilation at the agency level, one can only guess. At any rate, we stand to learn a good deal from gathering and analyzing data on what claimants do in the wake of an outright agency-level denial.[329] Arguably, the greater the tendency of disappointed claimants to accept such results, the greater their probable confidence in the fairness and accuracy of the administrative process.

Assuming that administrative procedures under the FTCA, as was hoped, are diverting large numbers of tort claims from litigation channels,[330] one would still like to have a better idea of the range and distribution of agency-level outcomes. Ballpark figures are mostly all we have, and they vary considerably. At the high end, for example, a Department of Interior attorney supposes that seventy-five percent of all claimants achieve an agency-level settlement, and one that as often as not approaches the amount initially claimed. Evidently, the Postal Service enters into monetary settlements in at least as high a percentage of the time, though the individual amounts involved tend to be lower, and the differences between recovery and initial demand greater, than the Interior Department experiences.[331] At the other extreme, Veterans Administration attorneys place at only some twenty-five percent the portion of total yearly tort claims resulting in final settlements at the agency level.[332] This figure doubtless reflects the relatively high incidence of very large and often very speculative medical malpractice claims in that agency's claims diet,[333] as compared with that, say, of the Postal Service, which is heavily weighted toward the generally more modest and routine slip-and-falls and fender benders. Most of the agencies I examined -- including the armed services, the Federal Bureau of Investigation and the Agriculture and State Departments -- put settlement rates generally somewhere in between.[334]

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[328] For example, data gathered for me from each of NASA's field installations for the last three fiscal years show very little evidence of litigation in any year despite a considerable percentage of denials throughout the period. And the Chief of General Claims at the Army Claims Service, who has as much experience in claims management as anyone with whom I spoke, thinks that disappointed claimants are on the whole as likely to accept defeat as to litigate.

Yet, other agency claims attorneys insist that upwards of ninety percent of claimants receiving agency level denials proceed to court. I have been given no data to support such an assertion and I find it not entirely credible. Most agencies report making payments in the case of no more than sixty or seventy percent of the claims filed, at the outside. If the overwhelming majority of disappointed agency level claimants in fact sued, I think we would find a much larger ratio of FTCA lawsuits to FTCA administrative claims than we seem to have. Given the absence of reliable filing figures on a complete agency by agency basis, no accurate ratio can be posited; but informal estimates both in the literature and in my conversations would certainly put the ratio at no more than one to ten and more likely at one to fifteen or twenty. Writing in 1977, the leading authority on the FTCA estimated new lawsuits filed under the Act to be in excess of 1500 yearly and new administrative claims to number "some 10 to 20 times that amount." 1 L. JAYSON, HANDLING FEDERAL TORT CLAIMS, p. 1-8 (1984). Annual Reports of the Administrative Office of the United States Courts reflect a doubling since then in tort actions commenced against the United States in the district courts: 2973 in the year ending June 30, 1982, 3084 in the year ending June 30, 1983. But there is no reason to doubt that the number of new administrative claims has kept fully apace. No one has gathered the figures on a government-wide basis, but a figure of 60,000 to 70,000 would probably not be an exaggeration.

[329] Denials due entirely to a failure to agree on a settlement sum presumably trigger litigation.

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[330] See supra note 328, and figures cited therein. If administrative claims estimates are correct, the agencies are managing to dispose of as high a percentage of claims as ever, if not higher, notwithstanding the rise over time in the number of FTCA suits. (Incredibly, the Justice Department had expected the 1966 amendments to reduce in absolute terms the volume of FTCA litigation. See Laughlin, supra note 312, at 38.)

[331] Nevertheless, the total is impressive. The Law Department estimates aggregate administrative tort payments in the vicinity of ten to thirteen million dollars a year, a figure, however, that must be put in the perspective of a $25 billion annual agency operating budget.

Of course, settlement rates may vary within a given agency depending on the locus of authority. Thus, claims adjudicated at Law Department headquarters show a somewhat lower settlement rate than those adjudicated in the field, but this may be due to the generally greater amounts or greater legal or factual complexity of the claims involved.

[332] No guess was hazarded as to the percentage of denials that go into litigation, but Veterans Administration attorneys estimate that no more than forty percent of claims that do go into litigation are compromised and that, among those going to judgment, the agency prevails at least nine times out of ten.

[333] See infra note 543.

[334] The Chief of General Claims at the Army Claims Service imagines that the number of administrative claims producing an agency-level settlement of some sort and the number resulting in a denial come out

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But claims officers are also quick to point out that the settlement rate of a given agency can fluctuate widely as one looks successively at different claims subsets, whether organized by dollar value or type of claim. Take the National Aeronautics and Space Administration. A crudely estimated settlement rate of as high as eighty percent on small claims drops to a fraction of that for claims in excess of $25,000. The Department of Agriculture shows a wide disparity in the percentage of claims honored as between the rising number of regulatory and program-related torts, on the one hand, and the more conventional vehicular accident claims, on the other.[335] This point only confirms the importance of having data that are refined as well as accurate and comprehensive.

Taken together, this bundle of data and impressions suggests that the administrative claims process is largely achieving its intended purpose, and that Congress' faith in the agencies was not generally misplaced. Whether each agency exploits the process to its full potential is, of course, another matter and one that lies well beyond the capacities of this writer to gauge and probably beyond anyone's capacity until such time as the agencies maintain adequate data. At this point in the report, a less macroscopic viewpoint seems in order. The two chapters that follow explore the specific procedures by which agencies handle the tort claims that come their way, mostly under the Federal Tort Claims Act. Chapter four outlines and critiques the regulatory framework that governs agency administration of the Act. Chapter five looks more closely at particular agency practices within that framework.

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about evenly, though the dollar values not surprisingly do not. A table of general claims, which may include non-FTCA matters, suggests that the percentage of claims paid administratively to claims filed administratively in recent fiscal years has ranged between thirty and forty, though this is another example of the use of a noncomparable claims data base.

[335] The theme is echoed by others, including a chief claims attorney at the Federal Bureau of Investigation. The Assistant Legal Advisor for claims of the State Department distinguishes sharply between vehicular incidents, which yield settlements somewhere in the sixty percent range, from what he describes as the "esoteric" claims, in which even a ten percent rate of administrative settlement might be an exaggeration.

Chapter Four

ADMINISTRATIVE SETTLEMENT UNDER THE FEDERAL TORT CLAIMS ACT: BASIC LEGAL ISSUES

The preceding chapter described the origin and contours of the administrative claim process under the amended Federal Tort Claims Act. The statute essentially requires that a claimant, prior to filing suit under the FTCA, present his or her claim to the appropriate federal agency and allow the agency a six-month period of time in which to consider it. If the agency finally denies the claim, the claimant has six months from the date of mailing of the letter of denial in which to bring suit. On the other hand, should the agency fail to act on the claim within the time allotted it, the claimant may exercise the option anytime thereafter of deeming such failure a denial of the claim and proceed to court. As the dimensions of this chapter suggest, within this apparently simple and straightforward statutory framework lurk a host of legal issues.

A. The Prior Claim

An exhaustive survey of litigated cases under the Federal Tort Claims Act shows that the statutory prior claim requirement has been a cause of needless confusion and occasional injustice to claimants;[336] many more instances doubtless never reach the courts and pass essentially unrecorded. But though this chapter dwells at length and in detail on the recurrent difficulties, I do not believe that experience implicates either the basic value of the prior claim requirement or the way agencies have generally gone about implementing it. Improvement in most respects may require no more than a fine-tuning of agency practices and some reconsideration of the Attorney General's regulations.

In most cases where an FTCA plaintiff is met with a jurisdictional defense based on the failure ever to file an administrative claim, he or she did not in fact purport at the time of the alleged prior claim to be filing one; oftentimes the plaintiff learns of the requirement only after filing suit and attempts at that point to characterize some previous action or communication on his or her part as satisfying it.

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[336] One commentator found 267 reported cases between 1966 and 1982 on the administrative procedures of the FTCA alone. The vast majority had to do with the sufficiency of the administrative claim as a prerequisite to suit. Zillman, Presenting a Claim under the Federal Tort Claims Act, 43 LA. L. REV. 961, 962, n.7 (1983). Critics of the 1966 Amendments had predicted substantial litigation. E.g., Corboy, The Revised Federal Tort Claims Act: A Practitioner's View, 2 THE FORUM 67, 73-74 (1967). See also Silverman, The Ins and Outs of Filing a Claim Under the Federal Tort Claims Act, 45 J. AIR L. & COM. 41, 60 (1979).

For a useful compilation of case law on certain aspects of the prior claim requirement, along with substantive aspects of the Act, see U.S. ARMY CLAIMS SERVICE, FEDERAL TORT CLAIMS ACT HANDBOOK 1-19 (rev. ed. Apr. 1983).

The extraordinary range and variety of forms that such purported prior notices of claim have taken -- oral requests to the alleged wrongdoer for restitution or other relief,[337] communications with the United States Attorney,[338] some notice of intent to file a claim,[339] a general letter of complaint,[340] the initiation of state court,[341] workmen's compensation[342] or other state agency proceedings,[342a] and assorted other forms of actual or constructive notice to the agency[343] -- itself suggests to me the wisdom of not liberalizing, either by legislative amendment or indulgent judicial interpretation, the present statutory requirement of a claim "in writing to the appropriate Federal agency."[344] Claimants can reasonably be required to present agencies with tort claims that are recognizable as such, especially as the requirement is well-publicized and coupled with a statute of limitations that is generous by most any standard.

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[337] E.g., Best Bearings Co. v. United States, 463 F.2d 1177, 1179 (7th Cir. 1972); Shubert Constr. Co. Inc. v. Seminole Tribal Hous. Auth., 490 F. Supp. 1008, 1011 (S.D. Fla. 1980); Mayo v. United States, 425 F. Supp. 119, 123 (E.D. Ill. 1977); Franklin State Bank v. United States, 423 F. Supp. 1, 3 (S.D.N.Y. 1975); Mims v. United States, 349 F. Supp. 839, 844 (W.D. Va. 1972).

[338] E.g., Lehner v. United States, 685 F.2d 1187, 1189 (9th Cir. 1982); Best Bearings Co. v. United States, supra note 2; Grasso v. USPS, 438 F. Supp. 1231, 1237 (D. Conn. 1977); Turtzo v. United States, 347 F. Supp. 336 (E.D. Pa. 1972).

[339] E.g., Wright v. Gregg, 685 F. 2d 340, 341 (9th Cir. 1982); Bailey v. United States, 642 F.2d 344, 346 (9th Cir. 1981); Smith v. United States, 588 F.2d 1209, 1211 (8th Cir. 1978).

[340] E.g., DiLorenzo v. United States, 496 F. Supp. 79, 84 (S.D.N.Y. 1980); Shubert Constr. Co., Inc. v. Seminole Tribal Hous. Auth., 490 F. Supp. 1008, 1011 (S.D. Fla. 1980); Mayo v. United States, 407 F. Supp. 1352, 1354 (E.D. Va. 1976). A much cited example of an insufficient claim is the service of a "Notice to Pay Rent or Quit Premises" upon the Postal Manager of the post office in the plaintiff's building. Three-M Enterprises, Inc. v. United States, 548 F.2d 293, 295 (10th Cir. 1977). The court apparently reasoned that the tort of unlawful detainer does not arise under state law until three days of possession beyond service of the Notice have passed and that treating the Notice as a tort claim for FTCA purposes would be to allow notification of a tort before it even occurs.

[341] E.g., Flickinger v. United States, 523 F. Supp. 1372, 1377 (W.D. Pa. 1981); Gush v. Bunker, 344 F. Supp. 247, 249 (W.D. Tenn. 1972); Landis v. United States, 335 F. Supp. 1321, 1323 (N.D. Ohio 1972). Neither are pleadings in federal court actions normally sufficient administrative tort claims. McWhirter Dist. Co., Inc. v. Texaco, Inc., 668 F. 2d 511, 526 n.24 (Temp. Emer. Ct. App. 1981); Ryan v. Cleland, 531 F. Supp. 724, 728-29 (E.D. N.Y. 1982).

[342] E.g., Mendiola v. United States, 401 F.2d 695, 698 (5th Cir. 1968).

[342a] E.g., Hejl v. United States, 449 F.2d 124, 126 (5th Cir. 1971).

On the other hand, though the statutory requirement of a prior claim is basically sound, the agencies should not be rigid in enforcing it. Significantly, neither the statute nor Justice Department regulations require that the claim take any particular form; I urge that the agencies also avoid doing so where consistent with the general purpose of the 1966 amendments and not prejudicial to the government's interests in sound claims adjudication. A good example of a situation calling for fairness and flexibility is one in which the claimant applies to the agency for a statutory benefit, or responsibly pursues some other administrative channel, only to learn that the FTCA was the only appropriate remedy under the circumstances. Where the two-year statute of limitations has not yet run, the claimant usually suffers no substantial prejudice in being asked to start over again, as it were. But it can happen that the statute has run.

Illustrative of the difficulty of establishing a general rule for such situations is the case of Gordon H. Ball, Inc. v. United States.[345] The plaintiff was under contract with the United States to construct a new dam on the Snake River in Idaho. As work was about to commence, the Teton Dam failed and the project could not go forward. Well within two years of this occurrence, the plaintiff filed a claim under the Teton Dam Disaster Assistance Act with the designated officer of the Department of Interior. The Department denied relief on the ground that it could only entertain claims arising in a location declared by the regulations to be a "major disaster area." Rather than appeal that determination, the plaintiff brought suit under the FTCA. The question arose whether the Teton Dam Disaster benefits application should be considered the equivalent of an administrative claim under the FTCA. If not, the FTCA action would be permanently time-barred.

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[343] E.g., Green v. United States, 385 F. Supp. 641, 644 (S.D. Cal. 1974). For example, an appeal to the Merit Systems Protection Board for a hearing on an alleged wrongful separation from a civil service position has been held not to constitute the filing of a tort claim. Dancy v. United States, 668 F. 2d 1224, 1228 (Ct. Cl. 1982).

[344] 28 U.S.C. § 2401(b) (Supp. 1983). Congress could take a useful precaution, however, by amending 28 U.S.C. § 2675 (Supp. 1983), the prior claim requirement, to make clear, as does 28 U.S.C. § 2401(b), the statute of limitations provision, that the claim must take written form.

[345] 461 F. Supp. 311 (D. Nev. 1978).

Though the case raises the question of how a court rather than an agency should respond to such a situation, like so many FTCA rulings it also carries implications for agency practice. The court in Gordon H. Ball thought it only fair and reasonable to accept an application for benefits as a claim for FTCA purposes where the government's interest in a prompt opportunity to consider the claim in tort has not been prejudiced by the delay. This may depend in turn on the similarity of factual and legal issues as between the tort and other remedy in question. Using this sort of standard, the court may have been correct in declining to treat the FTCA prior claim requirement as satisfied.[346] Liability under the Teton Dam Disaster Assistance Act is without regard to fault or evidently even proximate cause, and the plaintiff's claim under that Act in fact made no allegation of negligence. Agency investigation of most any FTCA claim arising out of the incident, on the other hand, would entail precisely such questions, as would any settlement negotiations to follow. To be sure, the two claims are not radically dissimilar, given their common core of physical damage to private property. Arguably, however, an application for benefits under the Teton Dam Disaster Assistance Act did not afford the agency the same practical opportunity to review and settle the claim as if the plaintiff had proceeded under the FTCA in the first place. As a general rule, unless the agency is presented with a claim and a claims context that fairly alert it to the presence of a claim sounding in tort, and otherwise satisfies the bare essentials of an administrative filing under the FTCA, it probably should not be required by the courts to accept it as such.[347]

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[346] Id. at 315.

[347] For instances where courts, without elaborating any particular standard of judgment, reached the probably correct conclusion not to treat a claim for statutory benefits as a prior claim under the FTCA, see Latz v. Gallagher, 562 F. Supp. 690, 692 (W.D. Mich. 1983) (filing of a flood insurance claim with the Federal Emergency Management Agency); Kelly v. United States, 554 F. Supp. 1001, 1004 (E.D. N.Y. 1983) (application for veterans benefits); Vanderberg v. Carter, 523 F. Supp. 279, 282-83 (N.D. Ga. 1981) (claims under CHAMPUS (Civilian Health and Medical Program of the Uniformed Services)); Knight v. United States, 442 F. Supp. 1069 (D. S.C. 1977) (claim for Veterans Administration service-related benefits); Dancy v. United States, 668 F.2d 1224, 1228 (Ct. Cl. 1982) (request for a hearing before the Merit Systems Protection Board to review separation from service through reduction in force.)

A related issue is whether an administrative claim should be construed for settlement or for jurisdictional purposes as covering a theory of liability other than those specifically stated in the claim. When faced with the issue, the courts properly tend to view the additional theory as covered if the agency's investigation of the claim should fairly have revealed the basis of that theory. Bush v. United States, 703 F. 2d 491, 494-95 (11th Cir. 1983); Rooney v. United States,

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Once again, however, what a court requires agencies to do as a matter of law and what agencies should do as a matter of sound and enlightened administrative practice are not entirely the same things. I do not believe that an agency should decline to consider a claim under the FTCA just because it supposes that a court would not insist that it do so. Fixed standards of equivalence between the FTCA and the countless other existing monetary remedies against the government cannot possibly be prescribed. But surely no claim should necessarily be disregarded by an agency for FTCA purposes simply because it fails on its face to designate the Act,[348] or even because it happens to be cast in terms of some other remedy. In the final analysis, the agencies must be left to decide in all fairness whether a timely claim filed with them for other purposes sufficiently enables them to investigate and evaluate the circumstances from a tort perspective.

Of course, applications for statutory benefits are only a single variant of the much more general problem of deciding when communications should fairly be treated by agencies as claims for FTCA purposes. Granted that most oral requests, informal inquiries, and indeed very many applications for different statutory benefits would not in themselves satisfy the jurisdictional prerequisite to a tort suit, agency personnel to whom they are directed or find their way still should, as a matter of sound administrative policy, undertake whenever feasible to inform the private party of the existence of a tort remedy. In this connection, they should advise of the general requirement that a written claim be filed with the agency and make reference to Standard

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634 F. 2d 1238, 1243 (9th Cir. 1980); Rise v. United States, 630 F. 2d 1068, 1071 (5th Cir. 1980); Dundon v. United States, 559 F. Supp. 469, 476-77 (E.D. N.Y. 1983); Dillon v. United States, 480 F. Supp. 862, 863 (D. S.D. 1979). In fact, most courts have not required that claimants spell out a particular theory of liability in order to perfect a valid administrative claim. E.g., Barnson v. United States, 531 F. Supp. 614, 623 (D. Utah 1982); Mellor v. United States, 484 F. Supp. 641, 642 (D. Utah 1978).

[348] For an example of such a case, see Boyd v. United States, 482 F. Supp. 1126, 1128-29 (W.D. Pa. 1980) (filing of Treasury Department form for "Application for Relief on Account of Loss, Theft or Destruction of United States Bearer Securities," which necessarily stated a sum certain, preceded by an explanatory letter, deemed a valid FTCA administrative claim). Cf. Santiago Rivera v. United States, 405 F. Supp. 330, 331 (D. P.R. 1975) (letter to VA specifically inquiring whether compensation being paid in the form of VA benefits to relatives of the deceased veteran included compensation for his death resulting from food poisoning at VA hospital is not a valid FTCA claim). The claimant in Boyd was held in later proceedings to have failed to establish actionable negligence by the government. 493 F. Supp. 529, 533 (W.D. Pa. 1980).

Form 95 as a convenient vehicle for doing so.[349] Citing the regulations would also be a convenient way of bringing the statute of limitations and sum certain requirement to the party's attention, though mentioning them specifically would be better yet. These recommendations are in a sense the mirror image of what I recommended in chapter two. Just as agency tort claims attorneys should be encouraged to know something of the other means an agency has for entertaining monetary demands,[350] so should other agency officers -- and not only in the claims and entitlement areas -- be aware of the FTCA and bring it to a party's attention where appropriate. Nothing in the FTCA, the statute of limitations included, suggests that agency personnel act improperly when they take reasonably limited steps to keep someone who has come forward with a potentially deserving claim from innocently failing to perfect a valid FTCA demand. Only an assumption that the relationship between claimant and agency is from the start strictly adversarial[351] -- an assumption I do not share -- would justify an agency in doing any less. What I have in mind certainly does not rise to the level of soliciting claims in violation of law or agency regulation[352] or risk imposing the kind of burdens that detailed assistance in the filing of claims would entail. Since each case necessarily presents unique circumstances, no further generalization would seem to me to be meaningful.

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[349] For an example of such action, see Benitez v. Presbyterian Hosp., 539 F. Supp. 470, 472 (D. P.R. 1982), where, upon receiving from the plaintiff a letter expressing the view that she was damaged by her husband's death due to negligence of a Veterans Administration Hospital, the VA district counsel acknowledged receipt of the letter and enclosed a Standard Form 95 advising her to complete the form so that his office could investigate and evaluate the claim. She never did so. Id. See also Shelton v. United States, 615 F. 2d 713, 714 (6th Cir. 1980); Muldez v. United States, 326 F. Supp. 692, 694 (E.D. Va. 1971).

[350] See supra notes 250-51 and accompanying text.

[351] Courts in the past have expressed such an attitude in passing upon the sufficiency of a prior administrative claim. In Green v. United States, 385 F. Supp. 641 (S.D. Cal. 1974), the court declined to take a child's duly filed administrative claim for personal injury as fairly embracing her mother's claim for medical expenses in connection with that injury. To the argument that the government was already on notice of the possibility of a related claim by the mother, the court made this remark:

> [I]nherent in plaintiffs' argument is a suggestion that if the United States has received some sort of constructive or actual notice of a possible claim it then has a duty to go out and solicit an administrative claim to ensure that the jurisdictional prerequisite to suit by the claimant is properly laid. Such a proposition is not only alien to the adversary concept of American jurisprudence, but is also unsupported as a matter of law. Id. at 644 (emphasis added).

[352] It is generally a criminal offense for a federal officer or employee to act as agent or attorney for anyone prosecuting a claim

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One distinctive and recurring pattern of hardship related to the administrative claim requirement does, however, require comment. I refer to the deserving claimant who is excusably ignorant of the fact that the tortfeasor was a federal officer acting within the scope of employment. The most common scenario involves the government driver who by law may not be sued at all under those circumstances and for whom the federal government, pursuant to the Drivers Act,[353] substitutes itself as sole defendant in any litigation that may be brought and removes the case from state to federal court as if originally filed under the FTCA. Normally, no claim will yet have been filed with the agency. Courts grappling with the inevitable government motion to dismiss for failure to exhaust administrative remedies usually do dismiss the complaint without prejudice in order to allow the filing of an administrative claim where still possible. The rub comes when the FTCA's two-year statute of limitations already has expired.

Since by definition the case now is in federal court, agency claims practice is not itself in issue, except when the claimant then specifically requests the agency to consider the claim and the agency says it is too late to do so. Suffice it to say that most courts by far have shown plaintiffs in this situation precious little sympathy. Understandably, they have declined to treat the state court filing as an administrative claim for FTCA purposes,[354] even when it took place

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against the United States. 18 U.S.C. § 205 (1969). Significantly, it is no offense where doing so is "in the proper discharge of [the officer's or employee's] official duties." Id. A number of agencies essentially restate the prohibition in their regulations or internal manuals, but then provide that agency personnel may and even must on request assist a claimant in preparing the claim and assembling evidence. See infra note 576.

[353] 28 U.S.C. § 2679(b)(Supp. 1983). Doctors and other medical personnel of various agencies have likewise been immunized from suit on claims arising out of action within the scope of their employment. 38 U.S.C. § 4116 (1979) (Veterans Administration); 42 U.S.C. § 233 (1982) (Public Health Service); 10 U.S.C. § 1089 (1983) (armed services); 22 U.S.C. § 2702 (Supp. 1983) (State Department).

[354] Wilkinson v. United States, 677 F.2d 998 (4th Cir. 1982); Rogers v. United States, 675 F.2d 123, 124 (6th Cir. 1982); Wollman v. Gross, 637 F. 2d 544 (8th Cir. 1980), reh'g en banc denied, 646 F.2d 1306 (8th Cir.), cert. denied, 454 U.S. 893 (1981); Melo v. United States, 505 F. 2d 1026 (8th Cir. 1974); Meeker v. United States, 435 F.2d 1219 (8th Cir. 1970); Flickinger v. United States, 523 F. Supp. 1372 (W.D. Pa. 1981); Lien v. Beehner, 453 F. Supp. 604 (N.D. N.Y. 1978); Fuller v.
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within two years of accrual, which will not always be the case under longer state statutes of limitations.[355] Somewhat less obviously, timely communications with the government employee personally also have been deemed not to satisfy the requirement,[356] even if the employee may reasonably be assumed to have brought them to the agency's attention, and indeed even though plaintiff actually sent copies of the correspondence to the agency directly.[357] While some more recent decisions question whether the prior claim requirement should apply at all to removals under federal officer immunization statutes such as the Drivers Act,[358] other approaches that more responsibly accommodate all the relevant concerns are readily imaginable.

One would be to give the plaintiff in all Drivers Act suits mistakenly brought in state court a very short additional period of time in which to file an administrative claim. This approach, which in effect rescues the claim with minimal prejudice to the government, figures in the Swine Flu Immunization Act, a statute that likewise made the United States the exclusive defendant in cases that otherwise would be heard against a private defendant normally in state court.[359] A

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Daniel, 438 F. Supp. 928 (N.D. Ala. 1977); Miller v. United States, 418 F. Supp. 373 (D. Minn. 1976); Driggers v. United States, 309 F. Supp. 1377 (D. S.C. 1970). But cf. Henderson v. United States, 429 F. 2d 588 (10th Cir. 1970) (government as a matter of law became a party to the action as soon as it was filed in state court).

[355] Wilkinson v. United States, supra note 354; Melo v. United States, supra note 354. Meeker v. United States, supra note 354; Flickinger v. United States, supra note 354.

[356] Binn v. United States, 389 F. Supp. 988 (E.D. Wis. 1975).

[357] Driggers v. United States, supra note 354, at 1378-79.

[358] Kelley v. United States, 568 F. 2d 259 (2d Cir.), cert. denied, 439 U.S. 830 (1978)(suit brought within two years of accrual); Van Lieu v. United States, 542 F. Supp. 862 (N.D. N.Y. 1982) (suit brought after two years from accrual but within state statute of limitations). See also Comment, Administrative Claims and the Substitution of the United States as Defendant under the Federal Drivers Act: The Catch 22 of the Federal Tort Claims Act?, 29 EMORY L. J. 755, 786-87 (1980). Other courts would waive the requirement only where the government can be said to have lulled the claimant into a false sense of security. Wilkinson v. United States, supra note 354, at 1000.

[359] The statute expressly provided that where a civil action is brought within two years of the administration of the vaccine and dismissed for failure to file a prior administrative claim, "the plaintiff . . . shall have 30 days from the date of such dismissal or two years from the date the claim arose, whichever is later, in which to
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minor disadvantage of adopting this approach to the Drivers Act situation is that it confers something of a windfall on claimants who are all along, or become early on, aware of the defendant's capacity as a government employee acting within the scope of employment. One recent court decision, seeking to underscore the distinction between the excusably unaware claimant, on the one hand, and the aware and inexcusably unaware claimant, on the other, developed what I regard, however, as an unduly rigid alternative. Under it, the latter category of claimant may not avoid the prior claim requirement, even if the time for filing such a claim has passed, while the former category is not subject to the requirement at all.[360] Apart from the fact that the court would make this categorization as of the time the state court suit began, irrespective of what the claimant came, or should have come, to know shortly thereafter, this policy too readily sacrifices the value of the agency claims procedure as a prior dispute resolution mechanism. I would prefer a rule that postpones accrual of the claim for statute of limitations purposes until the claimant first knows or should reasonably have known of the government connection.[361] This places a due measure of responsibility on the claimant and at the same time preserves the advantages of allowing agency consideration of tort claims before they go to court.

B. Presentation of the Claim

This report does not address the question of when a tort claim accrues for purposes of the statutory requirement that it be presented to the appropriate federal agency within two years of its accrual.[362] In the absence of any formal guidance either from Congress or the Justice Department, the courts seem to approach the issue in no substantially different terms than they approach the accrual issue as it affects virtually every claim, in private as well as public litigation, to which a statute of limitations on suit attaches. And though the Supreme Court lately has sought to clarify the ground rules, at least on the vexing problem of accrual in medical malpractice claims,[363] little of its

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file such administrative claim." 42 U.S.C. § 247b (k)(2)(A)(iii) (1976) (emphasis added).

[360] Harris v. Burris Chem., Inc., 490 F. Supp. 968, 971 (N.D. Ga. 1980).

[361] *Cf.* United States v. LePatourel, 593 F. 2d 827, 830 (8th Cir. 1979) (accrual postponed where question whether FTCA covers torts by federal judges is still an open one).

[362] 28 U.S.C. §§ 2401(b), 2675(a) (Supp. 1983).

[363] United States v. Kubrick, 444 U.S. 111 (1979) (claim accrues at the time plaintiff knows both the existence and cause of his injury, but not necessarily the fact of malpractice). See Zillman, *supra* note 336, at 983-84. *Kubrick* establishes that federal rather than state law governs the question of accrual under the FTCA.

analysis is unique to the FTCA context or to governmental liability in general.[364]

On the other hand, the Attorney General has addressed the question of when a claim is "presented" within the meaning of the statute. According to the regulations, this occurs when a written notification of the incident, accompanied by a claim for damages, is received by the agency.[365] This gloss on the statutory language would not seem appreciably to lighten the load on the agencies, but on occasion it has served to extinguish an otherwise valid claim mailed to the appropriate agency in the waning days of the two-year limitations period.[366]

From a legal point of view, the Justice Department was probably as free to select a receipt as a dispatch rule, but I think it unfortunate that it has done so. It could just as well have selected the date of postmark of the administrative claim, a standard that is arguably more objective than receipt by the agency. Apart from averting hardship to the occasional claimant whom the wording of the statute has not sufficiently alerted to the risks of an eleventh hour filing, a dispatch rule would avoid a distinctly ungenerous asymmetry in the operation of the statute of limitations. Both the FTCA and the regulations see to it that the six-month period within which suit, if any, must be brought following a final agency denial begins to run from the date the denial is mailed.[367] It would seem, then, that receipt rules do not uniformly enjoy the government's favor, but only when they operate to disfavor the claimant. Significantly, even the most cynical recorded critic of the 1966 amendments -- a plaintiff's attorney alert to the pitfalls to claimants set by the prior claim requirement -- assumed that the Attorney General would, if not for the sake of parallelism, then at least for ease of application, fix the moment of presentation at the date of mailing.[368] He underestimated the government's capacity to resolve procedural ambiguities to its own advantage, however small the scale. Incidentally, accepting the date of mailing as the operative moment for determining the timeliness of a claim does not necessarily shortchange the agencies in the time at their disposal to act upon it; the six-month period given them can easily be made to commence upon their receipt of the claim.

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[364] The Court specifically relied on the FTCA for little more than the observation that Congress intended "the reasonably diligent presentation of tort claims." Id. at 123.

[365] 28 C.F.R. § 14.2(a) (1983).

[366] Steele v. United States, 390 F. Supp. 1109, 1111 (S.D. Cal. 1975) (claim forever barred when mailed on the final day of the limitations period and received two days thereafter).

[367] See infra note 502.

[368] Corboy, supra note 336, at 75.

The current regulation, strictly applied by the agencies, also casts upon the claimant the entire risk of loss in transmission of a claim, even where he or she can later satisfactorily prove its timely dispatch. This very risk materialized in a piece of recent litigation that I describe at some length not only to illustrate the potential harshness of a rigid receipt rule, but what strikes me as a certain needless meanspiritedness in its implementation.

In Bailey v. United States,[369] attorneys for the estate of a man killed in an explosion at an Air Force gunnery range delayed filing a claim pending appointment of a personal representative for the estate under state law. According to the attorneys, a proper claim was mailed some sixteen months following the accident in question, well within the statute of limitations. Nine months thereafter (that is, just beyond two years from the incident), the attorneys learned of the agency's denial of a companion claim that they had filed with the agency on behalf of a colleague of the decedent injured in the same explosion and that had been under consideration by the agency for twenty-two months.[370] They immediately inquired as to the status of the estate's claim. At that point, the Air Force denied having any record of receiving any such claim and, though the attorneys immediately sent duplicate copies, refused to give it any consideration because by then two years and one month had elapsed since the incident.

The result seems harsh, though technically justified under the receipt rule. The attorneys had waited less than three months from the accident to file the two companion claims which did not require the appointment of a personal representative. Moreover, the Air Force, already entirely familiar with the incident from these other claims, knew perfectly well that a claim for the estate was imminent. In fact, correspondence over the estate's claim -- including submission of an autopsy report, a wage statement, and a funeral bill -- was exchanged between the attorneys and the Air Force between the third and tenth month following the incident. Phone conversations were also had. During that period, the claims officer actually requested and received information on the decedent's dependents, earnings and length of employment; at one point he wrote that the Air Force had not yet received a claim, but understood that one would be filed as soon as a personal representative was appointed, and undertook himself to "keep counsel advised of the status of [all] the claims."

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[369] 642 F.2d 344 (9th Cir. 1981). For a similar situation, see Barlow v. Avco Corp., 527 F. Supp. 269, 273 (E.D. Va. 1981).

[370] The fact that the Air Force had the companion claim under consideration for that length of time before issuing a notice of denial suggests that it was not unreasonable for counsel not to be alarmed by the passage of eight months without action on the estate's claim. In fact, as the dissenting judge points out, it is curious that the Air Force took so long in denying the companion claim in the first place. "For unknown reasons the Air Force withheld its decision on the [companion] claim until the statute of limitations had run on the [estate's] claims. If the [companion] claim had been denied but a few weeks earlier, it is obvious that duplicates of the missing . . . papers would have been remailed in time." Id. at 348 (Jameson, J., dissenting).

Obviously, the claim should have been sent by certified or registered mail in the first place. But for this, the claimant, through its attorneys, displayed diligence throughout, among other things by promptly furnishing evidence of the original timely filing upon learning that it had evidently gone astray. Though the Air Force may never have received that claim, it had substantial information concerning it, having investigated the same incident in order to deny the companion claims filed earlier and having received intermittently ample information on the decedent's own losses. In effect, all that was missing was the total amount claimed, and this the claimant promptly resupplied. All in all, to suppose that the government would have been in any way prejudiced under the circumstances by entertaining the duplicate claim one month beyond the limitations period or that doing so amounted to rescuing a claimant that had unreasonably slept on its rights seems quite fanciful. What is more, describing the filing of a prior claim as a "jurisdictional prerequisite," as both the agency and court did in denying the claim any consideration, does not sufficiently address the question whether the claim under the circumstances should have been deemed timely. Most agencies may prefer not to be burdened with the exercise of discretion called for under such admittedly rare circumstances; but, irrespective of what a court may or may not be willing to do for a claimant in such a situation, the agencies should take it upon themselves to enforce the statute in a fair and enlightened manner. In this case, not even a statutory mandate was at stake, for the receipt rule is strictly a Justice Department construction.

Since most incidents giving rise to government tort claims involve a single readily identifiable federal agency, the question rarely arises whether a claimant presented his or her claim to the "appropriate" one, as the Federal Tort Claims Act itself prescribes.[371] Nevertheless, one private practitioner writing about the Act advises attorneys to avert a potential problem by filing a complete claim "against each and every Federal agency which might be involved."[372]

A cursory reading of Justice Department regulations would suggest that the Department in this regard has done what the present report urges it do on a much broader and more consistent basis, namely, frame regulations that eliminate needless obstacles to the effective filing of a claim, where doing so does not substantially prejudice the government or work a result at basic variance with legislative purpose. The regulations provide that should the wrong agency receive a claim, it "shall transfer it forthwith to the appropriate agency, if the proper agency can be identified from the claim, and [shall] advise the claimant of the transfer. If transfer is not feasible the claim shall be returned to the claimant."[373] On this basis, courts have deemed a claim transferred to the proper agency when it should have been but was not.[374]

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[371] 28 U.S.C. § 2675(a) (Supp. 1983).

[372] McCabe, Observations on the Federal Tort Claims Act, 3 THE FORUM 66, 78-79 (1967).

But the courts sometimes have inferred from the regulation a tolling of the statute of limitations as of the initial filing in order to render an otherwise valid claim timely rather than stale where that would make the difference.[375] In an apparent response to such overtures, the Attorney General recently amended the regulations to specify that the claim shall be deemed "presented as required by 28 U.S.C. § 2401(b) as of the date it is received by the appropriate agency."[376] Leaving aside the question whether the Attorney General has been or could validly be delegated authority to determine when the statute of limitations on an FTCA lawsuit is satisfied, this particular exercise of that authority strikes me as regrettable. No less consonant with legislative purpose, and substantially fairer to claimants, would have been a regulation that not only directs the transfer where practicable of a wrongly filed but otherwise valid claim from one agency to another, but also provides that the original date of filing be used for determining its timeliness.[377]

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[373] 28 C.F.R. § 14.2 (b)(1)(1983).

[374] Barnson v. United States, 531 F. Supp. 614, 623-24 (D. Utah 1982). A claim as originally filed should rarely be so devoid of information as to free the receiving agency of any obligation to transfer it. See Slagle v. United States, 612 F. 2d 1157, 1159 n.5 (9th Cir. 1980). Case law under the FTCA prior to its amendment and the Attorney General's regulations did not mandate the transfer of claims. Johnson v. United States, 404 F.2d 22, 24 (5th Cir. 1968).

[375] Kirby v. United States, 479 F. Supp. 863, 867 (D. S.C. 1979) (claim valid where United States Attorney received it on the last permissible day, and the agency on the next day thereafter); Stewart v. United States, 458 F. Supp. 871, 872 (S.D. Ohio 1978) (claim valid where filed with the wrong agency one week before end of limitations period but reaches the proper agency only several months later). But see Lotrionte v. United States, 560 F. Supp. 41, 43 (S.D. N.Y. 1983).

[376] 28 C.F.R. § 14.2(b)(1)(1983). The amendment revives an idea found in a draft of the Attorney General's original regulations in 1966 and abandoned under criticism. I. GOTTLIEB, A NEW APPROACH TO THE HANDLING OF TORT CLAIMS AGAINST THE SOVEREIGN 11 (1967).

[377] Cf. 32 C.F.R. § 536.150 (1983) (Army) (statute of limitations on filing claims under National Guard Claims Act deemed tolled when claim

(Footnote Continued)

C. The Contents of a Valid Claim

The Federal Tort Claims Act says virtually nothing about what an administrative claim must contain, either to enable the agency to consider it or to satisfy the jurisdictional prerequisite to suit. The Attorney General's regulations fill that breach.[378]

Section 14.2(a) purports to identify the essential elements of a claim as "an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident."[379] Originally, the regulation

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(Footnote Continued)
filed with another agency, provided it is forwarded to the Army within six months or claimant makes inquiry with the Army within that time).

A related problem arises when the claimant alleges tortious conduct by employees of more than one agency. The prudent response is to file separate timely claims with each agency, with cross-referencing. A claimant who files a claim for the entire amount of loss with just one of the agencies may be charged with failing to file the required prior claim with the other agency or agencies with respect to that portion of the loss attributable to them. Even a claimant who duly files a claim with all appropriate agencies runs a risk if he fails to cross-reference them. In that event, according to the regulations, if any one of the agencies takes final action on the claim submitted to it, such action triggers the statute of limitations on suit with respect to the claims submitted to the other agencies, unless the others choose to treat the matter before them as a request for reconsideration of a final denial. 28 C.F.R. § 14.2(b)(3)(1983).

One would similarly hope that where a claim is filed with only one agency, the Attorney General's transfer directive would apply and further that the original filing date would attach to all claims fairly encompassed in the original claim. The regulations in fact provide that "[w]hen more than one Federal agency is or may be involved in the events giving rise to the claim, an agency with which the claim is filed shall contact all other affected agencies in order to designate the single agency which will thereafter investigate and decide the merits of the claim." Id. § 14.2(b)(2)(1983).

To my knowledge, such a case has not yet arisen. In the only similar decided case, the administrative claim actually filed addressed the conduct of the sole agency to which the claim was presented (wrongful detention by Interior Department officers). The claim was properly held inadequate for purposes of the claimant's charges of subsequent and distinct tortious conduct by a second agency (medical malpractice by Public Health Service). Provancial v. United States, 454 F. 2d 72, 74 (8th Cir. 1972).

[378] See generally Note, Federal Tort Claims Act: Notice of Claim Requirement, 67 MINN. L. REV. 513 (1982).

[379] Prior to this regulation, some agencies would entertain no tort
(Footnote Continued)

linked this description of a claim to the agencies' exercise of settlement authority under Section 2672 of the FTCA. By recent amendment, it was made applicable also to Section 2401(b), the jurisdictional prerequisite to suit.[380]

A copy of Standard Form 95, to which the regulation makes reference, is appended to this report as Appendix A. Briefly, it calls for the claimant to identify himself or herself (or for his or her representative to do so), provide minimal personal information (age, marital status and employment), identify the place and time of the incident, describe all known facts and circumstances surrounding the loss including its cause, identify the persons and property involved, report the nature and extent of the damage or injury, provide the names and addresses of witnesses, and state a separate amount of damages for property damage, personal injury and wrongful death. Besides calling for details of insurance coverage and action, it requests substantiation of the claim, including a full written report by the attending physician and itemized bills for medical, hospital and burial expenses (in the case of claims for personal injury or death) and either signed receipted bills or two estimates of repair, or detailed information on value where repair is not economically feasible (in the case of claims for damage to property). The form, which must be dated and signed, recites that the claimant "agree[s] to accept said amount in full satisfaction and final settlement of this claim." Standard Form 95 may be obtained from the legal department of virtually every federal agency and at most post offices.

Beyond the bare definition of a claim in Section 14.2(a) and the apparent incorporation by reference of the elements of Standard Form 95, the regulations provide for each basic category of claim -- death, personal injury, property damage -- the evidence or information that the claimant "may be required to submit."[381] For death claims, this includes evidence of death, employment and earnings, survivors, and dependents' support, health at the time of death, medical and burial bills, and the decedent's condition in the interval between injury and death.[382] Personal injury claimants may be required to provide doctors'

(Footnote Continued)
claim not filed on Standard Form 95, and the courts occasionally supported them. Johnson v. United States, 404 F. 2d 22, 24 (5th Cir. 1968). The rule is otherwise today. Crow v. United States, 631 F.2d 28, 30 (5th Cir. 1980).

[380] On the possible significance of this amendment, see text at notes 427-28 infra.

[381] 28 C.F.R. § 14.4 (1983).

[382] "Death. In support of a claim based on death, the claimant may be required to submit the following evidence or information: (1) An authenticated death certificate or other competent evidence showing
(Footnote Continued)

reports, itemized bills, and evidence of anticipated medical expenses and loss of income, and in addition submit to a physical or mental examination by a government physician.[383] For property damage claims, the agency may request proof of ownership, itemized repair bills or

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(Footnote Continued)
cause of death, date of death, and age of the decedent. (2) Decedent's employment or occupation at time of death, including his monthly or yearly salary or earnings (if any), and the duration of his last employment or occupation. (3) Full names, addresses, birth dates, kinship, and marital status of the decedent's survivors, including identification of those survivors who were dependent for support upon the decedent at the time of his death. (4) Degree of support afforded by the decedent to each survivor dependent upon him for support at the time of his death. (5) Decedent's general physical and mental condition before death. (6) Itemized bills for medical and burial expenses incurred by reason of the incident causing death, or itemized receipts of payment for such expenses. (7) If damages for pain and suffering prior to death are claimed, a physician's detailed statement specifying the injuries suffered, duration of pain and suffering, any drugs administered for pain, and the decedent's physical condition in the interval between injury and death. (8) Any other evidence or information which may have a bearing on either the responsibility of the United States for the death or the damages claimed." 28 C.F.R. § 14.4(a) (1983).

[383] "Personal Injury. In support of a claim for personal injury, including pain and suffering, the claimant may be required to submit the following evidence or information: (1) A written report by his attending physician or dentist setting forth the nature and extent of the injury, nature and extent of treatment, any degree of temporary or permanent disability, the prognosis, period of hospitalization, and any diminished earning capacity. In addition, the claimant may be required to submit to a physical or mental examination by a physician employed by the agency or another Federal agency. A copy of the report of the examining physician shall be made available to the claimant upon the claimant's written request provided that he has, upon request, furnished the report referred to in the first sentence of this paragraph and has made or agrees to make available to the agency any other physician's reports previously or thereafter made of the physical or mental condition which is the subject matter of his claim. (2) Itemized bills for medical, dental, and hospital expenses incurred, or itemized receipts of payment for such expenses. (3) If the prognosis reveals the necessity for future treatment, a statement of expected expenses for such treatment. (4) If a claim is made for loss of time from employment, a written statement from his employer showing actual time lost from employment, whether he is a full or part-time employee, and wages or salary actually lost. (5) If a claim is made for loss of income and the claimant is self-employed, documentary evidence showing the amounts of earnings actually lost. (6) Any other evidence or information which may have a bearing on either the responsibility of the United States for the personal injury or the damages claimed." 28 C.F.R. § 14.4(b)(1983).

estimates, purchase price and date, and salvage value.[384] As a later section of this report indicates,[385] litigants have come to contest not so much the authority of agencies to request supplementary information as the effect of noncompliance.

The regulations conclude with an invitation to the agencies "to issue regulations and establish procedures consistent with [these] regulations."[386] In fact, most agency regulations do not significantly expand on the definition of a claim or on the categories of evidence or information that a claims officer may request.

D. The Requirement of a Sum Certain

The regulatory requirement that claimants state a claim for damages in a sum certain has generated very little controversy as a matter of principle, but no small amount of litigation as applied. Though the FTCA does not by its terms impose the requirement, virtually every court called upon to address the question seems to agree that the Attorney General has a sound statutory basis for doing so.[387] The requirement is variously justified as useful in implementing the statutory provisions to the effect that the Attorney General approve any award in excess of $25,000[388] and that suit under the FTCA generally not be brought for any sum in excess of the amount of the claim presented to the agency;[389] it also facilitates any internal agency delegations of settlement authority that may exist. The requirement certainly does no violence to legislative history or to a common sense understanding of the term

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[384] "Property Damage. In support of a claim for injury to or loss of property, real or personal, the claimant may be required to submit the following evidence or information: (1) Proof of ownership. (2) A detailed statement of the amount claimed with respect to each item of property. (3) An itemized receipt of payment for necessary repairs or itemized written estimates of the cost of such repairs. (4) A statement listing date of purchase, purchase price and salvage value, where repair is not economical. (5) Any other evidence or information which may have a bearing on either the responsibility of the United States for the injury to or loss of property or the damages claimed." 28 C.F.R. § 14.4(c) (1983).

[385] See text at notes 406-468, infra.

[386] 28 C.F.R. § 14.11 (1983).

[387] Erxleben v. United States, 668 F. 2d 268, 271 (7th Cir. 1981); Molinar v. United States, 515 F. 2d 246, 248-49 (5th Cir. 1975); Caton v. United States, 495 F. 2d 635, 637-38 (9th Cir. 1974); Avril v. United States, 461 F.2d 1090, 1091 (9th Cir. 1972); Bialowas v. United States, 443 F. 2d 1047, 1050 (3d Cir. 1971).

[388] 28 U.S.C. § 2672 (Supp. 1983).

[389] Id. § 2675(b).

"claim,"[390] and cannot help but expedite the settlement process. I suspect, as a practical matter, that few agency claims officers would consider making a settlement offer anyway without a prior demand for damages in a stated amount.

On the other hand, little can be said in favor of abolishing the sum certain requirement. The only serious complaint I have heard is that it encourages claim inflation.[391] Actually, the charge is more appropriately leveled not at the sum certain requirement, but at the underlying statutory rule barring a litigant, absent newly discovered evidence or intervening facts, from seeking higher damages in court than at the agency level. The wisdom of that rule may be open to question, but once accepted, the sum certain rule all but follows.

A study of the decided cases suggests that the requirement does not catch many claimants completely unawares or cause the courts, in the event of a contest over the issue, very much trouble in distinguishing a certain[392] from an uncertain[393] sum. If a claim does lack a sum

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[390] Avril v. United States, supra note 387, at 1091.

[391] Zillman, supra note 1, at 973. Certain agency claims attorneys voiced this complaint.

[392] E.g., Erxleben v. United States, supra note 387, at 273 (personal injury claim for "$149.42 presently"); Insurance Co. of North America v. United States, 561 F. Supp. 106, 117 (E.D. Pa. 1983) ("approximately $170,000 in face amount" of bearer bonds); Industrial Indem. Co. v. United States, 504 F. Supp. 394, 397 (E.D. Cal. 1980) (qualified reference to a $560 claim); Fallon v. United States, 405 F. Supp. 1320, 1322 (D. Mont. 1976) ("approximately $15,000.00"); Walley v. United States, 366 F. Supp. 268 (E.D. Pa. 1973) ("approximate[ly] $100,000.00"). A fair number of courts have deemed the requirement met by bills, repair costs or other statements of value found in supporting documents. Crow v. United States, 631 F. 2d 28, 30 (5th Cir. 1980); Molinar v. United States, supra note 387, at 249; Lester v. United States, 487 F. Supp. 1033, 1038 (N.D. Tex. 1980); Boyd v. United States, 482 F. Supp. 1126, 1129 (W. D. Pa. 1980); Mack v. USPS, 414 F. Supp. 504, 506 (E. D. Mich. 1976). Contra Hlavac v. United States, 356 F. Supp. 1274, 1276 (N.D. Ill. 1972).

[393] E.g., Keene Corp. v. United States, 700 F.2d 836, 842 (2d Cir. 1983) ("$1,088,135 and . . . an additional amount yet to be ascertained"); Caton v. United States, supra note 387, at 638 ("Unknown at this time"); Bialowas v. United States, supra note 387, at 1050 ("neck, chest and right arm"); Robinson v. United States, 563 F. Supp. 312, 313 (W.D. Pa. 1983) ("amount undetermined"); Cooper v. United States, 498 F. Supp. 116, 118 (W.D. N.Y. 1980) ("Pending No Fault Benefits"); Raymond v. United States, 445 F. Supp. 740, 741 (E.D. Mich. 1978) ("in excess of $50,000.00"); DeGerena v. United States, 398 F.

(Footnote Continued)

certain, claims officers usually point out the deficiency.[394] To a one, those I happened to interview reported doing so. In fact, most also relate back the claim as amended to the date originally filed where necessary to avoid a time bar,[395] though neither Justice Department nor agency regulations give them any inkling that it is proper to do so. Only claimants genuinely at a loss in quantifying their claim will in the end be put to trouble in contriving a figure. That figure may well prove, as is often alleged, to be inflated. But, given the pattern of frequent and open exchange that characterizes the administrative settlement process in most agencies, usually the claims officer will soon enough know whether claim inflation stems from honest uncertainty on the part of a claimant or from tactical considerations.

If the sum certain requirement could be shown to prejudice claimants significantly, I would urge its reconsideration, for in the final analysis the absence of a sum certain cannot be said to prevent an agency from conducting an investigation or assessing damages, provided the claimant has otherwise furnished sufficient factual information. However, in the absence of that showing, the convenience of a sum certain to the agencies and its overall consistency with the statutory scheme of the FTCA persuade me that the Justice Department should retain the requirement and the courts enforce it as they have.

This having been said, my reading of the cases and discussions with claims officers also persuade me that three limited reforms of agency practice should be made with respect to the sum certain requirement.

(Footnote Continued)
Supp. 93, 94 (D. P.R. 1975) ("on treatment"); Robinson v. United States Navy, 342 F. Supp. 381, 383 (E.D. Pa. 1972) ("2,135.45 plus personal injury"). Some claims do not recite even the semblance of a sum certain. Benitez v. Presbyterian Hosp., 539 F. Supp. 470, 472 (D. P.R. 1982).

[394] Melo v. United States, 505 F. 2d 1026, 1027 (8th Cir. 1974); Bialowas v. United States, supra note 387, at 1048; Robinson v. United States Navy, supra note 393, at 383.

[395] For a case requiring the agency to relate the delayed furnishing of a sum certain back to the original claim lacking it, see Apollo v. United States, 451 F. Supp. 137, 139 (M.D. Pa. 1978). Most courts have refused to do so. Allen v. United States, 517 F. 2d 1328, 1329 (6th Cir. 1975); Cooper v. United States, supra note 393, at 118; Jordan v. United States, 333 F. Supp. 987, 990 (E.D. Pa. 1971), aff'd mem., 474 F.2d 1340 (3d Cir. 1973).

In Williams v. United States, 693 F.2d 555, 558 (5th Cir. 1982), the appeals court required that the sum certain be related back to the original filing, but its position was eased by the fact that claimant, even before filing an administrative claim, had brought suit in state court against the driver individually with a full description and itemization of damages. Contra Gonzales v. USPS, 543 F. Supp. 838 (N.D. Cal. 1982).

First, in view of the singular importance placed on the statement of a sum certain, I strongly urge that both the regulations and Standard Form 95 be amended specifically to advise claimants that a precise damages figure for all categories of claims is essential to their validity for all purposes, including the jurisdictional prerequisite to suit.[396] In fact, since claimants do not invariably consult the regulations or use Standard Form 95, agencies should advise individual claimants promptly if their claim lacks a sum certain and warn them in unmistakable terms that the failure to provide one by a given date will disqualify the claim from agency and possibly court consideration. The regulations currently require no measures of the sort and the courts for the most part have not presumed to do so either.

Second, the Justice Department should adopt a uniform policy on the question whether the subsequent supply of a sum certain relates back in time to the initial filing. At the moment, both the agencies[397] and the courts[398] appear to be divided. If, as I suspect the Justice Department would prefer, no relation back is to take place, then once again the regulations and, more important, Standard Form 95 should make this abundantly clear,[399] as should claims officers in any correspondence with a claimant or his or her attorney over the sufficiency of a claim. However, a better policy -- in light of the fact that the Attorney General rather than Congress actually has imposed the sum certain requirement -- would be to advise claimants specifically when a claim lacks a sum certain, state unmistakably the consequences of failing to supply one, and give them a reasonable length of time without prejudice in which to do so.

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[396] A few courts have expressed muted displeasure at the silence, particularly of Standard Form 95, on these points. Molinar v. United States, supra note 387, at 249; Jordan v. United States, supra note 395, at 988. Standard Form 95 appears to have been revised, perhaps in response to these concerns, to call some attention to the issue. The final instruction, in small print on the reverse of the form, states that "[f]ailure to completely execute this form or to supply the requested material within two years from the date the allegations accrued may render your claim 'invalid.'" With all respect, such boiler plate fails to communicate the particular rigors of the sum certain requirement and, more important, the consequences of an "invalid" claim.

[397] For example, the Assistant Legal Adviser at the State Department reports relating back the late statement of a sum certain, but Veterans Administration attorneys report not doing so, though they will use the telephone rather than the mails for communications with the claimant in order to meet a fast-approaching deadline and also may relax the rules on place of filing.

[398] See supra note 395.

[399] The instruction on the reverse side of Standard Form 95, referred to supra note 396, fairly states that an agency might choose not to relate back the delayed submission of a sum certain. But it still leaves unclear the consequences of an "invalid" claim.

Third and last, agencies should discontinue the practice of refusing to entertain a property damage claim supported by a sum certain and otherwise sufficient, simply because the personal injury or death claim arising out of the same incident and filed on the same form remains unquantified. If claims officers are truly forthcoming in discussing with claimants the significance of the sum certain requirement, the situation can mostly be avoided. Where it can not, the agencies should simply consider the death or personal injury claim surplusage and proceed with the property damage claim as stated. The courts have not required them to do so,[400] but the Attorney General should.

As observed a moment ago, a claimant may not sue for damages in excess of the amount sought from the agency unless the increase is based on "newly discovered evidence not reasonably discoverable at the time of presenting the claim . . . or upon allegation and proof of intervening facts, relating to the amount of the claim."[401] The question how these

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[400] Allen v. United States, 517 F.2d 1328, 1329 (6th Cir. 1975); Robinson v. United States Navy, supra note 393, at 383.

[401] 28 U.S.C. § 2675(b) (Supp. 1983). The stated ceiling on damages dates back to the original Act in which filing an administrative claim was optional. Legislative Reorganization Act of 1946, supra note C 1, § 410(b). The rationale, to gauge by the scant legislative history, was that "otherwise a claimant would stand only to gain by pursuing both the administrative and judicial remedies." Hearings on S. 2221 Before the Senate Judiciary Comm., 77th Cong., 2d Sess. (1942) (unpublished statement of Assistant Attorney General Francis M. Shea), quoted in Gottlieb, The Federal Tort Claims Act: A Statutory Interpretation, 35 GEO. L. J. 1, 24 n. 71 (1946).

For some general observations on the provision, see Zillman, supra note 336, at 991. The burden of proof on the question whether the conditions for seeking a higher sum are met predictably rests on the claimant. Bonner v. United States, 339 F. Supp. 640, 650 n.5 (E.D. La. 1972). For examples of cases in which recovery in excess of the amount claimed administratively was had on the basis of newly discovered evidence, see Husovsky v. United States, 590 F. 2d 944, 954-55 (D.C. Cir. 1978); Molinar v. United States, supra note 387, at 249; Campbell v. United States, 534 F. Supp. 762, 766 (D. Hawaii 1982); Joyce v. United States, 329 F. Supp. 1242, 1247-48 (W. D. Pa. 1971), vacated on other grounds, 474 F. 2d 215 (3d Cir. 1973). In Kielwein v. United States, 540 F. 2d 676, 680 (4th Cir.), cert. denied, 429 U.S. 979 (1976), however, a district court judgment substantially in excess of the administrative claim was reduced to the amount of that claim on the ground that plaintiff was in fact sufficiently apprised of the nature and extent of her injuries at the time she filed it. Accord Schwartz v.

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twin exceptions to the rule should be understood and applied quite obviously falls to the courts and, happily, beyond the scope of this inquiry into agency practice. On the other hand, the existence of the ceiling itself is something of which all claimants, particularly those who are unrepresented,[402] should be made aware early in the administrative claim procedure. At a minimum, both the Attorney General's regulations and Standard Form 95 should contain a conspicuous alert, as they currently do not, since the omission truly constitutes a trap for the unwary. But I would also have claims officers caution claimants on an individual basis, as appropriate, for evidently some claimants genuinely believe they can freely reserve the right to present additional bills to the agencies as they come in.[403]

Apart from invoking the exceptions for newly discovered evidence or intervening facts, claimants may also cope with this statutory ceiling on damages by amending the claim while still in administrative channels. Though the FTCA itself does not address the question, the Attorney General's regulations provide that a claim "may be amended by the claimant at any time prior to final agency action or prior to the exercise of the claimant's option [to sue after six months]."[404] The sum certain should be no less freely amendable than any other element of the claim.

Amending a claim entails only one conceivably adverse effect for a claimant, namely, the automatic renewal, as of the date of amendment, of the six-month period during which the agency may evaluate the claim and during which the claimant may not sue.[405] Arguably, some amendments, even in the damages figure, may be so minor as not to warrant a six-month extension. But to prescribe a variable set of extension

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United States, 446 F.2d 1380, 1382 (3d Cir. 1981); Nichols v. United States, 147 F. Supp. 6, 10 (E.D. Va. 1957).

[402] Even some attorneys not versed in the FTCA may wrongly assume that the liberal policy of the Federal Rules of Civil Procedure on the amendment of pleadings applies with full force. FED. R. CIV. P. 15(b) (1981). See Corboy, supra note 336, at 69.

[403] For an example, see Odin v. United States, discussed text at notes 495-502, infra.

[404] 28 C.F.R. § 14.2(c) (1983). The regulation further requires that the amendment be in writing and be signed by the claimant or his or her representative.

[405] Id. A claimant, for this reason, may pass up the opportunity to amend the claim and simply seek a higher sum in subsequent litigation on a showing of newly discovered evidence. A court has recently held that claimants are not obligated to amend a pending administrative claim to reflect evidence discovered after its initial presentation. McCormick v. United States, 539 F. Supp. 1179, 1184 n.2 (D. Colo. 1982).

periods to reflect the substantiality of any given amendment, assuming the latter can be measured, is obviously impractical; leaving the period of extension indeterminate would be still worse. A bright-line six-month rule is optimal.

E. The Substantiation Problem

If the FTCA does not as such call for inclusion of a sum certain as an element of a valid claim, it says nothing at all about having to document or substantiate the claim. Regulations of the Justice Department and of specific agencies, however, do appear to impose that requirement. I referred earlier to the long list of evidence or information that the claimant "may be required to submit."[406] The same regulations also contain a catchall provision to the effect that claimants "may be required to submit . . . [a]ny other evidence or information which may have a bearing on either the responsibility of the United States for death [or personal injury, or injury to or loss of property] or the damages claimed."[407] How obligatory these demands are, or are meant to be, is a question I shall raise shortly. Suffice it to say that agencies purport to "require" substantiation of that kind and, in its absence, to regard a claim as invalid for all purposes. As noted,[408] Standard Form 95, on which claimants are urged though clearly not required to present their claims, contains spaces for various kinds of pertinent information and directs claimants to attach specified evidence in support of their claims; the reverse side advises that failure to supply the requested material within two years of the incident may render a claim "invalid."[409]

The threshold informational demands of the agencies raise subtle legal and policy questions, have generated substantial litigation, especially of very recent years,[410] and have divided the courts and commentators. That the prior claim requirement should itself produce extensive litigation frustrates to an extent one of the basic purposes -- litigation avoidance -- that the requirement and the FTCA amendments which introduced it were meant to serve. Doubtless, some claimants and claimants' attorneys are needlessly unresponsive to agency demands for information, but just as clearly some government attorneys view the satisfaction or nonsatisfaction of their demands as but another, only richer, litigable issue under the FTCA.

(i) The Government View

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[406] See supra notes 389-91 and accompanying text.

[407] 28 C.F.R. §§ 14.4 (a)(8), (b)(6), (c)(5) (1983).

[408] See text at notes 380-81, supra.

[409] See supra note 396.

[410] See supra note 336.

Before looking at the cases, I shall consider certain problems that arise under the substantiation requirements on their face. According to one critique, the regulations fail to advise claimants adequately about the information an agency is authorized to demand.[411] Reference to "[a]ny other evidence or information which may have a bearing on either the responsibility of the United States . . . or the damages claimed" is condemned as impermissibly broad. In fact, I find it difficult to see how any guide to settlement of the generality of tort claims by the generality of agencies can avoid generalities. True, agencies may occasionally call for tangential information simply because it "may have a bearing" on a claim, but relevant information ought to be within their reach even if it is in some larger sense tangential, provided it is not privileged. Significantly, I know of no case in which a claimant has challenged a particular request specifically for its vagueness or overbreadth.

If there is ambiguity in the regulations, it lies in the phrase, "the claimant may be required." Does the Justice Department mean that failure to furnish the information requested renders the claim invalid for purposes of satisfying the prerequisite to suit, or at most makes it unlikely that the agency will settle the claim? To be sure, the ultimate question is not how "mandatory" the Attorney General intended his regulations to be, but how "mandatory" Congress intended that he make them. In some sense, the ambiguity is attributable to Congress, and the ambiguity in the term "may be required" only mirrors it. Still, what do the substantiation requirements, on their own terms, mean? One court, emphasizing the term "required," favored a strict interpretation;[412] another, stressing the "may," favored a looser one.[413] Conceivably, the Attorney General simply wanted the agencies to have, and know they have, the authority to make documentary demands in aid of their settlement efforts. Certainly the definition of a valid claim at the outset of the regulations -- "written notification of an incident, accompanied by a claim for money damages in a sum certain"[414] -- suggests there is nothing more to it than that. But I do not think that view of the regulations stands up to scrutiny. Semantics apart, the instructions for completing Standard Form 95, which claimants are told may be used in filing a claim, fairly state that failure to supply requested material on a timely basis may compromise the claim's validity.[415]

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[411] Note, Claim Requirements of the Federal Tort Claims Act: Minimal Notice or Substantial Documentation?, 81 MICH. L. REV. 1641 (1983).

[412] Kornbluth v. Savannah, 398 F. Supp. 1266, 1268 (E.D. N.Y. 1975).

[413] Tucker v. USPS, 676 F. 2d 954, 957 (3d Cir. 1982).

[414] 28 C.F.R. § 14.2(a) (1983).

If this reading of government policy is correct, the question remains whether it has been communicated effectively to the public. Apart from their being less than conspicuously placed on Standard Form 95, the instruction and warning do not quite convey the force of the government's demands. They state only that the amounts claimed "should" be substantiated, and they suggest that nondocumentation "may render [a] claim 'invalid,'" without telling a layman what that means. More basically, Standard Form 95 is simply not the required vehicle for submitting claims under the FTCA. Thus, neither its spaces for the supply of information nor its instructions to substantiate constitute effective notice of what the agency requires by way of a claim. Certainly where a claimant has not used Standard Form 95, claims officers should feel duty bound to bring its apparent demands specifically to his or her attention before attempting to enforce them. This is especially so because, as noted,[416] the regulations do not clearly couch the validity of a claim in terms of its documentation, and the statute itself most certainly does not.

So much for the regulations on their face and for the probable intent behind them. What of the FTCA itself and the policies that prompted Congress to amend it in 1966? These, in the final analysis, should guide the courts in whose laps the controversies are falling.

(ii) The Judicial Response

The problem generally arises when a claimant refuses or otherwise fails to provide some or all of the specified information requested by the claims officer in charge, who thereupon concludes that no valid claim has been filed. Typically, the officer will deny the claim, often for that stated reason; but he or she also may deny the claim on the merits or even simply ignore it. Upon the claimant's subsequent suit, the issue invariably resurfaces with a motion by the government to dismiss the complaint for lack of subject matter jurisdiction on the ground that no prior claim had been presented to the agency,[417] and to do so with prejudice if two years have by that time elapsed since the claim accrued.[418] The court will be reminded that the prior claim requirement, being a condition upon which the sovereign has consented to be sued, cannot be waived,[419] and being jurisdictional, may be raised at any time by the government or by the court sua sponte.[420] Each case, of course, presents a unique set of circumstances. The claims will be different. The claimants will have had quantitatively and qualitatively different exchanges with the agency. And different kinds and amounts of information will already have been supplied when the impasse occurs. Still, out of more than a decade of litigation over the issue, only two broadly different judicial responses have emerged.

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[415] See supra notes 396 and 399, and accompanying text. On the tension between Standard Form 95 and the regulations taken as a whole, see Note, supra note 411, at 1654 n. 68. The regulations of specific agencies may echo the theme that compliance with informational requests is essential to the claim's validity. Postal Service regulations state: "In order to exhaust the administrative remedy provided, a claimant shall submit substantial evidence to prove the extent of any losses incurred and any injury sustained so as to provide the Postal Service with sufficient evidence for it to properly evaluate the claim." 39 C.F.R. § 912.8 (1983).

[416] See text at notes 406-410, supra.

According to one view, a claimant must provide the agency with sufficient information to enable it to evaluate and settle the claim, or else there has simply been no valid administrative claim.[421] In what has become the leading case, Swift v. United States,[422] the claimant filed with the United States Forest Service a claim on Standard Form 95 seeking damages of two million dollars for personal injuries, the wrongful death of her husband and loss of consortium, all arising out of an automobile accident involving an agency employee. Wholly ignoring the agency's repeated requests over more than a year for documentation of the alleged personal injuries, the claimant took the position that the passage of more than six months since the filing without a final agency decision on the merits entitled her to sue. That she did, seeking two million dollars for wrongful death and loss of consortium alone. The district court dismissed the complaint for lack of jurisdiction, and the First Circuit affirmed.[423]

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[417] E.g., Erxleben v. United States, supra note 387, at 270. Alternately, the objection may be framed in terms of a failure to exhaust administrative remedies. Crow v. United States, supra note 392, at 28, 30.

[418] Cooper v. United States, supra note 393, at 117-18; Robinson v. United States Navy, supra note 393, at 383.

[419] Bialowas v. United States, supra note 387, at 1048-49.

[420] FED. R. CIV. P. 12(h)(3) (1981). The cases have so held. Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir. 1983) Lien v. Beehner, 453 F. Supp. 604, 605 (N.D. N.Y. 1978); Perkins v. United States, 76 F.R.D. 593, 595 (W.D. Okla. 1976); United Missouri Bank South v. United States, 423 F. Supp. 571, 575 (W.D. Mo. 1976).

[421] Swift v. United States, 614 F. 2d 812, 814 (1st Cir. 1980); Manis v. United States, 467 F. Supp. 828, 829-30 (E.D. Tenn. 1979); Founding Church of Scientology v. Director, FBI, 459 F. Supp. 748, 757-58 (D.D.C. 1978); Cummings v. United States, 449 F. Supp. 40, 42 (D. Mont. 1978); State Farm Mut. Auto. Ins. Co. v. United States, 446 F. Supp. 191, 192 (C.D. Cal. 1978); Rothman v. United States, 434 F. Supp. 13, 16-17 (C.D. Cal. 1977); Mudlo v. United States, 423 F. Supp. 1373, 1377 (W.D. Pa. 1976); Kornbluth v. Savannah, 398 F. Supp. 1266, 1267-68 (E.D. N.Y. 1975), Robinson v. United States Navy, supra note 393, at 383.

[422] 614 F. 2d 812 (1st Cir. 1980).

The First Circuit placed emphasis upon the Justice Department regulations authorizing agencies to call for the documentation of administrative claims, and on the agency's own regulations implementing them.[424] According to the court, as long as the information said to be needed is not forthcoming, the agency may properly consider the claim as not having been filed.[425] Not only does the agency then have no obligation to respond, but a court is without jurisdiction to hear the case as the jurisdictional prerequisite of a prior claim remains unsatisfied. Before Swift, most rulings on the sufficiency of the prior administrative claim as such went to the question whether a sum certain had been stated.[426] But unlike the sum certain requirement which, as I have earlier suggested, is fairly implied by the statute as well as inherently manageable, the substantiation requirement both stems from the Attorney General's regulations and lends itself to considerable and prolonged wrangling.

An important difficulty with the court's reasoning in Swift -- recognized by a growing number of decisions and the majority of commentators[427] -- is that the Justice Department apparently promulgated these regulations pursuant to Section 2672 of the Act, the provision conferring substantive settlement authority on the agencies, rather than Section 2675(a), the provision which makes the filing of an administrative claim a prerequisite to suit. Thus, the substantiation provisions guide agencies in getting a claim settled at the administrative level; they do not determine whether the claim meets the exhaustion requirement if it is not. Since the Swift decision, the Justice Department has amended Section 14.2 of the regulations to state that its definition of a claim applies as much to the jurisdictional question as it does to the question of agency settlement authority. One problem with this expedient is that the claim requirements of Section 14.2 are essentially uncontroversial. The more troublesome Section 14.4, with its sweeping potential for informational demands, contains no such reference.

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[423] The district court dismissed the complaint without prejudice, however, because it interpreted the agency warning as suspending the statute of limitations. 614 F. 2d at 815 n.3. If the court had not done so, the statue of limitations would have run and the claim would have been barred.

[424] 614 F. 2d at 814.

[425] Id.

[426] See cases cited supra notes 387, 390, 392-395.

[427] Note, Federal Tort Claims Act Administrative Claim Prerequisite, 1983 ARIZ. ST. L. J. 173, 188 (1983); Note Federal Tort Claims Act: Notice of Claim Requirement, 67 MINN. L. REV. 513, 520 (1982); Comment, The Art of Claimsmanship: What Constitutes Sufficient Notice of a Claim under the Federal Tort Claims Act?, 52 U. CIN. L. REV. 149, 164 (1983). But see Note, Claim Requirements of the Federal Tort Claims Act: Minimal Notice or Substantial Documentation?, 81 MICH. L. REV. 1641 (1983).

The more basic difficulty, though, is that Congress probably gave the Attorney General rulemaking authority only for purposes of organizing agency settlement activity, not for purposes of controlling access to the courts. I, for one, would not lightly conclude that Congress in effect delegated to him, and indirectly to the agencies, the power to regulate the jurisdiction of the federal courts. If I am correct, a claimant who fails to document his or her claim may be unlikely to win an agency-level settlement, but does not thereby necessarily forfeit the right to sue.[428]

In all fairness, the Swift opinion does not turn entirely on a mechanical application of Justice Department or agency regulations on the documentation of claims. It is also informed by substantial policy considerations favoring the disposition of claims at the agency level where possible. Swift properly emphasized the connection between an adequate presentation of the claim to the agency and the agency's ability to evaluate it and possibly settle it at an early stage, as Congress intended.[429] Needless to say, most agency claims officers warmly welcome the support that Swift gives them, praising the decision less for its doctrinal correctness than for its practical contribution to their basic capacity to settle claims.

A second approach, more recently to emerge, would require the claimant, for purposes of satisfying the jurisdictional prerequisite, simply to provide the agency with sufficient information to enable it to investigate the claim.[430] This has come to be known as the minimal notice standard.[431] In the widely-cited case of Adams v. United States,[432] for example, the claimants filed an administrative claim arising out of the alleged medical malpractice of Air Force physiciams in prenatal care and delivery, resulting in severe brain damage to their child. After partial compliance with an Air Force request for medical reports and expense records,[433] and after the lapse of over six months, the claimants brought suit. Concluding from their failure to comply with all the government's requests for substantiation that no sufficient administrative claim had been filed, the district court dismissed the action on jurisdictional grounds.

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[428] Many agencies simply would have denied the claim on the merits rather than question its legal sufficiency. Even so, the government might be expected in subsequent litigation to deny that a valid claim had ever been filed. For an instance, see Rothman v. United States, supra note 82, at 14. On Justice Department strategy on this issue generally, see text at notes 483-84, infra .

[429] 614 F.2d at 814, quoting Kornbluth v. Savannah, supra note 421, at 1268. For similar reasons, a claim must be reasonably precise and intelligible. Keene Corp. v. United States, 700 F.2d 836, 842 (2d Cir. 1983).

The Fifth Circuit reversed and remanded, holding that Section 2675(a), the prior claim requirement, as such demands no more than that the claimant give sufficient written notice of the claim to enable the agency to conduct an investigation, and also place a value on the claim.[434] The court was persuaded by the legislative history of the 1966 amendments that Congress intended through Section 2675 to demand only the kind of notice that states and municipalities traditionally require of a claimant seeking compensation for a state or municipal tort, that is, notice of the approximate nature and circumstances of the injury, together with a claim for money damages, and not substantiation of the claim on the merits as such.[435] The regulations, in turn, received a narrow interpretation, as applicable to Section 2672 but not Section 2675.[436] Thus, although the agency might have felt that it lacked, and in fact have lacked, sufficient information to settle the claim under Section 2672, the Adamses may have presented sufficient notice of the incident to satisfy Section 2675. Said the court, "[e]quating these two very different sets of requirements leads to the erroneous conclusion that claimants must settle with the relevant federal agency, if the agency so desires, and must provide that agency with any and all information requested in order to preserve their right to sue."[437] Furthermore, while the court joined earlier decisions in making a claim's validity conditional on the statement of a sum certain,[438] it did not rely upon the regulations to reach that result.[439] It simply believed that the requirement, in combination with the court's minimal notice standard, would promote the fair treatment of claimants without unduly prejudicing the prelitigation settlement of claims.[440]

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[430] Bush v. United States, 703 F. 2d 491, 494 (11th Cir. 1983); Avery v. United States, 680 F.2d 608, 611 (9th Cir. 1982) (calling only for "notice of the manner and general circumstances of injury and the harm suffered, and a sum certain representing damages"); Tucker v. USPS, 676 F.2d 954, 959 (3d Cir. 1982); Adams v. United States, 615 F. 2d 284, 289, on rehearing, 622 F.2d 197 (5th Cir. 1980); Reynoso v. United States, 537 F. Supp. 978 (N.D. Cal. 1982); Hoaglan v. United States, 510 F. Supp. 1058, 1061 (N.D. Iowa 1981). See also Erxleben v. United States, supra note 387, at 273, finding 28 C.F.R. § 14.2(a) applicable to defining a claim under Section 2675, but rejecting any "regulatory checklist" of jurisdictional prerequisites. The matter apparently remains unsettled in the other circuits.

[431] Note, Federal Tort Claims Act Administrative Claim Prerequisite, 1983 ARIZ. ST. L. J. 173, 180 (1983).

[432] 615 F.2d 284, on rehearing, 622 F.2d 197 (5th Cir. 1980).

[433] The exchange between claimants and agency was more complex than in the Swift case. Claimants had filed a Standard Form 95 with a sum certain, but did not furnish some of the requested supporting documentation and failed to provide information regarding future expenses. They evidently contended that the Air Force already possessed or had access to much of the information demanded. There also seems to have been some misunderstanding over what the claims officer actually wanted by way of substantiation. But the district court, considering these nuances irrelevant, ruled that claimants, in order to perfect their claim, were bound to inform the agency that they had no unreported medical expenses, if indeed they had none, and to provide an estimate of future medical expenses. Note that the claimants in the leading cases in other circuits adopting the Adams view did not contend that the agency already had the information sought.

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[434] 615 F.2d at 289. The court apparently did not attach any importance to claimant's contention that the Air Force already had or had access to the additional information sought.

[435] "Congress deemed this minimal notice sufficient to inform the relevant agency of the existence of a claim." 615 F.2d at 289. See also Avery v. United States, 680 F.2d 608, 610-11 (9th Cir. 1982), quoting 17 E. McQUILLAN, MUNICIPAL CORPORATIONS § 4807 (3d ed. 1968), itself quoted in the legislative history of the 1966 Amendments.

The District of Columbia Code provision, cited specifically by the House Committee on the Judiciary with favor, requires by way of notice a document containing a claim for money damages and stating "the approximate time, place, cause, and circumstances of the injury or damage." D.C. CODE ENCYCL. §§ 1-923, 12-309 (West 1966).

However, the Adams court may have placed undue reliance on the references in legislative history to the simple notice of claim provisions in existing state and municipal claims statutes. Those references were made not for purposes of defining the contours of a valid claim, but to justify introducing the prior claim requirement as such into the FTCA in the first place. S. REP. NO. 1327, 89th Cong., 2d Sess. 3-4 (1966), quoting from H.R. REP. NO. 1532, 89th Cong., 2d Sess. (1966), and reprinted in 1966 U.S. CODE CONG. & AD. NEWS 2517-18. See Note, Claims Requirements of the Federal Tort Claims Act: Minimal Notice or Substantial Documentation?, 81 MICH. L. REV. 1641, 1648-49 (1983).

[436] 615 F. 2d at 288. In Tucker v. USPS, supra note 430, which adopted the Adams reasoning verbatim, the court was satisfied by full compliance with Section 14.2 of the regulations, notably the filing of a complete Standard Form 95. Failure to supply supporting documentation -- mostly itemized bills -- upon request by a Postal Service inspector pursuant to Section 14.4 did not affect satisfaction of the jurisdictional filing requirement.

Still more recently, a variation on Adams has surfaced, according to which the validity of a claim for jurisdictional purposes depends on whether or not it contains sufficient information to enable the agency to arrive at a reasonable settlement figure. This was essentially the position of the Sixth Circuit in Douglas v. United States,[441] in which the claimant likewise failed to satisfy the agency's request for certain medical reports and insurance records, and was met with an explicit agency denial on that ground. In the ensuing litigation, the appellate court joined Adams in holding Section 2675 satisfied when the claimant places a value on the claim and gives the agency sufficient written notice of the claim to conduct an investigation, but it emphasized that the claimant had also provided sufficient information to permit calculation of a reasonable settlement figure.[442] Whether Douglas indeed means to set a standard of production distinct from that laid down in Adams is not entirely clear, but, if so, it is unfortunate. Though no standard for gauging the adequacy of a claim can be perfectly objective, one geared to the agency's ability to arrive at a settlement value seems unnecessarily to court differences of opinion in its implementation.[443] By comparison, once a claimant provides a complete Standard Form 95 or its equivalent, with a description of the incident and of the injury sustained, the agency presumably can conduct an investigation. In this connection, the Ninth Circuit usefully elaborated on the Adams minimal notice standard by asking that a claim provide notice of the manner and general circumstances of the injury and the harm suffered, together with a demand for a sum certain.[444]

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[437] 615 F.2d at 290. According to a subsequent decision largely in agreement with Adams, "Section 2675(a) was not intended to allow an agency to insist on proof of a claim to its satisfaction before the claimant becomes entitled to a day in court." Avery v. United States, supra note 430, at 611.

[438] See supra note 387.

[439] 615 F. 2d at 291 n. 15.

[440] Id. at 289.

[441] 658 F.2d 445, 447-49 (6th Cir. 1981). The court also based its decision on estoppel, arguing that the agency's earlier indication that the claim contained enough information barred it from thereafter contesting its sufficiency. Id. at 449.

[442] Id. at 448-49. In reaching its decision, the court attempted to reconcile Adams with Swift on the ground that Swift and a number of earlier cases (Kornbluth and Rothman, supra note 421), notwithstanding their holdings, in fact involved allegations so conclusory that investigation and disposition of the claim was actually impossible.

(iii) An Appraisal

So far as the proper interpretation of the FTCA is concerned, Adams seems to me, on balance, the basically sounder view. Given the rather meager legislative history of the 1966 amendments, the court probably cannot be faulted for not making a more convincing case for a minimal notice standard. In the final analysis, neither text nor legislative history provides a sufficient basis for supposing that Congress intended the measure of power to force information from unwilling claimants that Swift in effect confers on them. A more probable version is that Congress thought the inherent advantages of agency level settlement -- notably, more immediate payment and avoidance of the expense and inconvenience of litigation[445] -- a sufficient incentive to cooperate, as they indeed appear to have been for the vast majority of claimants. The less cooperative, as before, would litigate, provided they had previously filed with the agency a claim meeting the minimal notice standard.[446]

Of course, that Adams more closely approximates Congress' probable intent on the substantiation issue does not necessarily mean that it establishes the soundest framework possible for resolving it. I set out briefly here what I take to be the underlying policy considerations and then suggest the solutions that most responsibly accommodate them.

I first consider the element of fairness to claimants which weighed in heavily with the Adams court and courts that have followed its lead. Taking this factor into account, as I decidedly do, requires that the claimant's interest in the tort settlement process be accurately defined. Actually Congress did not express a very clear view of what fairness to claimants requires, and recent decisions may well have distorted the influence of this factor in the shaping of the 1966 amendments. Properly viewed, the allusion in legislative history to fairness to claimants relates not to the FTCA amendments as such, but to the overall 1966 legislative package on government litigation of which these amendments were only one part. The four bills comprising the package were reported to "have the common purpose of providing for more fair and equitable treatment of private individuals and claimants when they deal with the Government or are involved in litigation with their Government."[447] In fact, the other three bills in the package -- one giving agencies enhanced authority to compromise claims against private persons and to put an end to collection efforts when the debtor lacks present or prospective ability to pay,[448] another imposing a statute of limitations on government claims in contract and tort,[449] a third allowing private persons who prevail in civil actions against the government to collect costs as part of the judgment just as the government could against them in the opposite situation[450] -- do manifest an intent to put citizens on a more nearly equal footing with the government in the litigation and prelitigation context. But this concern seems much less pronounced in the specific context of the FTCA amendments. As to them, fairness simply inheres in the greater likelihood that a deserving claimant will have recovery against the government without the delay, expense and inconvenience of litigation.[451] The change was thought to be in everyone's interest.[452]

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[443] Comment, The Art of Claimsmanship: What Constitutes Sufficient Notice of a Claim under the Federal Tort Claims Act?, 52 U. CIN. L. REV. 149, 168-69 (1983).

[444] Avery v. United States, 680 F. 2d 608, 610 (9th Cir. 1982).

[445] On the advantages generally of administrative settlement in government tort claims, see 2 L. JAYSON, HANDLING FEDERAL TORT CLAIMS § 285 (1984).

[446] Reynoso v. United States, supra note 430, at 979 ("It is irrelevant for jurisdictional purposes whether plaintiff cooperated with the VA and provided all the information it requested, so long as he 'first presented' his claim to the VA, as required").

To whatever extent fairness to claimants specifically underlay the 1966 amendments, the fact remains that any sound framework for the administrative settlement of tort claims would promote that value. The challenge lies in fitting this consideration into the larger context of Congress' evident commitment to administrative settlement as an avenue of redress. Specifically, what risks do claimants run when agencies may demand proof of claim to their full satisfaction at the point of determining whether a sufficient prior claim has been filed? In the first place, if the government can demand full evidentiary documentation at this stage, it can indefinitely delay resolution of the claim both in administrative and in litigation channels for the simple reason that the six-month period which must pass before suit may be brought does not itself begin to run until a valid agency-level claim has been filed. Recent court decisions acknowledge this risk. As the Adams court put it, "[f]ederal court power [should] not depend on whether a claimant has successfully navigated his or her way through the gauntlet of the administrative settlement process, which, according to the vagaries of the claims agent, may touch picayune details, imponderable matters, or both."[453] A later decision described the rule of complete documentation as "permit[ting] federal defendants to be judge in their own cause by the initial determination of a claim's insufficiency."[454] When agencies may demand full documentation at the threshold, and also determine unilaterally what constitutes full documentation in any given case by reference to what they "need" to settle it, they acquire extraordinary control over the progress of the claim. Another concern of claimants which the courts have not identified, but which strikes me as no less significant, is that unnecessary factual disclosure may prejudice them if and when they later go to court. I explore this concern more fully shortly.

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[447] S. REP. NO. 1327, supra note 435, at 2, reprinted in 1966 U.S. CODE CONG. & AD. NEWS 2515-16.

[448] Act of July 18, 1966, Pub. L. No. 89-505, 80 Stat. 304 (1966).

[449] Act of July 18, 1966, Pub. L. No. 89-507, 80 Stat. 308 (1966).

[450] Act of July 19, 1966, Pub. L. No. 89-508, 80 Stat. 308 (1966).

[451] S. REP. NO. 1327, supra note 435, at 3, reprinted in 1966 U.S. CODE CONG. & AD NEWS 2517 ("[M]eritorious [claims] can be settled more quickly without the need for filing suit and possible expensive and time-consuming litigation."); Hearings on Improvement of Procedures in Claims Settlement and Government Litigation Before Subcomm. No. 2 of the House Comm. on the Judiciary, 89th Cong., 2d Sess. 15 (1966). ("[A claimant] could [settle] without the bother and cost of litigation."). In urging passage of the bill, the Justice Department opined that simple administrative claims might even be handled without need for counsel. Id. at 13. See Locke v. United States, 351 F. Supp. 185, 187 (D. Haw. 1972).

[452] See supra note 287.

A second set of policy considerations bearing on the substantiation problem relates to the preference for agency-level disposition of tort claims, a preference that animated the 1966 amendments in the first place. As numerous courts have found,[455] adequate supporting documentation is usually necessary in order for an agency to evaluate a claim for settlement purposes and specifically to guard effectively against a perennially suspected claim inflation.[456] Available evidence suggests that settlement of private tort claims also normally proceeds on the basis of a fuller and more detailed documentation than a minimal notice standard itself can exact.[457] The more evidence and information an agency has at its disposal, the greater its confidence both in its disposition to settle and in the precise level of recovery at which to do so. Quite obviously, the sooner a busy claims unit obtains the material necessary for determining a claim, the greater its chances of doing so within a six-month period. Against this set of considerations taken alone, a claimant who prefers to wait out the six months standing between him or her and court, tight-lipped as to the real nature and extent of injury, does not evoke a great deal of sympathy.

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[453] 615 F. 2d at 292.

[454] Avery v. United States, supra note 444, at 611.

[455] E.g. Rothman v. United States, supra note 421, at 16; Kornbluth v. Savannah, supra note 421, at 1267-68. See also Trail, Federal Tort Claims Act: Filing an Administrative Claim: A Two-Step Approach: Presentation and Substantiation, 27 JAB J. 421, 426 (1973).

[456] Note, Claim Requirements of the Federal Tort Claims Act: Minimal Notice or Substantial Documentation?, 81 MICH. L. REV. 1641, 1656 (1983).

Though others would take a different view,[458] I do not believe that the agencies alone should bear the burdens of investigating tort claims. They can appropriately ask some assistance of claimants, at least in the form of documentary production of material already in claimants' hands or readily accessible to them. To be sure, agencies are not defenseless; they always have the option of denying the tort claim on the merits and putting the claimant to establishing his or her case finally in court. But that alone scarcely ensures a substantial increase in prelitigation settlement.

Finally, an appropriate accommodation of these competing interests requires that the problem be kept in proper perspective. In a case that is truly susceptible to administrative settlement, the rational claimant normally will comply with reasonable agency requests for substantiation. Even partial disclosure, as in Adams, may provide an adequate basis for settlement. Finally, in many cases of noncompliance, administrative settlement for one reason or another is not likely anyway. Though the settlement process may founder at an early stage over the production of information, it may well be one that would only founder later. Still, ground rules, preferably ones that satisfactorily balance the competing interests at stake, may be useful for the conduct of participants in agency settlement proceedings.

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[457] Id. at 1641 n. 48, and authorities cited therein. See especially H. BAER & A. BRODER, HOW TO PREPARE AND NEGOTIATE CLAIMS FOR SETTLEMENT 91 (1973) ("It is impossible to emphasize strongly enough the role of disclosure in facilitating settlement. Free and open exchange of information generates mutual confidence, and this in turn creates the atmosphere out of which successful settlements are negotiated."); P. HERMANN, BETTER SETTLEMENTS THROUGH LEVERAGE 160 (1965) ("Probably the greatest roadblock in the way of advantageous settlement of personal injury claims is failure of the opposing sides to furnish information to each other.").

Virtually all agency claims attorneys agree. One specifically would like to see Standard Form 95 amended to require the claimant also to spell out his or her theory of liability. And most would urge that the regulations and preferably the statute be amended to clarify the obligations of claimants to supply relevant information and to negotiate in good faith.

[458] E.g., Note, Federal Tort Claims Act Administrative Claim Prerequisite, 1983 ARIZ. ST. L. J. 173, 186 (1983). See also Adams v. United States, 615 F. 2d at 289. Neither did Congress intend for claimants to bear wholly the burden of investigation. Id. at 290 n. 9.

(iv) A First Solution

I discern essentially two solutions -- one closely tracking Adams, the other requiring some radical rethinking -- that would work fair and sound results. Let me begin by rejecting a third approach, that of Swift v. United States. Giving agencies the power to prevent tort litigation from going forward by unilaterally finding insufficient disclosure by claimants simply tips the scales too heavily in their favor. To be sure, the courts ultimately will decide, if only as a matter of determining their own jurisdiction under the FTCA, whether a sufficient administrative claim has been filed. But if they conclude, as the very logic of Swift would suggest, that no claim suffices unless supplemented by the documentation that the agency declared necessary or useful to settle the case, then the agencies indeed retain the upper hand. Perhaps the courts would not uncritically endorse every agency demand for information, sanctioning it by dismissal of the case with or without prejudice, but the fact remains that Swift offers precious little assurance to this effect.

In fact, the judicial supervision necessary to ensure that agencies did not abuse the upper hand conferred by Swift would itself be intolerable. We do now see courts determine after the fact whether an agency has exceeded its bounds in demanding the substantiation of claims,[459] and anticipation of eventual judicial mediation might well induce agencies to pose demands that are exaggerated and claimants to mount resistance even to those that are not. Should the courts become mired in policing the reasonableness of agency demands in the inevitably unique circumstances of each case, Congress' desire to lessen their involvement in the resolution of government tort claims obviously will have been frustrated. That their involvement would center on opening skirmishes rather than the merits of the claim is not much consolation.[460]

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[459] See Koziol v. United States, 507 F. Supp. 87, 90-91 (N.D. Ill. 1981) ("The legislative history of the Federal Tort Claims Act amendments of 1966 does not support the judicial obeisance to administrative regulations which the government urges here and which it has successfully urged in the past.").

[460] Avery v. United States, supra note 444, at 611 ("It would . . . be an inefficient use of judicial resources to require more than a minimal notice to satisfy section 2675(a). Since the claims presentation requirement is jurisdictional, if it were interpreted to require more than minimal notice, there would be, inevitably, hearings on ancillary matters of fact whenever the agency rejected a claim as incomplete.").

A first solution, based on the Adams approach, would permit an agency to request of a claimant whatever information it supposes useful, but to hold the claim insufficient for exhaustion purposes only if it lacks either a sum certain or such content as would enable the agency to conduct an investigation. As already mentioned, a minimal notice standard essentially relies on the inherent advantages of early settlement as an incentive to claimants to be forthcoming in the substantiation of their claims. In some cases, clearly, the standard would operate to deprive the agencies of information useful and pertinent to arriving at a settlement, which may even cause some claims to go unsettled at the administrative level that might have been settled in the wake of fuller disclosure. But the recalcitrant claimant is the exception, and it may not be worth bringing him or her to heel if that means letting the agencies routinely decide for themselves whether claimants have been forthcoming enough to have earned their day in court, or systematically placing that burden on the courts. In any event, Adams does not give claimants nearly the degree of advantage that Swift gives the agencies. A claimant who exploits the minimal notice standard may get into court on the claim rather more easily than he or she could under Swift, but once there must still demonstrate its merits to the court's full satisfaction. At some point, the appropriate sanction for a claimant's lack of cooperation will simply be the greater likelihood of an agency denial on the merits,[461] the cost and inconvenience of litigation, and the risk of adverse inferences in the judicial forum.

The Adams approach does not require claims officers basically to alter the way they deal with claimants. They would find it neither very practical nor very productive to distinguish sharply in their initial correspondence with a claimant between the information necessary to constitute a sufficient claim under the minimal notice standard, on the one hand, and whatever additional information might be useful for investigation and settlement purposes, on the other. No particular good will come of communicating at the outset to a claimant the suspicion that he or she might be less than fully forthcoming in substantiating the claim. However, should their exchange reveal a pattern of serious noncooperation, the claims officer should indicate promptly and unambiguously whether he or she is inclined to view the continued nonproduction of designated information as compromising the validity of the claim as such under the minimal notice standard.[462] Where agencies

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[461] Writing just after enactment of the 1966 amendments, the then Chief of the Torts Section of the Justice Department predicted that claimants not forthcoming with information necessary for the sound evaluation of their claim would simply be met with a denial. Laughlin, Federal Tort Claims Act Amendments: A New Charter for Injured Citizens, 2 TRIAL MAG. 18, 38 (1966).

[462] Several agencies -- NASA and the VA are two among those whose claims activities I examined -- have developed a series of three form

(Footnote Continued)

have been diligent in requesting specific information, and especially in communicating clearly the consequences of nonproduction, the courts have proven remarkably supportive.[463]

Given the uneven case law at present, the Adams approach actually should be codified in the Federal Tort Claims Act. Congress could easily accomplish this by amending the definitional section of the Act to clarify the elements of a valid claim, preferably by way of enumeration. The definition should then be carried over into the Attorney General's regulations, restated on Standard Form 95, and made use of in correspondence with claimants.

(v) A More Far-reaching Alternative

The other solution I envisage would require a more fundamental change in our conception of the tort claim process. Consider again, by way of introduction, why claimants in fact do not always make full disclosure at the agency level. As intimated earlier,[464] the reason for this is that the disclosure of information, be it favorable or unfavorable, may work a substantial prejudice to the claimant in any ensuing FTCA litigation. The government commonly goes into litigation, as a result of the prior administrative claim, with an unusually and perhaps unfairly complete sense of the claim's legal and factual weaknesses, but without having revealed very much about its own defense.

This observation essentially revives the fairness issue that seems to have animated so many of the courts opting lately for the minimal notice standard. More important, it brings into question the proper identity of agency-level tort settlement itself. Is that phenomenon to

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(Footnote Continued)
letters to be sent at given successive intervals to claimants who fail to supply information requested and deemed essential to the validity of the claim. In the VA, they may culminate in the form claim denial letter that recites nonproduction as the reason for denial, that cites Swift or its local progeny, and that scrupulously avoids addressing the merits of the claim.

Not all agencies proceed in this fashion. The Department of Agriculture reports no standardized follow-up procedures; it does not necessarily even issue a denial letter of any sort where a claimant has failed to cooperate. In many cases it prefers "letting sleeping dogs lie."

[463] See e.g., Avril v. United States, supra note 387, at 1091 (lack of sum certain uncorrected by the claimant though called to his attention by the agency); Bialowas v. United States, supra note 387, at 1048-50 (failure to provide specific damage amounts even though requested to do so); Cummings v. United States, supra note 421, at 41 (no evidence of injury furnished in response to Air Force requests); Robinson v. United States Navy, supra note 393, at 382-84 (requested property damage estimates and medical bills not supplied).

[464] See text at notes 454-55, supra.

be viewed as an autonomous dispute resolution process in the hands of a claims officer who approximates a neutral decisionmaker, or as a simple prelude to litigation conducted by someone who already stands in an adversarial or at least a bargaining relationship with the claimant? Whether prior disclosure unfairly prejudices a claimant's litigation posture in tort claims really depends on whether the courts are taken to constitute the primary forum for their resolution and agency process but a procedural barrier to be hurdled in order to gain entry. Plainly, the risk diminishes to the extent that the parties view administrative settlement as the central dispute resolution process. Under the latter view especially, the tort claimant who withholds evidentiary matter at the agency level in the interest of surprise or tactical advantage in court elicits very little sympathy.

As a matter of fact, the relative prominence of the administrative and judicial phases of the FTCA remains problematic to this day, notwithstanding the 1966 reforms, perhaps all the more because of them. On the one hand, administrative settlement is a virtually full-fledged dispute resolution mechanism; yet the prospect of FTCA litigation is also never very far from mind. In the final analysis, the pervasive ambiguity of the administrative tort claim, and of the agency claims officer who handles it, explains why the unfairness problem has been so difficult to define and resolve.

We come then squarely to a second option, namely, entitling the agency, as under Swift, to full disclosure at its request of all pertinent information as a condition of validity of the claim, on the understanding that the agency submits to equally broad disclosure. Establishing a certain parity in this regard would go a long way toward blunting the unfairness argument I identified a moment ago, besides contributing to more informed settlement negotiations at an early stage. In the process, the administrative claim itself would become much less a simple antechamber to litigation.[465]

To put the matter squarely, the chief reason that fairness might be thought to excuse claimants from documenting their claims fully at the agency level is that today, nearly two decades after the FTCA amendments on administrative settlements, the courts rather than the agencies continue to be viewed as the "real" tort battlegrounds; the Adams court was not wide of the mark when it implied that the present scheme basically leaves claimants free to repair to the courts once they have presented a proper claim to the agency and allowed jurisdiction to attach either through final denial or the passage of time.[466] Conceivably tort claimants, like applicants for a statutory entitlement, could be made to present their claim fully at the agency level and, absent special circumstances, expect to be barred from adducing new evidence in court. If Congress left agency prerogatives at settlement somewhat undefined, it probably did so in order to avoid prejudicing a claimant's capacity to litigate effectively should settlement fail.[467] Unless and until claimants believe that claim and defense alike will be made primarily in administrative channels, with parity in access to information, suitable sanctions for noncooperation by either side,[468] and above all the promise of impartiality on the agencies' part, continuing resistance to agency demands for documentation and a somewhat reduced administrative settlement rate can be expected. Whether the magnitude of conflict and foregone settlement is substantial enough to warrant so radical a change in the ground rules is of course another matter. But the change might be a healthy one, not only as a way out of the substantiation dilemma, but as a step toward putting administrative settlement negotiations on a generally more candid and productive footing.

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[465] After all, most information requested by the agency can eventually be obtained through discovery once suit is filed. We may assume that discovery will give parties access "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." FED. R. CIV. P. 26(b)(1) (1972).

(vi) A Coda on Agency Access to Information

Virtually any realistic adaptation of the agency claims process -- even one such as I have just described -- would leave litigation in the federal courts a serious prospect. So long as litigation casts its shadow over that process, some sort of limits on agency access to information may be appropriate. According to one critic, the Attorney General's regulations are unfair because they "permit an agency to demand information that it could not obtain if the parties were conducting discovery?"[469] After all, any resolution of the Swift/Adams problem would leave the agencies free to demand some information or other as a condition of validity of the claim, and that information may be of the sort that is privileged in discovery.

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[466] 615 F.2d at 289-90. See also Reynoso v. United States, supra note 430.

[467] For a persuasive argument that Congres would not have wanted documentation requests to prejudice a claimant's interests in court, see Note, Claim Requirements of the Federal Tort Claims Act: Minimal Notice or Substantial Documentation?, 81 MICH. L. REV. 1641, 1653 n. 66 (1983). Congress recognized that not all tort claims could be resolved administratively and deliberately preserved claimant's option to file suit after six months. S. REP. NO. 1327, supra note 435, at 5-6, reprinted in 1966 U.S. CODE CONG. & AD. NEWS 2518-20.

[468] One commentator suggests that if, subsequent to filing a timely Standard Form 95, a claimant fails within a reasonable time to honor an agency's unambiguous requests for information discoverable under the Federal Rules of Civil Procedure, the running of the statute of limitations should resume. Note, supra note 467, at 1656-57. The sanction for unexcused nondisclosure then would be a time bar to suit.

[469] Id. at 1654.

I am prepared to concede that the catchall language of the regulations -- "[a]ny . . . evidence or information which may have a bearing on either the responsibility of the United States . . . or the damages claimed" -- reads broadly enough to encompass material that would be privileged in discovery, but I also see no harm in the agencies requesting privileged material, or in the Attorney General authorizing them to do so, provided they respect a claimant's right to exercise the privilege. The situation becomes problematic only if one subscribes to the view that failure to furnish information requested, even if privileged, renders the claim invalid as an administrative claim. Under no set of circumstances, though, does that view deserve to prevail.

As a practical matter, the issue is unlikely to arise under the Adams minimal notice standard, for agencies will rarely find themselves at a loss to investigate a claim on account of the absence of privileged information. Even Swift, however, should permit an exception for privileged information, and the courts would probably hold as much. I have uncovered no case in which a claim was ruled invalid for failure of the claimant to furnish the government information that it concededly could not obtain in litigation.

We come down then to the question whether the Justice Department should redraw its regulations to specify that information not discoverable in tort litigation is not discoverable in administrative channels either. Since I view the regulations as essentially indicating only what the agencies may request, and not what they may demand on pain of deeming a claim invalid for noncompliance, no change should be necessary. Furthermore, discovery privileges are generally waivable, and agencies should neither be barred nor even discouraged from seeking information that the claimant is perfectly at liberty to produce and whose production may very well conduce to a swifter and better informed settlement. Of course, no agency should attempt to coerce the disclosure of information in the face of an effective assertion of privilege by threatening otherwise to treat the claim as null and void. On the other hand, so long as some courts maintain the view that compliance with agency demands for information is essential to a claim's validity, the express incorporation of discovery standards in the regulations may be an important precaution and counterweight. Even so, however, the Department should avoid any implication that agencies behave improperly when they simply request privileged information.

Clearly my assumption, as a policy matter, is that agencies engaged in the administrative claim process should respect the privileges from discovery under the Federal Rules of Civil Procedure. Congress concededly had little or nothing to say about that precise issue, but it did recognize when it enacted the 1966 amendments that some tort claims would defy settlement and it deliberately preserved the claimant's option to sue on a de novo basis; it even consciously chose not to lengthen the six-month waiting period though that might have increased marginally the rate of prelitigation settlement.[470] Congress would not likely have required, as part of the administrative process whose exhaustion it made a prerequisite to suit, that a claimant produce information he or she would be privileged to withhold in litigation. Besides prejudicing the claimant at trial, that policy would give the agencies an unfair advantage in settlement, for, even armed with the Freedom of Information Act, a claimant is in no position to exact privileged information from the agency.

To be sure, complications may arise from the fact that the privileges, particularly those that are qualified rather than absolute, are no easier of application in the settlement than in the litigation context, yet by definition the courts will not be standing by to resolve the ensuing disputes. In any event, systematic resort to the courts on an interlocutory or ancillary basis surely would compromise the integrity and autonomy, not to mention the normally amicable spirit, of the agency claims process. But the magnitude of the problem should not be exaggerated. Claimants and claimants' attorneys do not appear to invoke privileges as such with any frequency in the agency phase of the FTCA. They may or may not furnish all the information an agency requests, but when they do not, they rarely give a reason. In fact, so far as I can tell, privilege has not even been invoked in court as a justification for not furnishing the agency with material it deemed essential. Other grounds -- typically that the agency already had the information or did not need it or had no authority to begin with to require it -- have been.

Assuming (whether or not the regulations are amended to reflect the assumption) that claimants may not be required to produce at administrative settlement what they could not be required to produce in discovery incident to litigation, I see no reason to provide specific machinery for resolving disputes over production demands before suit is filed on the tort claim itself. Either settlement will be reached notwithstanding the disagreement, or the claimant will be met with a denial of the claim or a ruling that the claim is insufficient under the regulations. In either of the last two circumstances, a claimant intent on pursuing matters will soon enough be in court, where the specific question of privilege in administrative settlement proceedings most likely will be overtaken by a substantially similar question of discovery in litigation.

F. Eligibility for Relief

Although the sum certain and substantiation issues account for the most live among controversies surrounding the validity of an administrative tort claim, the agencies have raised other kinds of objections at or near the threshold. I do not deal in any detail in this report with the question of eligibility as such to present an administrative claim. The question tends to be both highly technical in character and relatively devoid of policy considerations; in any event, the definition of a proper claimant at the agency level should not differ fundamentally from the definition of a proper FTCA plaintiff. The fact remains, however, that the statute leaves the term claimant undefined and that it is the Justice Department that has sought to regularize the agencies' response to the question of who can present a claim on behalf of whom. The solutions are on the whole reasonable.

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[470] S. REP. NO. 1327, supra note 435, at 8, reprinted in 1966 U.S. CODE CONG. & AD. NEWS 2519.

A claim for property damage or personal injury may be presented either by the victim or by a "duly authorized agent or legal representative;"[471] if presented by the latter, the claim must be filed in the name of the claimant, signed by the agent or representative with an indication of his or her title or legal capacity, and "accompanied by evidence of . . . authority to present a claim on behalf of the claimant."[472] A claim for wrongful death, on the other hand, may be presented by the executor or administrator, or other person authorized under state law.[473] Finally, a lawfully subrogated insurer is expressly authorized to present a claim.[474] These provisions have generated a surprising volume of litigation with inconsistent results. Some courts seem content to waive what they take to be "technical defects,"[475] but others are not.[476] According to the leading study of litigation under the administrative claim provisions of the FTCA, a number of otherwise meritorious claims have run permanently afoul of the statute of limitations due to the fact that a technically ineligible person presented them.[477]

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[471] 28 C.F.R. § 14.3(a), (b) (1983). The victims in these cases are identified as the owner of the property and the injured person, respectively.

[472] Id. § 14.3(e).

[473] Id. § 14.3(c).

[474] Id. § 14.3(d).

[475] E.g., Locke v. United States, 351 F. Supp. 185, 188 (D. Hawaii 1972) (court should not stand on technicalities on evidence of representative capacity where the rights of children are involved and inequities would otherwise result). Accord Forest v. United States, 539 F. Supp. 171, 174 (D. Mont. 1982); Young v. United States, 372 F. Supp. 736, 741 (S.D. Ga. 1974).

[476] E.g., Triplett v. United States, 501 F.Supp. 118, 119 (D. Nev. 1980) (claim invalid for lack of evidence of attorney authority though no prejudice to the government); Gunstream v. United States, 307 F. Supp. 366, 368 (C.D. Cal. 1969) (claim filed by plaintiff's parents held defective for failure to show parents' representative capacity).

[477] Zillman, supra note 336, at 977.

I bypass the relatively narrow and technical issues of eligibility arising under the Attorney General's regulations (for example, the question under what circumstances the filing of a claim by one of the parties to a partially subrogated claim should also be treated as a filing by the other[478]) in order to advance a general observation. The solution to difficulties of this order lies not in inviting the agencies to ignore the Attorney General's requirements, but rather in insisting that they not respond to violations with undue harshness. Thus, the appropriate response in most cases would be to treat an otherwise valid and timely claim as having been duly filed, to call the claimant's attention to the deficiency and to allow a reasonable length of time, without penalty, for its correction if even that is truly necessary. For example, most claims officers who implement the Attorney General's apparent requirement of a written power of attorney are content with its delayed submission, usually at some time before the onset of actual negotiations;[479] in fact, some never call for one at all.

Again, the proper benchmark is fair and sound administrative practice, not some prediction of the limits of judicial tolerance. Agencies faced with a claim filed by the technically improper party should not, as a general matter, refuse to address the claim, provided it fairly gives them notice of the essentials. They need to be more discriminating than they have sometimes been in the past, as do the courts when the issue arises on the government's motion to dismiss for want of a valid prior claim. Take, for example, the recurring problem of spousal claims for loss of consortium. Where a person files a claim for personal injuries without so much as mentioning a spousal claim for loss of consortium, the agencies and courts properly regard the latter as outside the ambit of the claim.[480] On the other hand, where a loss of consortium claim was filed, but as part of the physically injured party's claim rather than the spouse's, the prejudice to the agency and the disrespect for the administrative claim mechanism under the FTCA are truly minimal. Unfortunately, the agencies and courts have not always acknowledged the difference.[481] As a growing body of case law now holds,[482] rigidly technical attitudes toward the filing of a claim on behalf of family members, particularly spouses and minor children, may work an unfair and indefensible hardship. But the principle is even more general than that. Justice Department regulations should be amended, in the interest of fairness and decency, to adopt with respect to all claimants a principle of substantial compliance with the formal requirements of a valid claim. In other words, the Attorney General should direct the agencies not to rest on sheer technical deficiencies in otherwise valid, intelligible, and responsibly filed administrative claims, where they are not prejudiced as a result. Given the Attorney General's continuing responsibility for tort claims management at the agency level, this policing function should not be left entirely to episodic and uneven intervention by the courts.

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[478] The regulations provide that a partially subrogated claim "may be presented by the parties individually as their respective interests appear, or jointly." 28 C.F.R. § 14.3(d)(1983). Where the insurer or the insured presents only its claim for damages, the other may not benefit from it. Shelton v. United States, 615 F. 2d 713, 715-16 (6th Cir. 1980). But the opposite result has been reached where one party presents the whole claim with some mention of the other party's interest. Interboro Mut. Indem. Ins. Co. v. United States, 431 F. Supp. 1243, 1246 (E.D. N.Y. 1977). See also Cummings v. United States, 704 F.2d 437, 439-40 (9th Cir. 1983); Executive Jet Aviation, Inc. v. United States, 507 F. 2d 508, 516 (6th Cir. 1974).

[479] If a power of attorney is not supplied and this becomes an issue in litigation, the courts may be willing to inquire whether there was actual authority to represent another. House v. Mine Safety Appliances Co., 573 F. 2d 609, 617-18 (9th Cir.), cert. denied, 439 U.S. 862 (1978). The Ninth Circuit, reaffirming its basic approach to the FTCA administrative claim requirement in Avery v. United States, supra note 443, recently has held that whether or not a valid power of attorney is supplied has nothing to do with satisfaction of the jurisdictional prerequisite to suit. Warren v. Department of Interior, No. 82-4642, 52 U.S.L.W. 2444 (9th Cir. Jan. 24, 1984)(en banc). Accord Graves v. United States Coast Guard, 692 F.2d 71, 74-75 (9th Cir. 1982). But the prudent attorney will append a power to the initial Standard Form 95 since the courts are not always forgiving even when the government can show no prejudice. See Triplett v. United States, supra note 476.

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[480] Johnson v. United States, 704 F.2d 1431, 1442 (9th Cir. 1983); Fol v. United States, 548 F. Supp. 1257, 1258 (S.D. N.Y. 1982); Stephan v. United States, 490 F. Supp. 323, 324 (W.D. Mich. 1980); Stewart v. United States, 458 F. Supp. 871, 877 (S.D. Ohio 1978); Ryan v. United States, 457 F. Supp. 400, 402-03 (W.D. Pa. 1978); Heaton v. United States, 383 F. Supp. 589, 591 (S.D.N.Y. 1974). See generally Silverman, The Ins and Outs of Filing a Claim Under the Federal Tort Claims Act, 45 J. AIR L. & COM. 41, 50 (1979).

[481] Walker v. United States, 471 F. Supp. 38, 42 (M.D. Fla. 1978).

[482] E.g., Nelson v. United States, 541 F. Supp. 816, 817 (M.D. N.C. 1982); Forest v. United States, 539 F. Supp. 171, 174 (D. Mont. 1982); Campbell v. United States, 534 F. Supp. 762, 765 (D. Hawaii 1982); Estate of Santos v. United States, 525 F. Supp. 982, 985 (D. P.R. 1981); Van Fossen v. United States, 430 F. Supp. 1017, 1023-24 (N.D. Cal. 1977) ("[T]he government can in no way contend that it was surprised or deceived in its pretrial deliberations. In short, the expediting function which Congress envisioned as the role of the administrative procedure was not impeded here."); De Groot v. United States, 384 F. Supp. 1178, 1180 (N.D. Iowa 1974); Young v. United States, supra note 475, at 740-41; Locke v. United States, supra note 475, at 188. But see Jackson v. United States, 558 F. Supp. 14, 16 (D. D.C. 1982) (parents' own claim for wrongful death not a sufficient claim for spouse of decedent); Pringle v. United States, 419 F. Supp. 289, 291-92 (D. S.C. 1976) (claim null since while father qualified as executor of son's

(Footnote Continued)

Candidly speaking, I am not sanguine about the Justice Department's capacity to give agencies the needed encouragement. A Department that sees its primary responsibility under the FTCA as defending the government in the adversarial setting of tort litigation is not well situated to persuade agency attorneys to operate more by the spirit than the letter of the law in their dealings with claimants at the administrative level. As this report already makes clear, and will make still clearer when it is through, Justice Department regulations bear scarcely a trace of procedural magnanimity toward claimants, even where virtually nothing in the statute stands in the way. But the litigation practices of the Department are most eloquent of all. Time and again, the Department tries to keep a claimant out of court, permanently if possible, by raising as a jurisdictional defense technical defects in the administrative claim that the agency never brought to his or her attention and, what is more disturbing, that did not prevent the agency from addressing the claim and issuing a final denial letter on the merits.[483] Doing so under those circumstances is unfair as well as disingenuous. Because the practice goes more to ethics in Justice Department litigation strategy than to the handling of tort claims at the agency level, I mean to do no more than identify it as an unfortunately suggestive and negative signal to the agencies.

This report, finally, does not discuss the impact of the administrative claim requirement on class actions under the FTCA, an eligibility-related problem dealt with exhaustively and persuasively

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(Footnote Continued)
estate at time of suit, he did not so qualify at time of filing administrative claim).

[483] See e.g., Hunter v. United States, 417 F. Supp. 272, 274 (N.D. Cal. 1976); Ozark Airlines, Inc. v. Delta Airlines, Inc., 63 F.R.D. 69, 71 (N.D. Ill. 1974); Young v. United States, supra note 475, at 740; Sky Harbor Air Serv. v. United States, 348 F. Supp. 595, 596 (D. Neb. 1972).
The courts are less and less impressed with this litigation tactic. See e.g., Executive Jet Aviation, Inc. v. United States, supra note 478, at 516 ("We are convinced that our decision in no way will prejudice the Government except insofar as it may have hoped to avoid entirely a substantial portion of its potential liability through an adroit application of [the statute of limitations]."). See also Apollo v. United States, 451 F. Supp. 137, 138-39 (M.D. Pa. 1978). A Torts Branch monograph on the administrative claim procedures of the FTCA prepared for the guidance of the agencies and United States Attorneys acknowledges the new judicial trend. "In light of the inclination of the courts, the defense [of a defective administrative claim] should be asserted only when it can be demonstrated that the lack of the requested information completely frustrated the agency's good faith efforts to achieve an administrative settlement. It is extremely important that the requests to the claimant be documented, and that the claimant be warned of the consequences of his continued . . . withhold[ing of] evidence." DEPARTMENT OF JUSTICE, TORTS BRANCH MONOGRAPH, VOL. C, ADMINISTRATIVE CLAIMS 17-18 (Mar. 1983).

elsewhere. A recent study of class actions[484] concludes that while nothing in the Act expressly or impliedly bars use of the class action vehicle, the jurisdictional requirement of a prior administrative claim, as applied by the courts in the class action context, makes that vehicle for all practical purposes unavailable, however otherwise appropriate to the particular cause of action it might be. The courts in effect have held that each member of the class must submit a separate prior claim, not only showing individual authorization but also a distinct sum certain.[485] In the vast majority of cases, the requirement makes a class action administrative claim under the FTCA, and indirectly a class action suit, untenable. I do not rehearse here a problem that has been thoroughly considered elsewhere and that concerns only a highly peculiar subset of administrative tort claims.[486]

G. The Settlement Process

Once a claim is validly filed, responsibility for investigating and evaluating it can fairly be said to pass to the agency.[487] Few would say that the agencies may "unilaterally . . . shift the burden of investigation to private claimants while retaining only the responsibility of evaluating the information supplied."[488] But how the agencies are to go about discharging that burden is left both by statute and Justice Department regulation almost entirely up to them. I reserve their practices, as best I can piece them together from interviews with individual claims officers, for the chapter that follows.

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[484] Note, Administrative Exhaustion under the Federal Tort Claims Act: The Impact on Class Actions, 58 B.U.L. REV. 627 (1978).

[485] Lunsford v. United States, 570 F. 2d 221 (8th Cir. 1977) (victims of flooding caused by cloud seeding); Caidin v. United States, 564 F.2d 284 (9th Cir. 1977) (shareholders of failed bank); Blain v. United States, 552 F.2d 289 (9th Cir. 1977) (forest fire victims); Pennsylvania v. National Ass'n of Flood Insurers, 520 F. 2d 11 (3d Cir. 1975) (victims of major flooding in the state); In re Agent Orange Product Liability Litigation, 506 F. Supp. 757 (E.D. N.Y. 1980) (persons injured by use of Agent Orange in Vietnam); Luria v. CAB, 473 F. Supp. 242 (S.D. N.Y. 1979) (victims of government failure to regulate air travel charters); Kantor v. Kahn, 463 F. Supp. 1160 (S.D. N.Y. 1979) (same); Founding Church of Scientology v. Director, FBI, 459 F. Supp. 748 (D. D.C. 1978) (all Churches of Scientology in the United States).

[486] See supra note 484. Consideration should be given to amending the FTCA to simplify claims presentation requirements in the case of class claims, as some courts bound by the current strictures have urged. E.g., In re Agent Orange Product Liability Litigation, supra note 485, at 761.

[487] Corboy, Shielding the Plaintiff's Achilles' Heel: Tort Claim Notices to Governmental Entities, 28 DE PAUL L. REV. 609, 636 (1979); Zillman, supra note 336, at 969.

[488] Adams v. United States, supra note 432, at 290 n. 9. See also Koziol v. United States, supra note 459, at 90.

Congress clearly intended that agencies have a guaranteed six months in which to assess and possibly negotiate a claim without the threat of court action. However, it did not mean that the passage of six months without final agency action on a claim should necessarily trigger litigation. Thus, the statute provides specifically that such failure gives a claimant only the "option" to consider the claim as having been finally denied, and that this option may be exercised "any time thereafter."[489] The claimant may elect not to sue without in any way prejudicing his or her right to do so at a later date. To this extent, the act encourages, or at least avoids discouraging, the continuation of negotiations beyond six months and indeed indefinitely,[490] or until a final denial is issued.

An area of uncertainty with some potential for dispute in the settlement context is the question who is the offeror and who is the offeree. Just as buyer and seller in the sale of goods are not invariably or even presumptively the offeror or the offeree, neither are the claimant and claims officer in the administrative settlement of tort claims. What little indications we have would suggest that the government fancies itself in principle the offeree. First, the sum certain required of a valid claim is in effect an opening offer. Furthermore, Justice Department regulations allow amendment of a valid claim only "prior to final agency action,"[491] which strongly implies that the government has the power of final acceptance. And where, as in the case of settlement in excess of $25,000, the approval of the Attorney General or his designee is necessary, the Torts Branch invariably insists that agencies receive the prior unconditional assent of the claimant to a proposed settlement before committing either themselves or the government generally. On the other hand, the statutory provision that recites the preclusive effects of settlement states that "acceptance by the claimant of any such award, compromise or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States."[492]

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[489] 28 U.S.C. § 2675(a) (Supp. 1983).

[490] A good example of protracted negotiations is Douglas v. United States, supra note 441, discussed earlier in another connection. Plaintiff allegedly injured his ankle when a plank in the dock of the Detroit naval armory collapsed beneath him. Six years of communications between Douglas' attorney and the Navy ensued before the latter denied the claim for failure to provide the documentation requested. Only then did litigation take place.

[491] 28 C.F.R. § 14.2(c) (1983).

[492] 28 U.S.C. § 2672 (Supp. 1983) (emphasis added).

Why, one may ask, do the parties need to know in advance which of them has the final power of acceptance? As a practical matter, each negotiation tends to be sui generis; if it succeeds, common ground will have been reached without either party explicitly reserving the last word. Controversy is least of all to be expected where the government agrees to settle a claim in full, for presumably the claimant has either originally or by timely amendment stated a sum certain with which he or she can live. But it can happen that the claimant comes to regret the amount of settlement after agreement is reached, or comes to regret it even sooner, but fails to act quickly enough in amending the claim. Most courts faced with this scenario have barred suit for any larger amount,[493] and this seems quite proper if we mean to protect the integrity of the settlement process and, more specifically, prevent claimants from obtaining an unfair advantage in subsequent litigation.[494]

However, an unusual set of circumstances recently has led the Court of Appeals for the District of Columbia Circuit in the case of Odin v. United States[495] to go off in a different direction. There, the claimant, unrepresented at the time, filed an administrative claim in the amount of $791, reflecting the precise amount of medical bills incurred to date in connection with the aftereffects of a swine flu immunization. In spite of informal indications over the course of the next year from the attorney whom claimant subsequently retained that her injuries substantially exceeded that sum, the then Department of Health, Education and Welfare notified her that her claim as filed was granted in full. The amount of damages sought had never been amended. A payment voucher in the amount of $791 sent to the claimant and her attorney came back unsigned, together with an amended administrative claim for one million dollars, explaining that the smaller figure had been based on a misunderstanding of the claim form and only reflected medical bills to the date of filing. The Torts Branch of the Justice Department, acting for HEW, in turn notified the claimant that it would disregard the amendment on the ground that the agency's acceptance of the initial claim rendered that claim no longer pending and precluded the claimant both from amending it and from seeking a higher sum in court. This view was sustained by the district court, but disavowed on appeal. The Court of Appeals held in effect that the "final agency action," which admittedly bars subsequent amendment of a claim, does not itself take place until the agency procures the claimant's "acceptance" of the agency's "offer" to settle.[496] The claimant, said the court, has the power of acceptance,[497] and acceptance, following uniform agency practice, occurs when the claimant signs and returns the payment voucher expressly designed for this purpose.[498]

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[493] Ferreira v. United States, 389 F. 2d 191, 193 (9th Cir. 1968); Wexler v. Newman, 311 F. Supp. 906, 907-08 (E.D. Pa. 1970); Schlingman v. United States, 229 F. Supp. 454 (S.D. Cal. 1963). Cf. Wright v. United States, 427 F. Supp. 726, 729 (D. Del. 1977) (claim increase barred where settlement check negotiated). In Ferreira, the claimant was injured when his tractor went into a hole on his land left by employees of the Bureau of Reclamation. His claim for $93.50 was allowed by the agency ten months after filing, without the claimant earlier having taken steps to withdraw it. Refusing the payment, he sued for $75,000 on the basis of serious complications allegedly unforeseeable at the time of filing. Suit was barred. "[A] contrary reading of the statute would place upon federal agencies the unwarranted burden of processing claims to an award which, even though it is for the full amount of the claim, could be rejected by the claimant." 389 F.2d at 194.

[494] A different situation may obtain where the increase represents loss or injury arising from the same incident but suffered by a different claimant. Such may be the case of settlement by a parent for medical expenses resulting from injury to a child, followed by a timely claim on the child's behalf for his or her own pain and suffering. Stokes v. United States, 444 F. 2d. 697 (4th Cir. 1971).

[495] 656 F. 2d 798, 806 (D.C. Cir. 1981).

Though apt and eloquent in its denunciation of the government's attitude to a claimant's "one false step,"[499] and though perhaps not unfair in result under the particular circumstances of the case,[500] Odin is not wholly convincing on the narrow legal issue before it. That Congress, in making claimant's acceptance of a settlement "final and conclusive on the claimant," intended to vest the power of acceptance in any technical sense in the claimant as opposed to the agency is far from clear. Moreover, the court's somewhat disingenuous definition of "final agency action" in terms of unilateral conduct by the claimant simply cannot satisfy the Attorney General's legitimate concern that claimants not enjoy unfair leverage in subsequent litigation from an agency's prior assent to settlement.[501]

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[496] Id. at 804.

[497] The court relied on the language of the Act's release provision. See supra note 492, and accompanying text. It also relied on the suggestion in legislative history that the 1966 amendments "would provide the agencies with the authority to make settlement offers which could result in settlement in a large percentage of tort claims cases." S. REP. NO. 1327, supra note 435, at 4, reprinted in 1966 U.S. CODE CONG. & AD. NEWS 2518.

[498] The voucher form (Appendix B to this report) contains a caption "ACCEPTANCE BY CLAIMANT(S)" and provides a signature line for claimants to signify "acceptance" and to acknowledge its effect as a release in the terms of the statute.

[499] Judge MacKinnon said:

> [The court] refuses to countenance the creation of arbitrary barriers to claims for full compensation for government inflicted injuries . . . There is absolutely nothing in the statute or its legislative history to indicate that Congress, in requiring claimants to seek relief initially from the agency that harmed them, intended to set up a labyrinth of procedural rules and niceties in which one false step would deprive injured citizens of the relief Congress intended to grant them.

Id. at 806.

The question of who enjoys the final power of acceptance of administrative settlements in tort is not intrinsically very interesting, and certainly not well illuminated either by the statute or its legislative history. But when a case turns upon it, a clear answer is highly desirable. The Odin court thus correctly tried to fasten upon some fixed and visible event, such as the return of a signed voucher form. The moment it chose, however, occurs rather late in the proceedings; in fact the form primarily serves to trigger payment procedures on a claim the parties consider for all practical purposes already settled. Furthermore, upon receiving the voucher, the claimant has an indeterminate amount of time in which to sign and submit it. Needless to say, most claimants do so with dispatch, but the framework established by Odin still is an invitation to speculate.

Realistically, the party to the negotiations, if any, that has reason to fear unfair speculation by the other is the government. If the government were to withdraw at the last moment, the claimant normally would not have compromised in the least his or her litigation posture. Thus I would seek to ensure that at some point in the settlement process, which necessarily follows a variety of forms and rhythms, the claimant make and know that he or she is making an irrevocable expression of assent to the terms of settlement. For most practical purposes, this is already the case in settlements of over $25,000, for the Justice Department will not even entertain approving such a settlement until satisfied that the government already has the claimant's assent.

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[500] The Odin court expressed confidence that the claimant, under the facts of that case, had not abused the settlement process. Id. at 806 n. 30.

[501] True, the Act specifically declares an agency's disposition of a claim not to be competent evidence at trial on the question of liability or amount of damages. 28 U.S.C. §2675(c) (Supp. 1983). Whether this evidentiary bar is in practice very effective is highly questionable.

The provision originally was designed for multiple claimant situations, the idea being to remove the disincentive on the part of an agency to admit liability and settle a claim administratively when a related claim had been brought by another claimant directly to court, as was possible until 1967. 2 L. JAYSON, supra note 445, at pp. 17-35, 17-59. It is still useful to the government today where one claimant seeks to use the administrative settlement of another claimant's related claim as evidence of liability for damages in his or her own litigation. However, it also applies to the single claimant situation, where the claimant seeks to introduce in court statements against interest, including settlement offers or the allowance of a lesser sum, made by the government during the administrative claim phase. Id. at p. 17-59.

Disputes of the Odin variety most certainly do not abound, and neither Congress nor the Justice Department may feel the moment ripe to redefine the locus of the power to accept or the formalities of acceptance. For the time being, agencies should simply be alert to the opportunities claimants have to play fast and loose or to indulge in abusive second thoughts. If Odin, which rests at bottom on statutory interpretation, does produce a pattern of abuse, Congress should act to curb it. On the other hand, I do not mean by my criticism of the general rule laid down in Odin to endorse in the least the position of the Torts Branch in that particular case. Where it has evidence that the initial filing of a grossly understated claim was innocent and not an abuse of the settlement process, and where it has not yet received from the claimant a signed voucher, the agency cannot possibly believe that it lacks authority to reopen matters. It has that authority and should be prepared to exercise it with reasonable discretion.

H. The Final Agency Denial

An agency's final denial in writing of a claim under the FTCA triggers a six-month statute of limitations on suit in federal district court, running from "the date of mailing . . . of notice of final denial."[502] After this time, suit if "forever barred."[503] Fortunately, precious little dispute has arisen over what constitutes a final denial. Obviously, an express repudiation of liability on the claim qualifies as such. But equally clearly, so must a final offer in partial satisfaction of the claim which the claimant rejects, and legislative history indicates as much.[504] The problem with that situation is that the moment of final agency denial turns on an expression of intent by the claimant. Least determinate of all is the quite common scenario of an openended exchange of counteroffers in which either party might at any time bring negotiations to a close.

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[502] 28 U.S.C. § 2401(b)(Supp. 1983).

[503] Id. Carr v. Veterans Admin., 522 F. 2d 1355, 1357 (5th Cir. 1975). The courts have clearly and properly barred suit after a period of six months following the mailing of a final denial, even when less than two years have elapsed since accrual of the claim. Schuler v. United States, 628 F. 2d 199, 202 (D.C. Cir. 1980); Childers v. United States, 442 F. 2d 1299, 1301 (5th Cir.), cert. denied, 404 U.S. 857 (1971); Claremont Aircraft, Inc., v. United States, 420 F. 2d 896, 897 (9th Cir. 1970); Myszkowski v. United States, 553 F. Supp. 66, 68 (N.D. Ill. 1982); Heimila v. United States, 548 F. Supp. 350, 351 (E.D. N.Y. 1982).

[504] S. REP. NO. 1327, supra note 435, reprinted in 1966 U.S. CODE CONG. & AD. NEWS 2518.

One reason why the inherent potential for misunderstanding and confusion has not materialized is that the FTCA itself requires that final denials take the form of a certified or registered letter from the agency and that Justice Department regulations add the requirement of an express warning to dissatisfied claimants to bring suit, if at all, within six months of the date the denial letter was mailed.[505] Until receiving such a communication, a claimant may safely assume that the claim has not been finally denied and that the six-month statute of limitations has not yet begun to run.[506] The final denial mechanism thus appears to be in good working order, and the occasional misunderstanding so idiosyncratic as to warrant no general reform.

Only a few modest adjustments suggest themselves, one of them being really no more than a clarification. The Attorney General's requirement that any final denial be sent certified or registered mail and contain a reminder of the statute of limitations on suit, as mentioned, sets a useful objective standard for the timing of a final denial in otherwise doubtful settings. To ensure that it not only aids the courts in an occasional controversy over the statute of limitations, but also routinely guides claimants in their own conduct, the regulation might usefully be amended to make explicit what is already perfectly implicit, namely that no communication from an agency will in fact be treated as a final denial, for purposes of setting off the statute of limitations, unless it satisfies the criteria set out in the regulation.

Second, the statutory and regulatory provision that suit be brought within six months of the mailing date of the notice of final denial seems to court needless confusion and possible injustice. Several days may elapse between the mailing and arrival of the notice, and that may make all the difference between a timely and stale complaint, given plaintiffs' well-known penchant for bringing action at the tail end of the limitations period. Occasionally it has done just that.[507]

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[505] 28 C.F.R. § 14.9(a)(1983).

[506] Only rarely have the courts had to face this issue. But they have uniformly enforced the regulatory requirements against agencies that have failed to observe them. Sterner v. United States, 462 F. 2d 1177, 1178 (D.C. Cir. 1972); Boyd v. United States, 482 F. Supp. 1126, 1129 (W.D. Pa. 1980); Interboro Mut. Indem. Ins. Co. v. United States, 431 F. Supp. 1243, 1245 (E.D. N.Y. 1977).

[507] Carr v. Veterans Admin., supra note 503. In Carr, plaintiff's administrative tort claim was finally denied by a mailing of February 5, 1973, which arrived on February 9. Plaintiff brought suit on the claim on August 7. The action was dismissed as time-barred based on the date

(Footnote Continued)

Congress easily could start the six months running from the date of arrival of the communication, especially as the present requirement of registered or certified mail guarantees a dated record of receipt with notice thereof to the agency. Doing so would guard against unfair surprise to claimants,[508] without substantially burdening the United States. In any event, the present system -- postponing the effectiveness of a claim until it reaches the agency, but giving effect to a denial the moment it is mailed -- unfairly resolves ambiguities to the claimant's disadvantage.

Finally, and most substantially, the Attorney General's regulations pointedly refrain from requiring that agencies give a reason for their denial of a claim; at best, they suggest that giving a reason is not forbidden.[509] The fact is they should impose such a requirement. As a matter of elmentary fairness, a claimant who has taken the trouble, and managed, to perfect a valid administrative tort claim is entitled to some statement of reasons for its denial. To legislate any particular level of specificity in the reasons given would be futile; that simply must be left to the sound discretion of the officer in charge. But no agency should feel free to deny a claim without offering any reason at all.

No serious justification can be advanced for the absence of a requirement of reasons. That a claims officer would rather not be bothered is obviously not one, and no one has persuasively shown that the costs of stating reasons outweigh the benefits. Finally, the notion that a statement of reasons would unfairly tip the government's hand in the event of litigation is simply not credible. If the government's reason for denying a claim is a sound and convincing one, communicating it may only help prevent that litigation from happening; this is to everyone's advantage. Even if the reason is more debatable, it will not long remain a secret. Any passable answer to an FTCA complaint will inevitably reveal as much by way of defense as a reasoned denial letter, and usually a great deal more. Since a fair and adequate denial letter does not have to disclose anything very elaborate about the agency's factual or legal analysis of the claim, it need not compromise the government's litigation interests. In any event, the Justice Department's attempt to free agencies from providing even the "brief

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(Footnote Continued)
of mailing rule, though it still would have been timely under a date of receipt rule.

[508] Id. The court in Carr conceded that "it might be more equitable if the short period of limitations . . . commenced with receipt by the claimant of notice of the administrative agency's denial."

[509] "The notification of final denial may include a statement of the reasons for the denial, and shall include a statement that, if the claimant is dissatisfied with the agency action, he may file suit . . . not later than 6 months after the date of mailing of the notification." 28 C.F.R. §14.9 (a)(1983)(emphasis added).

statement of the grounds for denial" that the Administrative Procedure Act mandates in connection with any garden-variety written application or request[510] is misguided if not flatly illegal. The regulations should positively reaffirm the requirement of reasons.

I. Reconsideration of a Claim

Justice Department regulations invite a claimant who has received a final denial letter to "file a written request with the agency for reconsideration."[511] The claimant may exercise this option any time before filing suit and before expiration of the statute of limitations on doing so. By regulation, the request furnishes the agency six months from the date of the request to take final action on it and bars the claimant from suing until such action or until the expiration of the six months, whichever comes sooner.[512] Most indications are that a new six-month statute of limitations on filing suit begins to run at that time. The claims officers with whom I spoke, almost to a one, share this view.[513]

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[510] 5 U.S.C. § 555(e)(1977).

[511] 28 C.F.R. § 14.9(b)(1983). Presumably, reconsideration may be sought only once. Silverman, supra note 480, at 54. However, one agency claims attorney reports permitting claimants to seek reconsideration as often as they wish.

If, following a final denial by one agency, the claimant files a claim arising out of the same incident with a second agency, the latter may consider the claim before it a request for reconsideration. 28 C.F.R. § 14.2(b)(4)(1983). Only if the second agency chooses to do so, and so advises the claimant, will the statute of limitations on suit be tolled. Id.

[512] 28 C.F.R. § 14.9(b)(1983).

[513] In spite of the apparent clarity of the current regulations, one commentator seems to believe that a request for reconsideration does not necessarily prolong the initial statute of limitations. He further urges that the statute or regulations be amended to codify what he takes to be the current approach, namely that a request for reconsideration has no effect whatsoever unless and until the agency expressly notifies the claimant in writing that it has agreed to reconsider the claim. Zillman, supra note 336, at 987. In fact, of all the agencies whose claims practices I examined, only the Army reported following that policy.

The proposal is undesirable. If a reconsideration request is filed toward the end of the six-month period following the denial letter, as well it may be, it will scarcely have been filed when suit must be brought in federal district court on the very same claim. No better way could be devised to shortcircuit the reconsideration that might in fact have taken place. What is more, such a suit is premature if the agency does agree to reconsider the claim, since it has a right to six months

(Footnote Continued)

Still, the reconsideration device can operate as something of a trap for the unwary. In one case, a claimant who received a notice of final denial sought to amend the claim to present new evidence, and was told he might do so. He conveyed his request within six months following the original denial, but did not actually furnish the new evidence until some two weeks after that period had passed. The agency disregarded the request on the ground that it was not timely. The disappointed claimant then promptly filed suit, only to learn that his claim had by then become too stale for judicial consideration.[514] The court reasoned that the statute of limitations is tolled only when the agency leads the claimant to believe it is reconsidering the claim, not when it simply says it would reconsider it. In a somewhat easier case, the claimant upon receiving a notice of denial made two further inquiries, the first of which evidently led him to think the claim might be reconsidered. It was not, and he brought suit some seven and a half months after the first exchange and less than a month after the second. The court dismissed the action as untimely. "[T]he courtesy of the Air Force in supplying subsequent oral and written explanation should not be held to erase . . . its previous 'final denial.'"[515]

These results point up a certain ambiguity about the reconsideration process and a very real potential for misleading an honest and reasonably diligent claimant. The regulations themselves are not flawed. As drafted, they fairly state that a request for reconsideration gives an agency six months from then to act and bars the claimant from suit during that period, unless the agency acts sooner on the request. They also incorporate by reference the rules governing final denial letters; that is to say, final agency action on a request for reconsideration must be in writing, must be sent by certified or registered mail, and must contain notice of the right to sue within six

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(Footnote Continued)
without suit in order to do so.

I find it significant that the vast majority of claims officers, who would not be expected lightly to resolve doubtful questions of procedure to their own disadvantage, do not suppose that they have to agree expressly to reconsider a claim in order for the reconsideration request to take effect. The commentator may have been influenced by case law dating from the period before the regulations specifically provided for a reconsideration procedure. At that time the courts conceded that a claimant led to believe that the denial of his or her claim was being reconsidered enjoys an extended statute of limitations. Trepina v. Wood, 227 F. Supp. 726, 729 (D. Mont. 1964); Stever-Wolford, Inc. v. United States, 198 F. Supp. 166, 168 (E.D. Pa. 1961).

[514] Woirhaye v. United States, 609 F. 2d 1303, 1306 (9th Cir. 1979).

[515] Claremont Aircraft, Inc. v. United States, 420 F. 2d 896, 898 (9th Cir. 1970).

months from the date of mailing.[516] Failing such a communication, the claimant has the option of bringing suit any time thereafter. Scrupulous observance of these rules should avoid most misunderstandings, and they apparently do.

The lingering problem is knowing whether a claimant has made a request for reconsideration sufficient to trigger this reasonably straightforward procedure. Does the simple submission of additional evidence, without more, constitute a request? Does a statement of intent to do so, as in the first of the two cases just mentioned? Does a written request for clarification or elaboration, as may have been the case in the second? Obviously not every written communication from a claimant following a final denial necessarily amounts to a request for reconsideration, and there is no litmus test for determining when it does. A claimant may not even want formal reconsideration, with its six-month bar to litigation. He or she simply may have a question to put or a comment to make. All that can be asked of claims officers is that they endeavor to place the most reasonable interpretation possible on any such communication, and promptly indicate that they do or do not, as the case may be, take it to be a request for reconsideration. If they do, nothing more is required at that point, except that confirming the fact might obviate the filing of a premature suit and proceedings to have it dismissed.[517] If they do not, they should plainly remind the claimant that the clock has not stopped running since the denial letter was sent.[518]

All of this may strike some claims officers as excessive handholding. But many claimants do need guidance, since the regulations do not and can not reasonably be expected to alert them to the risk that, in awaiting a response to some communication on their part, they may find that the statute of limitations has passed them by. Even if they appreciate the risk, they still may need guidance. The claimant who reopens matters, but out of caution files suit within six months of the original denial letter, has not given the agency the six months to which the regulations entitle it for reconsideration. The suit is plainly premature and subject to dismissal. On the other hand, waiting a full six months by definition means letting the original statute of limitations, and more, expire. Even if the agency makes some response within six months, the original limitations period may by that time have passed. The fact is that, in extending claimants an invitation to seek reconsideration, the Justice Department carefully protected the government's own prerogatives, for the regulations secure the agencies a period of time in which to act while unmistakably postponing the claimant's right to sue. For claims officers to put claimants similarly at ease would be no less simple. In doing so, they also would spare the courts from having to decide after the fact, on a motion to dismiss, what claimants under varying circumstances may or may not reasonably have been led to believe.[519]

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[516] 28 C.F.R. § 14.9(a),(b) (1983). For a different view, see supra note 513.

[517] E.g., Trepina v. Wood, supra note 513, at 729.

[518] At the United States Army Claims Service, where a request for reconsideration does not, without more, trigger an extension of the limitations period, claims attorneys invariably provide just such a warning in their response should they decline to reconsider.

The request for reconsideration based specifically on new evidence not accompanying the request, as in the first case cited in the text, may require more explanation. The claimant in that case might have been spared his difficulty if the agency had clearly given either of the following two reasonable warnings: (a) that a request for reconsideration specifically premised on the furnishing of new evidence is not effective for any purpose until the new evidence is in fact furnished, or (b) that the request for reconsideration is provisionally effective, but conditional on the new evidence being supplied by a deadline set no earlier than the end of the period in which reconsideration might have been sought initially.

A final word or two on the reconsideration request. Its temporary bar to litigation affords agencies a limited opportunity to conduct a reconsideration without discovering to their surprise that the claimant has gone to court after all. It serves a useful purpose. But plainly most reconsiderations do not require six months, as shown by the speed with which agencies manage to send most letters renewing a denial. Where denial on reconsideration is all but a foregone conclusion, agencies should act especially promptly, so as not to keep claimants artifically out of court. Suppose, however, a claimant asks to withdraw a request for reconsideration before the end of six months. May he or she do so? The regulations imply that a claimant may not demand its withdrawal. But I do not see why he or she may not request it, particularly since reconsideration was entirely optional with the claimant in the first place. In fact, agencies should routinely honor such a request, provided they have not as yet expended significant resources on the reconsideration process.[520] The agencies alone should be allowed to make that determination, but they should make it fairly and objectively.

J. The Aftermath

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[519] See supra notes 513-15 and accompanying text.

[520] Before the 1966 amendments, a claimant could withdraw a claim optionally filed with the agency on fifteen days' written notice. See supra note 293.

The most convenient rule would be to allow the claimant six months from the withdrawal in which to bring suit, as was the case in the pre-amendment days. Theoretically, a claimant could file a reconsideration request for the sole purpose of prolonging the normal limitations period, but this seems an extremely improbable tactic.

Following a final denial, and either no request for reconsideration or a fruitless one, the disappointed claimant's remaining option is litigation. In fact, not all disappointed claimants exercise the option, and for this the administrative process itself is doubtless partly responsible. That process achieves its end not only when it yields a fair settlement of a meritorious claim, but also when it dissuades a claimant from pressing a nonmeritorious one. In both situations, it avoids needless litigation. Still, in some cases a claimant abandons his or her claim without abandoning a belief in its merits. This category of foregone litigation cannot quite so easily be described as needless. But where a claimant chooses not to litigate because he or she at least has had the satisfaction of being heard, has come to a more realistic assessment of the claim's strengths and weaknesses, or can weigh the costs of litigation more intelligently and dispassionately than would otherwise have been possible, the administrative claim procedure also shows a measure of success.

Tort claims that go to litigation are not inherently incapable of settlement. In fact, it is estimated that between sixty and seventy percent of them are settled prior to judgment.[521] The fact that these percentages approach the eighty percent that prompted Congress to enact the 1966 amendments[522] obviously does not indict an administrative settlement process which now results in the settlement or abandonment of a vastly greater portion of claims than was previously even imaginable. The fact is that litigated cases now represent a very small subset of all claims filed. What is more, a good many postlitigation settlements do not represent in any sense a concession of liability, but a rational decision by the Justice Department to conserve scarce litigation resources for cases that count more heavily. Agency and Justice Department officials alike seem to agree that the Department may properly compromise litigation over a claim that an agency could not in good conscience settle.

Legislative history suggests that Congress never expected the agencies to dispose finally of all the claims they received,[523] and probably did not anticipate even as high a rate of final disposition as they actually have achieved.[524] In fact, the authors of the Senate Report on the 1966 amendments thought it "obvious" that action on difficult tort claims could not be completed in the six months allotted to the agencies, but were content that "the great bulk" of claims would probably be ripe for decision within that time.[525] Even so, they deliberately chose not to make claimants wait any longer than that before seeking a judicial remedy. Of course, not all FTCA litigation comes from impatient claimants. Some litigants are met with prompt and outright agency denials that may or may not be warranted, or early offers they believe they can top in litigation, either through compromise settlement or judgment. Others just want their day in court. One cannot know the precise mix. But the fact remains that in no category of litigation -- and the FTCA is still ultimately a judicial remedy -- do the disputants always work things out before going to court. That something in the vicinity of five to ten percent of all tort claims brought to the agencies' attention finally end up in court[526] is neither very surprising nor disappointing.

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[521] 2 L. JAYSON, _supra_ note 445, at p. 15-9. A current Torts Branch Director estimates the figure for postlitigation settlement as a full eighty percent.

[522] _See supra_ note 312 and accompanying text.

[523] _See supra_ note 467.

[524] _See supra_ note 318 and accompanying text.

Once litigation is brought under the FTCA, the agencies lose their authority to settle a claim. Only the Attorney General or his designee may "arbitrate, compromise or settle" it.[527] But the agencies do not cease to play a role. They will prepare a formal litigation report for the benefit of the United States Attorney on the case. They will conduct further investigations if necessary and will help identify and locate witnesses, expert or otherwise. They will be consulted throughout on factual and legal issues and, as appropriate, on litigation and settlement strategy or the advisability of appeal from an adverse judgment.[528] Agency counsel even may participate actively in the defense, though they rarely prepare pleadings or make court appearances. At all events, agency personnel will themselves constitute key witnesses and discovery of all sorts will implicate agency records. Especially where the claim advances a regulatory tort, rather than a slip-and-fall or fender bender, or where large sums of money or large issues are at stake, they will maintain the liveliest of interest. But the administrative process as such will have come to a close.

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[525] S. REP NO. 1327, _supra_ note 435, at 5, _reprinted in_ 1966 U.S. CODE CONG. & AD. NEWS 2518-19.

[526] _See supra_ note 328.

[527] 28 U.S.C. § 2677 (Supp. 1983).

[528] In most agencies, the same attorneys will be involved in the litigation as were involved in the administrative claim. In the Army, exceptionally, whatever responsibility the agency bears in litigation will be carried by the litigators in the Torts Branch of Army JAG rather than by the Claims Division attorneys who saw the claim through its earlier phases.

Chapter Five

ADMINISTRATIVE SETTLEMENT UNDER THE FEDERAL TORT CLAIMS ACT: A LOOK AT AGENCY PRACTICE

The administrative settlement of tort claims under the FTCA takes place within the reasonably straightforward statutory and regulatory framework described in the two preceding chapters. Though I have emphasized the legally problematic aspects of the claims process, the overwhelming majority of claims obviously pass through administrative channels without raising any significant difficulties of a procedural nature. In fact, as I have been quick to note, some of the problems I identify in the system remain, nearly twenty years after enactment of the FTCA amendments, potential rather than actual ones.

By these remarks, I do not mean to suggest that either the statute or the Attorney General's regulations provide answers to all important procedural issues that may arise. On the contrary, both of these sources are conspicuously silent on how agencies should conduct what really lies at the heart of the operation, namely the actual investigation and determination of a claim. In fact, the Justice Department has taken a strikingly narrow view of the rulemaking authority vested in it. Its regulations essentially dictate to claimants the form and content of a valid and sufficient claim,[529] and detail the measure of cooperation that agency claims officers may expect of them.[530] They further advise claimants of when and how to amend a claim or seek reconsideration.[531] But as for guiding and channeling the conduct of the agencies, the regulations say practically nothing, beyond instructing generally when to submit a proposed settlement to review by an agency legal officer or the Justice Department,[532] how to convey a notice of final denial,[533] and how to process a claim for payment once it has been settled.[534] The essence of agency responsibility under the FTCA -- investigating and initially determining a claim -- is as much passed over by the regulations as it is by the statute itself.[535] In the end, the agencies are virtually free to adopt whatever manner of operation they choose and presumably to reduce it to writing or not as they see fit.[536] Whether Congress expected the Justice Department to impose greater procedural guidance on the agencies, is entirely conjectural.[537] The fact is it has not.

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[529] 28 C.F.R. §§ 14.2-.3 (1983).

[530] Id. § 14.4.

[531] Id. §§ 14.2(c), 14.9(b).

[532] Id. §§ 14.5-.7. For example, an agency referral to the Justice Department "shall be directed to the Assistant Attorney General, Civil Division, Department of Justice, in writing and shall contain: (a) A short and concise statement of the facts and of the reasons for the referral or request, (b) copies of relevant portions of the agency's claim file, and (c) a statement of the recommendations or views of the agency." Id. § 14.7.

[533] Id. § 14.9(a).

[534] Id. § 14.10(a).

The purpose of the present chapter is to sketch the agency practices that put procedural flesh on the statutory and regulatory skeleton. My insights as well as my examples stem from conversations with personnel in the claims divisions of ten federal agencies -- the Departments of Agriculture, the Air Force, the Army, the Interior, Justice and State, the Federal Bureau of Investigation, the National Aeronautics and Space Administration, the United States Postal Service and the Veterans Administration -- as well as the General Accounting Office. The agencies chosen do not necessarily constitute a cross section; in fact, I selected them mostly for some peculiarity like an especially high claims volume or access to a meritorious claims statute in addition to the FTCA. They do provide an opportunity to examine claim settlement practices in a series of less than perfectly simple agency settings.

I find it striking, though not wholly surprising, that the relative autonomy of the agencies in organizing their claims activities has not prevented them from all heading in basically the same procedural direction. Out of a rich universe of conceivable models, they have landed upon one whose shared characteristics permit us to identify it as essentially investigatory in character. For the most part, the differences that emerge go to details of the operation. The presence of this strong common denominator leads me to present what I have learned from the agencies as small variations on a single common theme rather than as a series of identifiably distinct alternatives.

I use the term investigatory to denote the following sort of procedure. The agency out of whose activities a claim arises takes charge itself of assembling what will be the factual basis of the determination. While the appropriate operating division of the agency may be asked to execute certain basic investigative foot- and paperwork, responsibility for seeing that the job is satisfactorily done ultimately rests with the claims division of the agency's Office of General Counsel or its equivalent, the same body that eventually passes upon the merits of the claim. Neither in its investigating nor its evaluating functions does the agency afford anything remotely approaching a judicial-style hearing. There will be no formal record, no cross examination or confrontation of witnesses, no rules of evidence, and no special discovery devices -- none of the elements normally associated with a formal hearing. In a very basic way, the model is simply nonadversarial. What makes this fact most evident is not so much the absence of the procedural trappings just mentioned (for it is possible to have those trappings in a nonadversarial setting), but the fact that the ultimate decisionmaker, though at a remove from the events giving rise to the claim, is not entirely neutral. Decisionmaking authority at the agency level has not been vested in an independent claims commission, a body of administrative law judges, or some other unit enjoying substantial institutional independence from the different agencies out of whose activities the claims arise. One might say without exaggerated contrast that administrative tort claims are decided essentially by lawyers for one of the parties. Viewed in that light, the prevalence of an agency-centered investigatory mode of operation is anything but surprising. In many cases, the filing of an administrative claim does not even signify a "dispute" between the parties.[538] Some sort of "incident" there will have been, but not necessarily a dispute. That will be revealed only in the outcome.

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[535] Section 14.8 of the regulations, entitled "Investigation and examination," does no more than authorize an agency to enlist the cooperation of another agency in conducting its investigations.

[536] _Id._ § 14.11, authorizing agencies to issue regulations consistent with the Attorney General's.

[537] _See_ text at notes 303-07, _supra_.

A. A Sense of Numbers

Before hazarding a composite chronological sketch of agency-level settlement practices, I should say a word about the relative burden of tort claims in the various agencies. On the one hand, no federal agency, however distinctive its affirmative missions, is without its incidence of them. Each has had to address the relevant substantive and procedural questions and establish the necessary machinery. Some agencies, particularly those with large numbers and recurring patterns of tort claims, have developed detailed regulations that supplement those of the Justice Department and that may also govern whatever meritorious or other auxiliary claims authority they may possess; others have essentially reenacted the Justice Department regulations, in some cases verbatim.[539]

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[538] Obviously some tort claims are filed after a dispute, in every practical sense of the term, has arisen. Such is the case of many so-called regulatory torts, as well as some conventional common law tort situations like conversion, trespass or false arrest or imprisonment.

[539] For FTCA regulations of the particular agencies in my sample, see 7 C.F.R. § 1.51 (1983) (Agriculture Department); 14 C.F.R. §§ 1261.300-.315 (1983) (NASA); 22 C.F.R. §§ 31.1-.17 (1983) (State Department); 32 C.F.R. §§ 536.1-.171 (1983) (Army), 842.0-.181 (1983) (Air Force); 38 C.F.R. §§ 14.600-.610 (1983)(Veterans Administration); 39 C.F.R. §§ 912.1-.14 (Postal Service); 43 C.F.R. §§ 22.1-.5 (Interior Department). Adjacent sections of the regulations of the military services, the Veterans Administration and the State Department, for example, address the complex array of ancillary claims settlement authority -- such as the Military, Foreign and National Guard Claims Acts, or the statutes that authorize payment of tort claims arising

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But though universal, tort claims strike some agencies more frequently than others. Statistics reported at the time of the 1966 amendments showed the incidence of tort claims to be highly concentrated in a small number of agencies, typically those having extensive direct dealings with the public or making use of a large number of motor vehicles. Over four-fifths of tort suits pending against the government at the end of October 1965 arose out of the activities of five agencies: the Defense Department, the Post Office (as it was then called), the then Federal Aviation Agency, the Department of Interior and the Veterans Administration.[540] So far as one can tell,[541] the pattern has continued. Judging by the admittedly somewhat skewed sample of claims actually approved in calendar year 1982 by the Justice Department for sums in excess of $25,000, the incidence is dramatically uneven. Of 155 such claims, the agencies just mentioned collectively account for all but ten.[542] Comparisons in numbers of incoming claims are more elusive, but also more reflective of the actual relative burdens on the agencies. Figures given me by some of the agencies I sampled indicate dramatic variations. On the high end for fiscal year 1982, the Veterans Administration received a total of 936 malpractice and 1660

(Footnote Continued)
abroad -- conferred on those agencies. Unless incorporated by reference, the basic Justice Department regulations on the FTCA have no bearing on the latter provisions. In fact, most of the agencies busiest with claims of various sorts have produced an impressive battery of internal agency memoranda, handbooks, manuals and the like that detail substantive and, to a much greater extent, procedural aspects of the various claims programs. See, e.g., Air Force Regulation No. 112-1, Claims and Tort Litigation (July 1, 1983); Army Regulation No. 27-20, Legal Services: Claims (Sept. 1970); United States Postal Service, Administrative Support Manual, pt. 250 (Oct. 15, 1982); Veterans Administration Regulation No. M-02-1, pt. 18 (Aug. 1, 1981).

Regulations on the FTCA and on ancillary claims statutes may differ in their particulars. Non-FTCA State Department claims, for example, may demand by way of a claim a formal sworn statement and greater particularity than the simple written statement required under the FTCA. 22 C.F.R. § 31.4(b)(1983). The Veterans Administration calls for claims to be filed in duplicate. 38 C.F.R. § 14.616(a)(1983).

[540] S. REP. NO. 1327, 89th Cong., 2d Sess. (1966), quoting from H.R. REP. NO. 1532, 89th Cong., 2d Sess. (1966), and reprinted in 1966 U.S. CODE CONG. & AD. NEWS 2519.

[541] The General Accounting Office is in the process of devising a system for recording by agency the volume as well as the dollar value of payments out of the judgment fund on administrative tort claims in each fiscal year. That information is not now systematically available.

[542] The Army alone accounted for over half of the dollar value of such claims.

The pattern for 1983 was similar. Of 120 claims approved by the Justice Department, all but nine were generated by the named agencies.

nonmalpractice claims,[543] and the Air Force 1727 in the aggregate.[544] Even this healthy total is dwarfed by the reported 9323 tort claims processed administratively by the Postal Service in calendar year 1982. Annual claims totals range downwards through an estimated 1500 for the Department of Interior, 500 for the Agriculture Department, and 100 or so for the Federal Bureau of Investigation, until one reaches the comparatively modest levels of fifty claims or less each in the State Department and National Aeronautics and Space Administration, even counting claims under those two agencies' meritorious claims statutes. Clearly some agencies outside my sample have annual tort claims tota that can be stated in one-digit numbers.

B. A Sense of Organization

The volume of an agency's tort claims business necessarily has a bearing, though not always the same bearing, on how it organizes its conduct of that business. To relate the organization of each agency in my sample would be tedious, especially as a few examples should suffice to indicate the possibilities. In the State Department, a single Assistant Legal Adviser within the Office of Legal Adviser personally handles all the agency's tort claims with the assistance of one attorney-adviser and one secretary; even then the work does not consume all or even most of his time.[545] Centralization on a scale like that is entirely feasible. All final determinations are made by the Deputy Legal Adviser on the Assistant Legal Adviser's recommendation, which takes the form of a self-contained memorandum, without the former necessarily ever examining the claims file. Only foreign claims may be finally settled elsewhere, namely in the foreign missions, but only in an amount up to $1000, and even then the missions are reportedly reluctant to issue a final denial; they prefer that such a ruling come from Washington.

By contrast, tort claims in the Veterans Administration, though officially handled by an Assistant General Counsel who likewise has other important duties,[546] command the full-time attention of a deputy assistant general counsel with a staff of four attorneys. More important, tort claims occupy agency lawyers in each of fifty-four regional counsel offices. Nevertheless, considering the scale of the agency's tort claims business, matters are reasonably centralized. All tort claims, wherever filed, are routed to counsel headquarters in Washington for a superficial examination of their sufficiency. Only then are they forwarded to the district counsel office nearest where the claim arose. There an investigation will take place, and there final settlements of up to $25,000 may be reached[547] and final denials issued on claims up to any amount. Any proposed settlement in excess of $25,000 requires approval from the General Counsel's office on the basis of the file assembled locally. That office, exercising a de novo standard of review, may deny the claim entirely, or it may remand to district counsel with instructions to negotiate and settle the claim for a stated lesser amount within their authority or, if that cannot be done, to deny it altogether, or it may even exceptionally give regional counsel authority to negotiate and settle the claim for an amount less than that recommended but beyond their normal authority, subject to Justice Department approval. Of course, it may simply endorse the regional counsel recommendation in which case it will seek Justice Department approval itself. Any decisive action taken in Washington, though handled by an ordinary staff attorney, requires a formal memorandum to the Deputy Assistant General Counsel to be transmitted, upon his own review and revisions, together with a draft letter, to the Assistant General Counsel for action.[548]

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[543] In the same period, incidentally, 156 malpractice and 877 nonmalpractice claims were settled administratively. The figures confirm the variability of settlement rates within a single agency according to type of claim. *See* text at notes 334-35, *supra*.

[544] *See* text at note 321, *supra*. I do not have a comparable total for the Army, but the Chief of General Claims in the Army Claims Service gives a ballpark figure as high as 5000.

[545] In calendar year 1982, 31 tort claims came into the Assistant Legal Adviser's office, ranging from a $500 claim for property stolen from an embassy abroad to a $100 million claim for the alleged negligence of State Department officials in failing to evacuate the claimant quickly enough from a foreign country to receive needed medical attention.

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[546] The other duties of the Assistant General Counsel, as head of Professional Staff Group One, include educational programs, vocational rehabilitation, loan guaranty and bankruptcy.

The agency's other four assistant general counsel handle, respectively, (1) compensation, pensions and insurance, (2) hospital administration, personnel and labor relations, and constitutional torts, (3) Freedom of Information, Privacy Act and equal employment opportunity matters, and (4) contracts and construction.

[547] The fact that district counsel is authorized and even disposed to settle a claim in an amount up to $25,000 does not mean it necessarily will do so. Advice of headquarters may be sought on any factual or legal issue or on matters of valuation. One Washington-based claims attorney reports spending a substantial portion of his tort claim activity time on the phone with district counsel or over files referred by them. See 38 C.F.R. § 14.608 (1983) on referrals from district counsel.

[548] Other agencies with a much smaller claims volume than the Veterans Administration nonetheless use a similar moderately decentralized system. At the National Aeronautics and Space Administration, tort claims responsibility falls to an Assistant General Counsel for Litigation whose resources are devoted in far greater measure to other matters, notably contracts and procurements. He and

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Even so, the Veterans Administration does not push centralization of large scale tort claims operations to the limit. The Department of the Army may take credit for that. Suffice it to say that any claim with a face value in excess of $5000 requires direct handling in claims service headquarters at Fort Meade, Maryland. Claims of a lesser face value are processed by the post having geographic responsibility for the incident, in particular by the designated claims attorney -- military or civilian -- within that post's Judge Advocate's office.[549] Substantive settlement authority, exercised on the basis of the officer's investigative report complete with findings and recommendations,[550] vests in the Staff Judge Advocate (the chief legal officer at the post) or by delegation in the claims officer directly. No more than $5000 may be authorized for payment at this level. Apart from the Army's markedly lower cutoff point on local settlement, even compared with the relatively centralized Veterans Administration, the best measure of concentration in the Army Claims Service is its policy on denials.[551] Put simply, no local post may deny a claim, however, small the sum sought.[552] The most it can do is prepare a so-called Seven-Paragraph

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his assistant can handle the tort load themselves because NASA regional counsel have independent settlement authority up to $10,000 and an unlimited denial authority which, as so many other agencies report, they are reluctant to exercise. Proposed settlements over $10,000, and referrals from regional counsel in other cases, come to Washington for review and recommendation by the Assistant General Counsel and formal action by the General Counsel. Quite clearly, NASA could handle its entire yearly claims volume of roughly fifty claims directly out of Washington -- much like the State Department does -- but finds it more efficient to decentralize matters among the eight regional space centers out of whose operations its tort claims almost invariably arise.

[549] Alternatively, a post may have a separate unit claims office headed by a claims officer who is not normally an attorney; in that event, the claim will be supervised and handled there.

[550] If a unit claims officer, supra note 549, investigated the claim, he or she will prepare the report; if a subordinate unit officer investigated the claim, the report will come from the claims officer in the Judge Advocate's office.

The Army has devised a small claims procedure whereby amounts up to $750 may be paid on a proper claim without the filing of an investigative report. Army Regulation No. 27-20, Legal Services: Claims §§ 2-29 - 2-35 (Sept. 1970).

[551] Like the Veterans Administration, the Army Claims Service also reports steady referrals of issues and whole claims from local agency attorneys even on matters fully within their settlement jurisdiction.

[552] This contrasts sharply with the more usual agency practices of delegating to local agency attorneys either (a) authority to deny claims of a face value coextensive with their payment authority or, more often,
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Memorandum and Opinion specifically justifying its recommendation to deny;[553] a decision to deny must come from Fort Meade, and it must come from the Chief of the General Claims Division of the Army Claims Service personally rather than from any of his headquarters attorney subordinates.[554] The rationale for the policy is as interesting as it is unusual among agencies. Basically, it reflects a belief that settlements warrant the attention of high-level authorities not only when subordinates propose to dip deeply into the Treasury in making payment on a claim -- as is the customary belief and the reason why so many agencies delegate limited settlement authority but unlimited denial authority[555] -- but also when they propose to pay nothing at all on a claim or simply less than the claimant is prepared to accept. But why has Army Claims actually reversed the usual presumption, for local posts do have unreviewed settlement authority for up to $5000 but no denial authority at all? The answer lies in what may be a realistic fear that local claims attorneys sometimes end up denying valid claims simply because they are not sufficiently able or willing to negotiate a compromise.[556]

When a claim states a face value of over $5000 and the Chief of the General Claims Division does not realistically think local post

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(b) authority to deny claims up to any amount irrespective of the monetary ceiling on their payment authority.

[553] Internal Army regulations prescribe the contents and arrangement of a Seven-Paragraph Memorandum and Opinion:
"(1) Claimant's name and address.
(2) Date and place of accident or incident.
(3) Amount and date of filing of claim.
(4) Type of claim and brief description of accident or incident giving rise thereto.
(5) Facts.
(6) Opinions.
(7) Action."
Army Regulation No. 27-20, supra note 550, § 2-12.

[554] Subordinate attorneys will handle the matter and as often as not reopen the investigation. But only the Chief of the General Claims Division can issue an initial denial. The Chief estimates his rate of reversal of recommendations to deny to be fifty percent. Interestingly, since the Army guarantees reconsideration by an attorney of higher rank than the initial decisionmaker, persons whose claims are finally denied necessarily get reconsideration, albeit on the written record, by the Chief of the entire Army Claims Service.

[555] See supra note 552.

[556] The denial policy described above is as good a manifestation as any of a view -- held with unique conviction in the Army Claims Service -- that agency-level claims attorneys owe loyalty as much to the claimant as to the Treasury. See text at notes 702-07, infra.

attorneys could settle it for less, the entire procedure -- not just negotiation, but the coordination of all investigations -- is centered in Fort Meade. For the burdens that an already claims-heavy agency has thus taken upon itself, the General Claims Division needs, in addition to its chief, nine full-time "action officer" attorneys and nine full-time investigators, with teams composed of one of each. Each action officer has unlimited settlement authority, subject to the Chief's as well as the Justice Department's approval if he or she proposes to pay out over $25,000. Once again, while subordinate officers are free to settle for up to $25,000 and to negotiate alone with the Justice Department for approval of larger settlements,[557] no denial letter may go out except on the Chief's own decision and under his own name.[558]

Confirming the variety of organizational possibilities are the Interior Department's uniquely decentralized operations. Notwithstanding the Department's heavy claims volume,[559] the General Law Division of the Washington Office of the Solicitor has but one attorney-adviser, admittedly a man with twelve years' experience as an insurance company claims adjuster, who devotes full time to the administrative handling of tort claims.[560] This arrangement suffices because each of Interior's eight regions in turn has a good-sized regional solicitor's office and up to as many as four field offices with claims personnel. Building on the investigative activities of non-attorney operating personnel attached to each and every installation within the Interior Department's jurisdiction, the Regional Solicitor, the Assistant Regional Solicitor, or more often one of the other attorneys in the regional or field offices[561] will handle the negotiations and consider entering into final settlements, which they may do up to $25,000, or denying a claim up to any amount. Though on paper the division of authority looks not unlike that of the Veterans Administration, a number of factors -- the heavy reliance on investigative reports and recommendations prepared at the local installation, the fact that reconsideration when requested also occurs on a regional rather than headquarters basis, and the highly local character and generally lower dollar value of Interior Department claims compared to Veterans Administration claims[562] -- combine to make for a uniquely decentralized tort claims operation.[563]

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[557] However, the Chief will review the memorandum of law and fact produced by the action officer in preparation for Justice Department approval.

[558] For a somewhat outdated but still apt narrative account of Army tort claim procedures, see Williams, The $2500 Limitation on Administrative Settlements Under the Federal Tort Claims Act, 1960 INS. L.J. 669 (1960).

Lest Army claims organization be taken as applicable to all the armed services, a word should be said about Air Force operations. Though $2500 is the ceiling on settlements that may be entered into by the Judge Advocate offices in the 120 air force bases that serve as administrative subdivisions of the Department, those offices retain primary investigative authority in all cases. The entire legal as well as factual workup of a case is coordinated there, which explains why each base has at least one standing claims attorney -- again civilian or military -- and often a full-time paralegal assistant. Settlements up to $2500 may be made by the Staff Judge Advocate, based on a Seven-Paragraph Memorandum, supra note 553, prepared by the claims officer; denials may be issued only when the claim does not exceed that amount. Action -- whether settlement or denial -- in all other cases takes place in Washington, but largely on the basis of the existing claims file.

[559] See text at note 540, supra.

[560] The attorney-adviser reports only indirectly to the Associate Solicitor of the General Law Division. The Associate Solicitor is responsible for essentially three branches of agency legal practice --
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equal employment opportunity compliance, administrative law and general legal services (including labor and personnel matters), and, finally, procurement and patents -- each of which is headed by an Assistant Solicitor. The attorney-adviser reports to the Assistant Solicitor in charge of procurements and patents. (Besides the General Law Division, the Office of the Solicitor has several program-oriented divisions: Indian Affairs, Energy and Resources, Parks Administration and Land Management.)

[561] The full-time headquarters attorney-adviser functions as a regional claims officer for claims arising in the Washington area, relying as do the true regional offices on investigative reports prepared at the local installation out of whose operations a given claim arose, and following in nine out of ten cases the recommendations in those reports. Should a claim arise within the National Capital Region of the National Park Service, one of two non-attorney claims investigators attached to the National Park Service itself will conduct the investigation. The attorney-adviser's personal settlement authority is limited to $10,000. Higher awards require the approval of the Assistant Solicitor in charge of procurements and patents.

[562] A very substantial number of claims arise out of the Department's management of the government's extensive landholdings, operation of widely dispersed public facilities, and maintenance of a large police force and fleet of vehicles to service those facilities.

[563] The current legal division of claims authority within the Department is of relatively recent origin. Until 1977, notwithstanding all the factors favoring decentralization, the regional counsel could not settle a tort claim in an amount in excess of $3500. Pressure from the regions for greater settlement autonomy led to the change.

Another strikingly decentralized mode of operation is the Agriculture Department's. The General Counsel's Office normally sees no
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Although I could expand still further on the organizational peculiarities of the different agencies in my limited sample, I will confine myself to one last example, which is none other than the Justice Department itself. A unique feature of its handling of tort claims arising out of the Department's own activities (as opposed to its exercise of approval authority over other agencies' settlements) is the extent to which substantive authority has been delegated to some of the Department's component agencies. For example, the Federal Bureau of Investigation enjoys and has vested in a specially created Civil Litigation Unit in Washington settlement authority on a nationwide basis up to $5000. It has a small number of FBI attorneys and paralegals for claims alone. The Drug Enforcement Administration and United States Marshals' Service have similar centralized authority, though only up to $2500. The Immigration and Naturalization Service and Bureau of Prisons also enjoy $2500 settlement authority, but exercise it on a regional and local basis, respectively.

Component agencies within the Justice Department conduct their own investigations, usually on a local basis and either by an attorney (as in the FBI) or a non-attorney (as in the Immigration and Naturalization Service or Drug Enforcement Administration), and proceed to settle deserving claims within the monetary limits of their own authority if they can. Otherwise the investigative file comes to the Torts Branch of the Justice Department's Civil Division for whatever further investigation and negotiation may be appropriate and for possible settlement. In practice, referrals are made to the Torts Branch even of claims within component agency authority if they entail close legal or policy issues, or when the component is simply unable or unwilling to conduct the hard negotiation necessary to achieve settlement. And as elsewhere, those who enjoy unlimited denial authority may be quite reluctant to exercise it.

By contrast, the Parole Commission has no delegated settlement authority, nor do any of the Justice Department divisions: Civil Rights, Land and Natural Resources, Antitrust, or Office of Solicitor General, for example. The tort claims to which their activities give rise are handled out of the Torts Branch through the same attorneys who

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claim at all, even one arising in the Washington area, unless its face amount exceeds $60,000. On all other matters, as one high-ranking Washingon claims officer put it, "regional counsel are on their own." Washington will at most get copies of correspondence. Regional counsel conduct reconsideration of their own decisions and in principle deal directly with the Justice Department when a proposed settlement needs approval. How a claim is to be investigated is a matter between regional counsel and the "tort liaison" officer (rarely a lawyer) in the local office of the component Agriculture Department agency out of which the tort claim arose. The current organization, like the Interior Department's, is of recent origin. Until raised a few years ago to $60,000 -- at that time the level of United States Attorneys' settlement authority -- the ceiling on regional authority was set at $10,000.

handle approval matters and tort litigation generally, though much of the burden is borne by a single Tort Branch paralegal officer.[564]

C. The Initial Stages of a Claim

Wherever they happen to be filed within a given agency,[565] tort claims usually make their way to its legal department, either the Office of General Counsel or a regional or district counsel's office, depending on how the agency and its tort claims operations are organized. Each claim, according to its amount or apparent complexity, will be assigned to a particular claims attorney or, for the routine claim in a claims-heavy office, to a paralegal.[566] His or her responsibility is to see that the factual basis of the claim is adequately investigated, to evaluate the claim personally on the investigative file as supplemented, and to conduct negotiations with the claimant or claimant's attorney if the prospects for settlement warrant it.

Among the first items of business on the agenda of a claims attorney is a cursory examination of a claim's sufficiency. If Standard Form 95 has been used, telling whether the claim is free of technical defects, recites a sum certain and otherwise contains what is necessary for an investigation to go forward is reasonably easy. Most of the claims attorneys with whom I spoke profess to run each claim against some sort of a mental checklist of essential elements and, as I indicated earlier, inform the claimant or his or her representative if the claim falls short in any respect. This seems to me without question a sound practice, unless one deems it contrary to principle to save a well-meaning claimant from innocent but costly errors in the filing of a claim.

One way for agency attorneys to spare claimants unfair hardship is to adopt a standard of substantial rather than strict compliance with the Attorney General's regulations on the filing of a claim.[567] Chapter four detailed the rich variety of ways, technical and not so technical, in which a claimant may innocently fail to perfect a valid claim; I shall not rehearse them here, except to reiterate that Congress itself neither legislated stringent and particularized claim requirements nor specifically authorized the Attorney General to do so. Though full compliance with each and every regulation may help regularize agency claims operations, less than full compliance does not necessarily make it impossible to process a claim.[568] A recent study[569] of the notice requirements for government tort claims in Illinois persuasively concludes that legislative[570] and judicial[571] liberalization has allowed them to serve their intended purpose without causing unwarranted inconvenience or hardship to claimants. Federal claims attorneys with whom I happened to speak generally professed liberalism in monitoring compliance with the formal requirements of the statute and regulations, but judging by the high volume of litigation over them, some in the government must not.[572]

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[564] In more routine cases, the paralegal officer is in charge, with the Torts Branch Director serving as a reviewing authority. Otherwise, a Torts Branch attorney will be in charge either alone or in conjunction with the paralegal, subject to review by an Assistant Tort Branch Director.

[565] Agriculture Department claims, for example are supposed to be filed with the local office of component agency whose activities gave rise to the claim, not with regional counsel.

[566] The Attorney General's regulations impliedly approve the use of paralegals, subject to the requirement of review by an agency legal officer in the case of awards exceeding $5000. 28 C.F.R. § 14.5 (1983).

[567] See text at notes 479-83, supra. A number of agency claims attorneys report that the only elements of the claim they absolutely insist be in place by the time the statute of limitations has run are an identification of the agency, the name and signature of the claimant (or representative), and a sum certain.

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[568] Executive Jet Aviation, Inc. v. United States, 507 F. 2d 508, 515 (6th Cir. 1974) ("The purpose of the [1966] amendment was not to make recovery from the Government technically more difficult . . . [T]he Government . . . certainly was not prevented from attempting a compromise simply because the insurers did not join in [the victim's] administrative claim"); Apollo v. United States, 451 F. Supp. 137, 138-39 (M.D. Pa. 1978) ("Since the policy behind the rule of resort to the appropriate administrative agency is to give the agency a chance to consider the claim and to settle the claim without litigation, it should not be necessary to have submitted a claim that is technically perfect and in conformity with all the associated regulations so long as defects are corrected and so long as the claim as considered contains the essential elements necessary to permit settlement").

[569] Corboy, Shielding the Plaintiff's Achilles' Heel: Tort Claim Notices to Governmental Entities, 28 DE PAUL L. REV. 609 (1979). See also Note, Federal Tort Claims Act: Notice of Claim Requirement, 67 MINN. L. REV. 513, 530 (1982).

[570] The Illinois legislature amended the Tort Immunity Act in 1973 by inserting the words "in substance" before the list of information required in the notice of claim. ILL. REV. STAT. ch. 85, § 8-102 (1977). The Illinois Workmen's Compensation Act specifically provides that a defect or inaccuracy in a notice of claim does not invalidate the claim unless the employer can show undue prejudice. ILL. REV. STAT. ch. 48, § 138.6(c)(2) (1977). Such a showing has been virtually impossible where the employer has actual notice of the incident.

[571] Examples cited include acceptance of a filing in the wrong forum, finding a waiver of the notice of claim requirement where the municipality is fully insured against the claim in question or where it fails to object, dispensation from the requirement in the case of counterclaims and claims by infants and incompetents, disregard of factual errors or omissions in the notice of claim, allowing service by registered mail though personal service of the claim is technically required, and even -- somewhat questionably -- acceptance of the filing of a complaint in court as equivalent to the filing of a claim with the entity.

Let me cite just one example having to do with an agency's enforcement of the sum certain requirement. Three months following a collision with a postal truck, a claimant filed with the Postal Service a detailed Standard Form 95, along with a physician's report and medical bills for injuries sustained in the accident. The original supporting exhibits met all the regulatory requirements but, because the form did not contain a sum certain, were returned to him with instructions to perfect the claim. The plaintiff filed a new Standard Form 95, specifically requesting $22,000, but despite being instructed to do so by the Postal Service, failed to resubmit the exhibits until after the limitations period had expired. The agency called the claim stale and refused to consider it. As the court was to observe in sustaining the claim's validity, "[t]he circumstances are that the Postal Service ultimately received conforming copies of the Form 95 and its supporting exhibits, but never at the same time":

> The [1966] amendments were intended to provide a framework conducive to the administrative settlement of claims, not to provide a basis for a regulatory checklist which, when not fully observed, permits the termination of claims regardless of their merits . . ..
>
> The Federal Tort Claims Act requires that the claimant give notice to permit the government to investigate the matter in a timely fashion and to permit negotiations in an effort to resolve the claim without litigation if the government determines there is some merit to the claim. Plaintiff's notice in 1977 was sufficient for those purposes, and he is properly now before this court.[573]

What was shortchanged in the end was the agency process itself.

A second way to avoid unfair hardship to claimants, likewise alluded to in chapter four, is for agency attorneys to take certain very limited affirmative steps to salvage a technically deficient claim. My conversations with individual attorneys lead me to believe that they are often willing to give early warning signals of deficiencies, to relate cures back in time to the original filing, and to use the telephone rather than the mails when time is of the essence, to give just a few examples.[574] I do wish to emphasize though that if agency attorneys do make these kinds of overtures, it is not because Justice Department regulations give them the slightest encouragement to do so. So far as one can tell from the regulations, an officer theoretically may sit upon a defective claim without uttering a word until the moment for a timely cure has passed.

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[572] See supra note 336. To some extent, however, Justice Department litigation strategy rather than agency practice is responsible for injecting technical defenses into the litigation. See supra note 483 and accompanying text.

[573] Koziol v. United States, 507 F. Supp. 87, 88-91 (N.D. Ill. 1981).

[574] See supra notes 394-95 and accompanying text. When time is

(Footnote Continued)

Until recently, the courts likewise have avoided imposing on agency attorneys any affirmative duty to point out a claimant's errors or omissions, however innocent and fatal they may be.[575] Of late, some have shifted a small measure of the burden to the agencies. One court told an agency that it should have taken the untotaled medical bills appended to claimant's written demand for damages for personal injury and property damage resulting from an automobile collision as the equivalent of a sum certain, rather than wait three and a half months, with less than thirty days left before the statute of limitations would expire, to send him four copies of Standard Form 95 for completion and return.[576] Other courts candidly embrace the notion of estoppel where more or less technical defects are concerned,[577] even in a case in which a claimant fails to substantiate his claim as requested and the agency simply neglects to set a reasonable time limit for doing so or to warn

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truly of the essence, the Army claims Service has authorized claimants to being an initial or corrected claim to the local Army Recruiting Office and to have the recruiter telephone the Service to report that the claim was received and to confirm that it is defect-free.

[575] Muldez v. United States, 362 F. Supp. 692, 694 (E.D. Va. 1971) (claims attorney has "no 'duty to speak' other than to provide the [standard] form as requested" and therefore need not specifically advise a claimant that a sum certain is indispensable to a valid claim). See also Mudlo v. United States, 423 F. Supp. 1373, 1376-78 (W.D. Pa. 1976) (suit dismissed for insufficient documentation even though there had never been any communication to this effect from the agency either to the claimant or his attorney).

[576] Molinar v. United States, 515 F.2d 246, 249-50 (5th Cir. 1975).

[577] E.g., Campbell v. United States, 534 F. Supp. 762, 765 (D. Hawaii 1982) (government estopped from objecting to husband's filing a claim for his wife on the ground that he was not appointed guardian ad litem until after suit was brought, since the agency failed to object to his representation at the time of filing); Hunter v. United States 417 F. Supp. 272, 274 (N.D. Cal. 1976) (absence of power of attorney not fatal where agency dealt with claim on merits without ever mentioning the defect); Sky Harbor Air Serv., Inc. v. United States, 348 F. Supp. 594 596 (D. Neb. 1972) (insurers given party status where FAA failed to object earlier). See also Forest v. United States, 539 F. Supp. 171, 175 (D. Mont. 1982). See generally Comment, The Art of Claimsmanship: What Constitutes the Sufficient Notice of a Claim under the Federal Tort Claims Act?, 52 U. CIN. L. REV. 149, 156, 162 (1983).

of the consequences of nonproduction.[578] The fact remains, though, that Congress intended the 1966 amendments to the FTCA to reduce, not to enlarge judicial intervention in government tort claims. With or without encouragement from the Justice Department, agency attorneys should themselves meet well-intentioned claimants halfway on procedural aspects of the claims process to avoid their even becoming litigable issues,[579] and, as I have said, I have the impression that most of them do. In a sense, this recommendation only serves the government's enlightened self-interest, for reasonable overtures to claimants at the agency level may spare the government the resources entailed in litigating procedural issues before a judiciary that shows an ever greater solicitude for tort claimants against the government.[580]

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[578] Industrial Indem. Co. v. United States, 504 F. Supp. 394, 398 (E.D. Cal. 1980).

[579] Specific agency regulations are silent on the question, which makes it basically a matter of individual attorney preference. Regulations of the armed services, however, have something oblique to say. While they expand upon the criminal prohibition against soliciting claims (supra note 352) by expressly forbidding agency personnel to "represent or aid any claimant or potential claimant in the prosecution or support of any claim against the United States" (32 C.F.R. §§ 536.2(a)(Army), 842.6(a) (Air Force)(1983)), they not only carve an exception for "the assistance [claims officers] render as an official part of their duties" (id. §§ 536.2(b) (Army), 842.6(b) (Air Force)(1983)), but specifically enjoin them on request to advise a claimant on how to present a claim and even help in preparing the claim and in assembling the evidence (id.). Cf. 32 C.F.R. § 536.29(k)(4), (6)(1983)(Army) (claims officer should keep claimant and attorney informed of status of claim and familiarize them with all aspects of the procedure).

Similarly, an internal Postal Service Manual forbids assistance in the presentation of a claim, but then goes on to provide that "when necessary, desirable and considered in the best interest of the Postal Service, the person [who indicates a desire to file a claim] should be assisted in preparing the form and assembling evidence." United States Postal Service, Administrative Support Manual § 253.211 (Oct. 15, 1982).

[580] One repeatedly hears in conversation and reads in the literature suggestions that, whatever good faith requires of a claims officer in dealing with an unrepresented claimant, he or she owes little if anything to the claimant who has retained counsel. E.g. Hlavac v. United States, 356 F. Supp. 1272, 1276-77 (N.D. Ill. 1972) ("Plaintiff had a lawyer from the outset and cannot claim that she was a simple layman who did not understand what was required of her"); Zillman, Presenting a Claim under the Federal Tort Claims Act, 43 LA. L. REV. 961, 962 (1983). Granted, the presence of counsel on the other side properly affects the government attorney's choice of strategies in substantive negotiations, particularly when they take on a bargaining character. See text at notes 653-57, infra. But it should have no

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D. Investigating the Claim

In a large number of cases, agencies may conduct routine accident investigations quite apart from any actual or imminent tort claim. Virtually all have an elaborate battery of procedures and forms for the mandatory completion of a contemporaneous accident report by the officer personally involved and of an immediate investigative report by his or her hierarchical superior. These generally may be found in agency handbooks and manuals rather than published regulations,[581] and the reader will be spared their details. Take by way of sole example the Postal Service, roughly seventy-five percent of whose claims arise out of motor vehicle accidents and another twenty percent out of post office slip-and-falls. In the event of a motor vehicle accident, the government driver routinely completes a contemporaneous accident report on Standard Form 91,[582] a supply of which will be carried in the vehicle glove compartment and a copy of which is attached to this report as Appendix C. Upon the mandatory notice, his or her supervisor completes a Postal Service Form 1700 ("Accident Investigation Worksheet") (Appendix D), supplemented as appropriate by one or more witness statements each on a Standard Form 94 (Appendix E). The supervisor in turn contacts the local accident investigator of which each post office has at least one. His or her job is to conduct a full-scale investigation which includes securing a driver's statement, photographs and diagrams, a firsthand view of the wreckage or the scene, police reports, witness statements, an account by the victim and so on. This file is now forwarded for review and storage to the one of 230 Management Sectional Centers into which the nation's post offices are grouped. Should a claim then happen to arise out of the incident, as well it may any time over the next two years, a complete and fresh record will be on hand to constitute the basic investigative file. Needless to say, elaborate internal agency guidelines govern the

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bearing on his or her willingness to make the modest and threshold procedural overtures to which I refer in this section.

[581] E.g., Army Regulation No. 27-20, supra note 550, ch. 2, sec. I; Air Force Regulation No. 112-1, Claims and Tort Litigation ch. 4 (July 1, 1983); Department of the Interior, Departmental Manual § 451.1.8-.10 (Oct. 29, 1975). For example, an Interior Department Manual requires, irrespective of whether a tort claim is filed, that tort claims officers conduct an investigation of any incident involving injury to person or damage to or destruction of property, and this above and beyond investigations required by agency regulation to be made by supervisors, safety officers and auditors. The regulations spell out precisely the matters the tort claims officer must investigate and the material he or she must include in the investigative report.

[582] A Standard Form 92-A ("Report of Accident other than Motor Vehicle") should be used on the appropriate occasion.

investigation of accidents,[583] vehicular and nonvehicular alike, involving Postal Service employees.

What happens in the event a claim is actually filed? At that point, the Management Sectional Center completes a very brief Postal Service Form 2198 ("Accident Report: Tort Claim") (Appendix F) which will state a conclusion under the rubric "Remarks" on how the claim should be handled, based largely on the completed accident investigation file as the Center may have supplemented it upon receipt of the file and subsequent claim. By this time, of course, the agency will have the benefit of the claimant's precise allegations and showings of loss, and they will be scrutinized. Unless the Management Section Center is able to settle the claim for $100 or less,[584] it must send Form 2198, in the case of simple property damage claims of no more than $1000, to that one of the nation's three Postal Data Centers[585] having geographic jurisdiction. The Centers, the primary apparatus within the Postal Service for determining small claims, consist of claims clerks without any formal legal training, but high volume experience in small claims adjustment.[586] Though they essentially lack investigative means, the Centers critically examine the existing file and through telephone and mail contact with claimants -- interspersed with referrals on all sorts of issues to the Law Department in Washington -- determine whether the claim is valid and, if so, what it is worth. Should reconsideration of a denial be sought, it will be had on the existing record in Washington.[587] A claim alleging property damage in excess of $1000, or personal injury in any amount, is directed not to a Postal Data Center, but to the Postal Inspection Service which is organized in fifteen to twenty regional offices and composed of trained nonlawyer professional investigators.[588] Again, the accident investigation file, covered by Form 2198, constitutes the core of the record, but the Postal Inspection Service, unlike the Data Centers, is equipped to reopen it itself if need be. Claims may be settled for up to $5000 at this level, but claims even within this range commonly pass to headquarters for a first determination, especially in a less than routine case.[589]

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[583] United States Postal Service, Methods Handbook Series M-19, Accident Investigations: Tort Claims, paras. 111-234.4 (July 11, 1977).

[584] The Center may not deny a claim in any amount.

[585] Postal Data Centers are located in New York, Minneapolis and San Francisco. They handle roughly seventy-five to eighty percent of Postal Service claims, though a small percentage of overall claim dollars.

[586] As a practical matter, few cases in this category involve subtle legal issues. Where legal advice is needed -- for example, on the local contributory or comparative negligence standard or on the collateral source rule -- the Centers will make a telephone inquiry to Washington or, less often, to regional counsel.

[587] As a rule, any reconsideration of a denial by one of the Postal Data Centers is handled by a paralegal officer in Washington with independent settlement authority up to the amount of $10,000. Action over that amount, whether on reconsideration or as an original matter, requires the decision of an attorney, up to a maximum settlement authority of $25,000 in the case of the Claim Division's Supervising Attorney. By in-house custom, though not by regulation, the Supervising Attorney also observes a $25,000 ceiling in denying a claim. Thus, in practice, both settlements in excess of $25,000 and denials of claims over $25,000 require the attention of the Assistant General Counsel.

Clearly, different kinds of claims warrant different investigatory routines. The steps normally adequate for getting to the bottom of a motor vehicle accident will not quite do for the crash of a military aircraft; for this the relevant agencies have devised an entirely different set of investigative procedures.[590] And neither of these will answer the needs of a thorough investigation into an incident of possible medical malpractice.[591] But the principle is the same. In

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[588] Because it is organized on a narrower regional basis than the Postal Data Centers, the Postal Inspection Service is more inclined to direct legal questions to regional counsel than to the Law Department in Washington.

[589] Thus, the Law Department receives three categories of claims: reconsiderations, proposed settlements above the authority of the Data Center or Inspection Service, and hard cases even within that authority. It estimates the total as about one hundred claims a month. For this, the Claims Division requires a staff of five lawyers and one paralegal spending part of their time only on FTCA matters.

If a final settlement is reached at any level, it will be recorded and processed for payment on Postal Service Form 2106 (Appendix G), rather than through usual GAO channels, because all Postal Service tort payments, by way of unique exception among agencies, come out of revenues. See supra note 173.

[590] See Air Force Regulation 110-14, Investigations of Aircraft and Missile Accidents (July 18, 1977). The regulations, which describe the purpose of the investigation as "to preserve available evidence for use in claims, litigation, disciplinary actions, administrative proceedings, and all other purposes," prescribe specific guidelines for the inquiries to be made, the use to be made of the separate and prior confidential Safety Investigation Report (Air Force Regulation No. 127-4), the detailed materials to be obtained, and the precise sequence in which all forms, documents and exhibits are to be arranged.

[591] See e.g., Office of the Judge Advocate General, United States Air Force, Handbook for Judge Advocates: Investigating Medical Malpractice Claims (Mar. 1983). The handbook is a 126-page step-by-step guide with forms and appendices.

In the Veterans Administration, investigation of a medical malpractice claim by district counsel entails at a minimum contacting the hospital, ordering a copy of the patient's complete medical record,

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each case, routine and near-contemporaneous reports will constitute the starting point for the investigation of any subsequent tort claim arising out of the incident. They invariably require amplification in

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conducting a physical examination, interviewing the treating physician, obtaining hospital and pharmaceutical records (and even purchasing or maintenance records) where relevant, and getting the opinion of an impartial medical expert through the VA's own district medical director on whether a deviation from accepted standards of practice occurred. The investigation culminates in a standard two-part district counsel report -- the first consisting of a statement of fact, the second, a brief on the applicable law -- plus exhibits. Veterans Administration Regulation No. M-02-1, § 18.07c (Aug. 1, 1981). According to the regulation:

> The investigation is not complete until the following are acquired or accomplished and included in the report:
>
> 1. Understanding of the patient's medical history as understood by the physician.
> 2. Determination as to whether the medical history had any bearing on the course of treatment and how much it was taken into consideration by the treatment team.
> 3. Understanding of the significance of the symptoms presented by the patient and of the clinical, laboratory, and x-ray findings.
> 4. Understanding of the diagnosis and how it was reached.
> 5. Understanding of the treatment regimen or procedures, alternative methods of treatment available, the reason for selection of the treatment followed, including information as to the perils and hazards of alternatives. Where error in diagnosis is claimed, facts must be elicited to show how the diagnosis was determined.
> 6. The reasons for untoward results from treatment must be determined. Did the patient contribute to the poor result by failure to cooperate during treatment? Are there sound medical reasons for the results other than those claimed by the patient?
> 7. Where untoward results from diagnostic or surgical procedures occurred, were they of such a nature that they actually would not occur but for error?
> 8. If a serious drug reaction is claimed, the frequency or rarity of its occurrence must be determined. Were other less-dangerous drugs indicated? Was the patient warned of the risk? Did the patient history show prior reactions?
> 9. Relevant medical opinions must be documented by medical literature. Copies of the relevant medical literature should be obtained and attached to the report.
> 10. If failure to obtain consent is the issue, the most recent Federal cases on the subject as well as the relevant State cases must be studied before the investigation is completed. The facts concerning the information furnished the patient concerning the risks, consequences and complications must be developed, including the medical reasons for withholding or minimizing such risks or consequences.

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one respect or another after a specific claim comes in, if only on such questions as damages or documentation of loss which may not have been fully covered. Needless to say, some tort claims arise out of incidents whose claims potential no agency personnel at the time could have recognized. This means investigation from the top. Limitations of time and space do not permit a look at investigative techniques for the myriad kinds of claims an agency may receive. One Air Force claims manual alone describes the different investigative steps and documents required for a diverse list of claim types such as crop loss, soil damage, sonic boom, animal claims and mail claims;[592] entire manuals are devoted to large-scale and recurring types such as medical malpractice.[593]

The larger agencies, especially those generating the bulk of federal tort claims, have their own staffs of trained investigators and their own internal networks for securing the assistance of skilled professional advice where needed.[594] Agencies not so well-endowed have

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> In summary, the attorney must know and report the medical facts, favorable or unfavorable, to fulfill his or her responsibility.

Id. § 18.07c(3)(f).

[592] Air Force Regulation No. 112-1, §§ 4-19 - 4-32 (July 1, 1983). Following an extensive all-purpose list of items, an Army Claims manual singles out for detailed and specialized treatment traffic cases, mail cases, explosion and detonation cases and overflight claims. Army Regulation No. 27-20, supra note 550, § 2-8.

[593] See supra note 591.

[594] Medical malpractice is a good example. In the Veterans Administration, if the district counsel encounters disagreement on the applicable standard of medical care or on whether the injury claimed resulted from substandard medical care, he or she is directed to request an opinion from the VA Medical District Director with geographic jurisdiction (except when the Director is found in the facility where the incident occurred). The Medical District Director in turn is charged with obtaining reviews from all relevant specialists within or without the VA. If medical issues remain outstanding, the file is forwarded to the Office of General Counsel for referral to the VA's Special Assistant for Professional Services, a woman with special legal and medical background. Veterans Administration Regulation No. M-02-1, supra note 591, § 18.07c(3)(e).

The Air Force has a somewhat different system for medical malpractice claims. At each Air Force Medical Center, a Judge Advocate is assigned to the position of Medical Law Consultant. The Consultant provides medical-legal advice to any air force claims officer investigating an actual or potential malpractice claim at bases within the jurisdiction, and is available for consultation at any stage. When the investigative file is complete, the claims officer routinely sends

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express authority from the Attorney General to request the assistance of other agencies in claims investigation, including the performance of physical examinations.[595] Whatever the situation, surely one of the claims officer's greatest challenges is deciding how precisely hands-on investigative responsibility should be delegated and possibly subdelegated in any given case, and ensuring that it is carried out in a timely and professional manner. Even in agencies that squarely concentrate the adjudicative function over all cases in one attorney's office in the nation's capital -- indeed especially in those agencies -- the primary investigative function as such will normally have to be lodged elsewhere.[596] But in other agencies, the vital task of coordination itself is dispersed.

Take the Agriculture Department by way of example. A claim is generally filed with the local office of the relevant component agency, normally one of the Department's multitude of bureaus. It is then sent to the designated "tort liaison" officer of that component agency who in all but two instances sits in Washington, unless the particular agency has chosen to establish liaison facilities at the state or regional level. The tort liaison officer is seldom a lawyer and most often has some other primary staff responsibility -- finance, contract, personnel, to name the most probable. He or she is in charge of orchestrating the investigation from start to finish, though much of that investigation will take place at the distant local program office where the claim was originally filed. (The person who conducts the local investigation

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it in full to the Medical Legal Officer under a cover letter containing a detailed summary of the facts and legal issues. The latter in turn refers the file to relevant members of the Medical Center's professional staff for an expert review and opinion on the adequacy of treatment, and on that basis compiles for the claims officer a nonbinding but persuasive Medical-Legal Opinion with recommendations. Office of the Judge Advocate General, United States Air Force, Handbook for Judge Advocates: Investigating Medical Malpractice Claims, supra note 591, § 2. Evidently the Army follows a similar routine. However, the practice at the level of the Army General Claims Division at Fort Meade is never to select a military or other government doctor for the examination of a claimant or for the review of a medical file.

[595] 28 C.F.R. § 14.8 (1983). Technically, an agency before which a claim against the United States is pending also enjoys statutory authority to apply to a federal district court for a subpoena ordering witnesses to appear for deposition or respond to interrogatories on the subject of the claim. 5 U.S.C. § 304 (1977). It is also entitled to the services of a Justice Department attorney, not only in conducting the examination but also in investigating the underlying claim. 28 U.S.C. § 514 (1968). These devices are evidently not much in use. 2 L. JAYSON, HANDLING FEDERAL TORT CLAIMS p. 17-72 (1984).

[596] In the State Department, for example, basic factual investigations may be carried out in the relevant bureau or other functional unit within the Department's regional office.

should be beyond any suspicion of involvement in the incident giving rise to the claim or other ground for supposing bias.) Who will prepare the final investigative report and recommendation may itself not even be clear;[597] it may be the tort liaison officer, it may be the local program investigator, or it may be someone at the state or regional level. Only when the report is complete does the matter reach the attorneys for disposition: the General Counsel's Office for claims of a face value over $60,000, regional counsel for all others. Should the attorneys find a gap or two in the investigation, instructions will filter back down the investigative channels as appropriate for them to be filled.[598]

Sooner or later, the next order of business for the officer charged with handling a claim is to request detailed information from the claimant to the extent that it is needed. In every case, he or she will want to know the circumstances surrounding the incident, if it has not already been the subject of an adequate investigative report, and obtain more or less full documentation of the loss allegedly suffered and the amount claimed for it. Early access to such information may shed light on important threshold questions such as whether the alleged government tortfeasor was acting within the scope of employment at the time of the incident, whether his or her actions proximately caused the injuries alleged, whether the claim was timely filed, and many others. A clearly negative conclusion on any one of these may avoid any necessity for investigation, especially on intricate damages questions. In cases not so easily disposed of, on the other hand, it will alert the officer to the identity of possible witnesses and avenues of factual and legal inquiry more generally.

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[597] Each agency is directed generally to produce for agency counsel "a narrative report" containing:

1. A background description of the program involved, referencing statutory authority and applicable regulations,
2. A complete description of the events in question including references to documents included and a response to every allegation made in the claim,
3. Agency analysis of who was at fault for losses or damages alleged in the claim, referencing the opinion of technical experts, either non-involved agency personnel or outside consultants, where necessary,
4. Any policy reasons arguing for or against settlement,
5. An analysis of damages claimed by claimants unless waived by [agency counsel], and
6. Any possible USDA claims against claimant whether or not they arose out of this incident.

Office of General Counsel, Memorandum to Heads of Department Agencies, infra note 598, at 3.

[598] The particular problems of the Agriculture Department in coordinating the investigation of claims and preparing them for adjudication are specifically addressed in an Office of General Counsel Memorandum to Heads of Department Agencies (Oct. 5, 1981).

E. Patterns of Correspondence

The extent and character of correspondence between claims officei and claimant[599] is essentially a matter of style. An initial request for substantiation of a claim often will be followed up with repeated demands for information still outstanding and fresh requests as new issues or new doubts arise. No generalization is possible about the number or rhythm of these exchanges. The two principal modes of communication are telephone and personal letter, used in different proportions according to taste. Each claims officer has his or her preferred form letter for recurring kinds of corespondence, sometimes drawn from models found in attorneys' manuals prepared by supervisors in a high-volume agency claims division. Though the case may not be unique, I know of only one agency -- in truth only one of the eight regional installations in the National Aeronautics and Space Administration's decentralized claims operations -- that has devised a largely standardized set of nonletter forms for use in eliciting information from claimants beyond that specifically called for on Standard Form 95 itself.[600] It takes the form of 432 standard interrogatories covering virtually every item on which a claims attorney might want information from a party pressing any conceivable kind of claim for personal injury, death or property loss, with a particular emphasis on the substantiation of damages.[601]

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[599] Where a claimant is represented by counsel, all communications should be with counsel.

[600] 4 NASA-Ames/University Consortium for Astrolaw Research, Federal Management Law Practice Manual (Tort Matters) pt. 1 (Aug. 1, 1982). The installation, NASA Ames Research Center, does not have a volume of tort claims -- a total of fifteen for fiscal years 1980 through 1983 combined -- that itself would warrant the obvious effort expended in compiling this careful and impressive set of forms; but there is no reason why it cannot serve as a model for adoption by other NASA installations and other agencies generally. The collection resulted from a collaborative effort between the Ames Research Center and the Hastings College of Law.

The manual containing the sample interrogatories also contains a seemingly very useful step-by-step procedural checklist, with specific time limit indications, for processing claims under the FTCA and the NASA meritorious claims statute. Another interesting item is a four-page Small Claims Settlement Form, in checklist format, for use in settlements not in excess of $5000. Presumably, it obviates the need to prepare the usual narrative report containing the formal findings of fact and conclusions of law normally necessary to justify settlement. Also in the manual are more conventional standard letters acknowledging receipt of Standard Form 95, requesting submission to a physical examination, and requesting information or documents, as well as a set of form follow-up communications when prodding is necessary.

[601] Included are interrogatories addressed to the employer of the alleged tortfeasor.

Though set in classic sworn statement format, the model

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Closely related to the largely written nature of the claims process is the physical separation between the parties. Among the milder criticisms lodged against the 1966 amendments to the FTCA was the alleged geographic distancing of claimants and their attorneys from those with authority to settle for the government,[602] for the "head of each Federal agency or his designee," in many cases a Washington-based claims attorney, came to replace the local United States Attorney as the government's negotiating representative. Only an unusual claim would justify the travel required to bring claimant and claims attorney face to face. On the other hand, the more recent decentralizing trend in agency claims management was meant in part -- just how great a part is hard to say[603] -- to bridge this gap. I do have the impression second-hand that claims officers and claimants alike take moderate advantage of the greater opportunity for face to face contact in local and regional negotiations.

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interrogatories expressly state at the outset that the questions "are not to be construed as those filed with an Adverse Party" and "need not be answered under oath." However, they specifically purport to be continuations of Standard Form 95 which, one is reminded, states civil and criminal penalties for presenting fraudulent claims for making false statements.

[602] See text at note 307. For contemporaneous criticism of the amendments, see I. GOTTLIEB, A NEW APPROACH TO THE HANDLING OF TORT CLAIMS AGAINST THE SOVEREIGN 26-33 (1967); Corboy, The Revised Federal Tort Claims Act: A Practitioner's View, 2 THE FORUM 67 (1967); Jayson, Federal Tort Claims Act Amendments: Trial Counsel Warns Problems Ahead, 2 TRIAL MAG. 18, 19 (1966). At the time of writing, Mr. Jayson was the former chief, and Mr. Gottlieb the former assistant chief, of the Torts Section of the Justice Department.

The distance factor was not the chief criticism. Critics worried that claimants would be tempted to their detriment to negotiate without the benefit of counsel in a deceptively nonadversarial setting. See text at notes 609-10, infra. They also rightly predicted that the agencies would call upon claimants to divulge all the particulars of their claims without sharing comparable wisdom about the government's own case. And, above all, they voiced misgivings about lodging the government's settlement authority in the very agency whose activities gave rise to the claim.

[603] According to the Interior Department's attorney-adviser for tort claims, local claims handling also brings agency adjudicators more closely in touch both with the factual circumstances of a case and the applicable substantive law. The price paid for this may be a lesser degree of skill and professionalization in negotiating for the government, possibly reflected in a lower settlement rate (see supra note 331), and a certain loss of uniformity in agency practice.

Veterans Administration attorneys strongly emphasize the direct contact factor as a consideration in that agency's somewhat decentralized practice. See text at notes 546-548, supra.

Of course, even Washington-based claims officers are free to travel to a claimant's home base if they wish to do so. Some virtually never do;[604] a few who find it congenial or productive of settlement, or who think claimants appreciate and deserve personal contact, do so regularly;[605] the greater number choose to travel only if and when the size of the claim, the prospects of settlement, and the utility of a firsthand look clearly justify the strain on agency resources. A claimant likewise has the option of coming to Washington or having his or her lawyer do so, or of retaining Washington counsel specially for the claim; neither of these, however, is the rule.

Thus, the vast majority of claims continue to be handled through a pattern of written correspondence and telephone conversations. Agency claims attorneys seem to believe that claimants neither feel nor are prejudiced by this, and they report virtually no complaints. The absence of an organized FTCA plaintiffs' bar makes it difficult to test this impression, but significantly no published critique of FTCA practice makes a very great deal of the issue.[606] All told, I am inclined to think that whatever claimants may have suffered in losing the local United States Attorney as negotiating partner in the first instance is more than offset by the advanatages of dealing with a government officer who can more easily escape an adversarial mentality.

F. The Investigatory Model

The account thus far given of the way tort claims are most often presented and investigated in the federal agencies confirms that the process is basically investigatory and that it is marked, depending on the personalities involved, by a good deal of give-and-take. The informality of agency claims adjudication as such rarely has been challenged either as a matter of law or policy. This, like much that I have come across in the agency handling of tort claims, can best be explained by the presence on the not too far distant horizon of a full-scale judicial remedy in tort. No one would describe the administrative process as affording claimants a hearing except in the loosest sense of the term, and few would depict the attorney-decisionmaker as utterly impartial. But neither would many argue that requiring a claimant to pursue these channels for a period of no more than six months is in principle an unfair imposition. The process may not be entirely to claimants' liking, but, once in the neutral judicial forum, they will not find themselves prejudiced by what went on before, except possibly for the substantiation problem evoked earlier.[607] A lawsuit under the Federal Tort Claims Act proceeds on the basis of a trial de novo, a de novo standard of judgment, and an undiluted application of the Federal Rules.[608] Apart from the usual production and persuasion burdens, the plaintiff need not contend with any presumption in favor of the correctness of the prior agency determination if any.

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[604] An example is the Agriculture Department's supervising attorney for tort claims.

[605] The Chief of the Army's General Claims Division exemplifies this approach.

[606] See 2 L. JAYSON, supra note 595, at pp. 17-19 - 17-20.

Part of the informality of the administrative claim procedure is the implicit invitation to proceed without the benefit of counsel. Critics of the 1966 amendments actually saw in this a trap for the unwary, imagining a variety of risks, from ill-advised statements against interest to acceptance of a patently inadequate sum in settlement of a valid claim.[609] Those fears may not be entirely idle, though the prevalence of contingent fee representation, combined with a statutory ceiling on attorneys' fees, does curb what might be a dangerous temptation to go it alone. The fact remains that most claimants, whether or not they choose to retain counsel at the agency level, would regard having the option of proceeding unrepresented as a distinct advantage.

If the combination of administrative and judicial remedies under the FTCA meets whatever due process and sound public policy require,[610] the meritorious claims statutes present a quite different situation. Since Congress has expressly created an administrative remedy, an argument can be made that the process governing it must not be procedurally arbitrary or unfair; yet virtually all either provide or are assumed to provide no judicial review of the action taken upon a claim, much less a judicial remedy as such. The procedural truth is that agencies enjoying such authority almost invariably conduct themselves along the same general lines -- an ex parte investigation supervised by the agency's own legal department, a paper record, and a pattern of informal written and telephonic exchange with the claimant -- as they do under the FTCA.[611]

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[607] See text at notes 406-468, supra. In addition, the sum stated in the administrative claim is a presumptive ceiling on the damages recoverable in court.

[608] Note, The Federal Tort Claims Act and Administrative Claims, 20 BAYLOR L. REV. 336, 342 (1968).

[609] Jayson, supra note 602, at 38.

[610] See text at note 607, supra.

[611] Few meritorious claims statutes -- and in this respect it is not particularly useful to distinguish at all between ancillary and meritorious claims statutes (see text at note 97, supra) -- identify the kind of administrative procedure to be followed; and the agencies generally speaking have no reason whatsoever to suppose that a written investigatory procedure would meet with congressional disfavor. One

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Gerritson v. Vance[612] is one of those rare instances calling for a judgment on the fairness of the investigatory model in the tort claims context. Besides disputing the merits of the State Department's denial of her claim for personal injury arising abroad,[613] the plaintiff contended that the agency's way of handling such claims offended fundamental notions of due process. The challenge went to the heart of the investigatory model, for it rested on claims that the State Department failed to provide her an oral hearing and that it indulged in an impermissible fusion of investigative and adjudicatory functions. Without ever really addressing the threshold question whether a statute such as the State Department's implicates a protected liberty or property interest, the court found that due process simply does not require an oral hearing in every sort of agency determination.[614] It concluded that when the agency invited the claimant to submit for its consideration memoranda of law, statements and affidavits of witnesses, medical reports and bills, and other proof of loss, and when it gave her an opportunity to respond to its initial denial of her claim by a petition for reconsideration, it afforded all the process that was due.[615] As for plaintiff's subsidiary challenge to the fusion of

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possible exception is the recent Panama Canal Act of 1979, notes at 103-09, supra, which contemplates more or less formal hearings.

Confusion is apt to arise under the Foreign Claims Act, text at notes 187-90, supra, which provides for the settlement of claims brought by residents of foreign countries for losses resulting from the acts of American military service personnel abroad. The Act and the service regulations provide for determinations to be made by Foreign Claims Commissions located at military bases abroad. In every foreign country where the United States has a military presence, each of the military services has established at least one one-person and one three-person standing commission all of whose members are Judge Advocates at bases in that country. (Where, in a given country, the Army, Navy or Air Force has been assigned "single-service responsibility," this means that the Claims Commissions it has staffed in that country will exclusively handle claims arising out of activities of all the military branches.) I am assured, however, that the Commissions -- one- and three-member alike -- proceed in an investigatory manner without hearings as such. (In a three-member commission, one member will conduct the investigation, and the entire panel will adjudicate the claim.) For procedural regulations under the Foreign Claims Act, see supra note 188.

[612] 488 F. Supp. 267 (D. Mass. 1980).

[613] See text at notes 141-43 supra.

[614] Boddie v. Connecticut, 401 U.S. 371, 378 (1970). Cf. United Fruit Co. v. United States, 33 F. 2d 664, 666 (5th Cir. 1929) (in processing claims an agency may proceed in the manner it deems most appropriate).

[615] The opinion reflects the analytic framework set out in Mathews
(Footnote Continued)

investigative and adjudicatory functions in the same office, the court had ample authority for the proposition that an adjudicatory procedure is not unfair simply because the person who gathers the evidence also rules upon it.[616] Conceivably, a court might insist on a higher procedural standard where faced with a true statutory entitlement;[617] but meritorious claims statutes are usually viewed as giving agencies very wide discretion and enabling them to act, as it were, out of grace.[618]

That an investigatory model passes constitutional muster in the meritorious claims context does not of course mean that it represents sound procedural policy, either for the meritorious claims statutes or, more importantly, for the FTCA. In fact, I believe it does that too. Meritorious claims statutes, to start with them, strike me as very poor candidates for procedural formalities. Apart from the fact that formal hearings are simply not the exclusive avenue to truth, meritorious claims statutes generally speaking require neither proof of fault (or of too many other discrete factual elements for that matter), nor the application of well-defined statutory or regulatory standards. In short, they do not demand what evidentiary or adversarial hearings can best offer. Tort claims, properly speaking, present a much stronger case for the use of such procedures, but so long as the FTCA continues to afford claimants relatively prompt access to the courts on a de novo basis, we would do well to keep the administrative phase of the process decidedly simple. Also, compensation of governmental tort victims, however worthy a purpose, is not the principal mission of the agencies;[619] it is even quite secondary to most agency legal departments

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(Footnote Continued)
v. Eldridge, 424 U.S. 319, 332-35 (1976), for it underscores not only the substantial administrative burden on the agency of oral hearings, especially if held abroad, but a certain skepticism that such hearings would appreciably improve the accuracy of the determinations. 488 F. Supp. at 270.

[616] Withrow v. Larkin, 421 U.S. 35, 47-54 (1977); Richardson v. Perales, 402 U.S. 389, 410 (1970).

[617] E.g., Davis v. United States, 415 F. Supp. 1086, 1091-92 (D. Kan. 1976), and Saladino v. Federal Prison Indus., 404 F. Supp. 1054, 1056 (D. Conn. 1975) (Federal Prison Industries Act confers on federal prison inmates an entitlement to compensation for work-related injuries and triggers a due process right to an evidentiary hearing.) See supra note 155.

[618] The Comptroller General recently ruled that even the Military Personnel and Civilian Employees' Claims Act, supra note 27, a far stronger candidate, does not rise to the level of a statutory entitlement. See supra note 36.

[619] This is not to say that the compensation of government tort victims could not be made the principal mission of a specialized agency, much as workmens' compensation for federal employees has been made the
(Footnote Continued)

that handle the problem, for, putting aside the growing but still small category of so-called regulatory torts, claims of this sort -- unlike programmatic and regulatory matters, and even the contract and personnel relations critical to their execution -- are essentially a random and unintended byproduct of agency operations. Their own claim on procedural resources must be kept within bounds.

G. Claimant Access to Information

An investigatory model does not necessarily imply secrecy in the gathering of information. Though denied an opportunity to confront witnesses or conduct cross-examination or oral argument, claimants presumably would find it useful to know what the government itself knows on the subject of their claims. To my surprise, however, agency attorneys report that demands to date for access to information in agency claim files have been few and far between.[620] Information disclosure thus remains an issue with tremendous potential but little actual friction in the administrative tort claim process. The explanation may lie in the fact that unlike many other corners of administrative law, tort claims do not generally pit the agencies against well-organized regulated interests accustomed to doing battle with the government on any available front. Tort claimants are mostly an atomized class; far more often than not, their contacts with the government resemble those of the average member of the public -- episodic and nonregulatory. Quite likely they will not be represented by an attorney. Finally, unlike the regulatory process which tends to postpone any very early or searching judicial review, the tort claims process can move swiftly into a full judicial phase, bringing on all the opportunities for information disclosure which that implies.

Still, the fact that claimants do not generally make informational demands on the agencies does not mean that claims attorneys should not think about how "open" they want the process to be as a matter of sound administrative policy, or about the proper framework for responding to a demand if and when one should arise.

(i) Prevailing Attitudes to Claimant Access

(Footnote Continued)
principal mission of the Labor Department's Office of Workers' Compensation Programs. Such is the model for handling of government tort claims in some states. But that would require a fundamental redesign of the federal tort claim system.

[620] Reportedly, private parties are more likely to seek access to general agency files for the purpose of determining whether they have a tort claim that is worth bringing than for the purpose of documenting a tort claim already filed. In that event, the Freedom of Information Act will be the usual vehicle, and agency attorneys assigned to FOIA rather than FTCA matters -- assuming they are not one and the same -- will receive and process the request.

So far as I can tell, no very well-defined policy on information disclosure exists within the agencies, much less across agency lines.[621] Its absence is as good a reflection as any of the basically unstructured nature of the administrative as compared to the judicial phase of the tort claims process, the latter of course being governed by the discovery provisions of the Federal Rules. It also contrasts strikingly with the Justice Department's position that compliance with an agency's demands for information is the precondition of a valid claim.[622] In any event, claimant access to information, like much else in the agency claims process, has become a question of individual style among claims officers.

I find a surprisingly broad range of attitudes on the question whether and how far to make agency-held information available to a claimant. A good number of claims attorneys report disclosing no information at their disposal, except as a tactical measure calculated to elicit further information from the claimant or to persuade the claimant to lower his or her demands. At the other extreme, at least one attorney purports to conduct business on an "open file" basis and to encourage claimants to do so too. He does not routinely transmit available information to a claimant even without request, but does issue something on the order of a standing invitation to inspect the claim file as it develops.[623] Most common by far is an intermediate approach summed up this way: volunteer little if anything very specific, but disclose particular information on request if no valid ground exists for withholding it.[624] What this most likely comes down to is that

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[621] There is one exception. Section 14.4(b)(1) of the Justice Department regulations provides that in personal injury cases claimants may be required to submit to a physical examination by an agency physician. If a claimant agrees to provide his or her own physician's report to the agency, as is almost invariably the case, he or she is then entitled to the agency physician's report. Obviously, however, this right of access is only a byproduct of a claimant's duty of disclosure to the agency.

[622] See text at notes 406-15, supra.

[623] So far as I can tell, however, no agency allows claimants to take the formal deposition of agency personnel prior to litigation. E.g., Veterans Administration Regulation No. M-02-1, supra note 591, § 18.04c(3) ("Claimant's attorney is not to be permitted to interview VA physicians before or during the administrative phase of a tort claim. After suit is filed, VA physicians are not to discuss a case against the Government except under the supervision and guidance of Department of Justice attorneys").

[624] Thus claims files are generally not open. E.g., Air Force Regulation No. 112-1, supra note 581, § 12-17b("claim [f]iles . . . are the property of the Air Force. Do not give them to the claimant or his agent for review or reproduction; portions of files are releasable").

(Footnote Continued)

claimants on request may have any documentary material to which they are entitled under the Freedom of Information Act.[625]

(ii) A Freedom of Information Act Framework

Using the Freedom of Information Act as a standard for determining the extent of claimant access to agency documents on a pending claim seems to me eminently sensible, whether or not claimants expressly invoke the FOIA in making their request. As a matter of law, the FOIA is as much available to the claimant in agency settlement proceedings as it is to anyone else.[626] On a procedural level, the very short time frame for disclosure under the FOIA[627] makes it a practical vehicle for use in a six-month settlement period. Finally, as a matter of policy, use of FOIA standards should afford claimants ample access to information without causing the government substantial prejudice in the event of subsequent litigation, while at the same time promoting the disposition of claims at the agency level. People who should know have surmised that some claims go to litigation simply because claimants feel they lack sufficient information to weigh intelligently the strength of

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(Footnote Continued)
Cf. 32 C.F.R. § 842.6(b)(3) (1983) (Air Force) ("On request, the claimant may be furnished information or evidence obtained during the course of a claims investigation except when barred by law or regulation").

[625] 5 U.S.C. § 552 (1977). For an apparent endorsement of this standard, see 32 C.F.R. § 536.2 (1983)(Army).

Alternatively, disclosure may be said to be governed by the standards applicable to civil discovery. E.g., Veterans Administration Regulation No. M-02-1, supra note 591, § 18.04c(1) ("where a claim under the provisions of the [FTCA] has been filed or . . . can reasonably be anticipated, no information, documents, reports, etc., will be released except [for] . . . release of information which would be available under discovery proceedings, were the matter in litigation").

Among the chief grounds for nondisclosure of specific information under either the FOIA or the civil discovery analogy are the attorney-client privilege, the work product privilege, and the government's deliberative privilege, particularly where disclosure would reveal an analysis of the strength or weakness of a claim or recommendations to a superior officer.

[626] NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 n.10 (1975); Hoover v. Department of Interior, 611 F. 2d 1132, 1137 (5th Cir. 1980); Columbia Packing Co. v. Department of Agriculture, 563 F. 2d 495, 499 (1st Cir. 1977); United States v. Murdock, 548 F. 2d 599, 602 (5th Cir. 1977); Brockway v. Department of Air Force, 518 F. 2d 1184, 1192 n.7 (8th Cir. 1975).

[627] Action on a FOIA request or appeal must be taken within ten or twenty working days, respectively, of its receipt, absent one of a narrow set of "unusual circumstances" permitting an extension of no more than ten days. Id. § 522(a)(6)(A), (B).

their case for purposes of settlement prior to suit.[628] As I have already suggested,[629] they may also be less than forthcoming in substantiating their claims because they do not believe the government itself is willing to part with information especially if unhelpful to its cause. This, too, disserves the purpose of agency-level settlement. Put squarely, the prospect of a much fuller disclosure under the Federal Rules than under agency claims practice may well lead claimants and the government into otherwise avoidable litigation.

Central to any understanding of how the FOIA works in the tort claims context is the Exemption five exclusion of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."[630] Exemption five, which has been construed to "exempt those documents, and only those documents, normally privileged in the civil discovery context,"[631] by definition should leave a claimant in nearly as good a position, so far as access to information is concerned, as if he or she had invoked discovery in litigation,[632] and in fact afford much that one might want or need to know in order to conduct intelligent settlement negotiations with the government. But neither would it shortchange the government, for the FOIA protects from mandatory disclosure just about anything that the government is privileged to withhold in litigation.

The truth is that even full disclosure under the Freedom of Information Act does not quite measure up to discovery in litigation, for the FOIA compels agencies neither to assemble information nor to prepare documents not already in existence.[633] In fact, it brings in nothing not already in documentary form in agency files; the unrecorded identity of witnesses, accounts of an incident not reduced to writing, and so on, all lie well beyond its reach. Yet the claimant will have disclosed precisely this kind of information to the agency as part and parcel of the claims process itself. Standard Form 95 itself is nothing short of a demand for a good deal of information not previously prepared or assembled, and a claimant cannot answer to the charge of an incomplete claim that his or her files contain no documents as such on the missing item. I do not mean to suggest that the FOIA is an inadequate tool for information disclosure in the claims context, for as a practical matter agency attorneys are unlikely to leave accident reports, witness statements, and the like in unwritten form. I mean only to demonstrate that a square application of the FOIA would not give tort claimants an unfair advantage.

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[628] Laughlin, Federal Tort Claims Act Amendments: A New Charter for Injured Citizens, 2 TRIAL MAG. 18 (1966). Mr. Laughlin was Chief of the Torts Section at the Justice Department at the time of the 1966 amendments and also their chief proponent.

[629] See text at notes 454-55, supra.

[630] 5 U.S.C. § 552(b)(5)(1977).

[631] Federal Open Mkt. Comm. v. Merrill, 443 U.S. 340, 353 (1979); NLRB v. Sears, Roebuck & Co., supra note 626, at 149. Accord Renegotiation Bd. v. Grumman Aircraft Eng'g Corp., 421 U.S. 168, 184 (1975); EPA v. Mink, 410 U.S. 73, 86-87 (1973); Sterling Drug, Inc. v. FTC, 450 F. 2d 698, 704-05 (D.C. Cir. 1971).

[632] EPA v. Mink, supra note 632, at 86.

[633] NLRB v. Sears Roebuck & Co., supra note 626, at 161-62; Yeager v. Drug Enforcement Admin., 678 F. 2d 315, 321 (D.C. Cir. 1982); DiViaio v. Kelley, 571 F. 2d 538, 542 (10th Cir. 1978). See also Forsham v. Harris, 445 U.S. 169, 186 (1980); Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 152 (1980).

All in all, both legal and policy considerations point decisively in favor of taking the FOIA as a minimum standard of disclosure in the tort claims setting. Although the government might resist moving full-scale disclosure of nonprivileged information into the administrative phase of the FTCA, I fail to see where the FOIA leaves the agencies any other principled choice. Where a claimant, with or without specific reference to the Information Act,[634] seeks access to his or her claim file, or to other information relating to a pending claim, agency claims attorneys should look to the FOIA for guidance. They should disclose information whenever the FOIA would mandate it, and they should entertain the possibility of disclosure even when the FOIA would not, if in their estimation that might advance the tort settlement process.[635] Unfortunately, a few agency claims attorneys continue to regard the FOIA as somehow alien to their own tort claims operations.

(iii) Understanding the FOIA in the Tort Claim Setting

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[634] Agencies have no sound reason to place a premium on whether a claimant specifically invokes the FOIA in support of an otherwise intelligible request for access to identifiable agency documents.

[635] Some agency guidelines expressly invite claims attorneys to divulge exempt portions of a claimant's file with the consent of the General Counsel. Air Force Regulation No. 112-1, supra note 581, § 12-17b(3); Veterans Administration Regulation No. M-02-1, supra note 591, § 18.04c(1).

A more emphatic endorsement of limited voluntary disclosure is the Army's. "Information within a category which is normally exempt from mandatory disclosure may also be released to a claimant or his attorney by the authority having jurisdiction over the request . . . if no ligitimate [sic] purpose exists for withholding it from him. In determining whether such a legitimate purpose exists, the authority should take into consideration whether the claimant or his attorney has released to the Army similar documents in his possession or obtainable by him alone." Army Regulation No. 27-20, supra note 550, § 1-6b(2). A unique feature of Army Claims Service discosure policy, echoing its peculiar denial policy (text at notes 551-58, supra), is the rule that only the Chief has authority to refuse a claimant's request for information. Id.

To concede that the FOIA basically defines disclosure policy in the tort claims context is only the beginning of the analysis. What the exemptions to the Act mean and how they relate specifically to the kinds of information that routinely turn up in tort claims investigations should govern actual disclosure practices in that setting. Unfortunately, even some claims attorneys who acknowledge that the FOIA in principle belongs in the tort claims context display only the most rudimentary and intuitive sense of what its exemptions legitimately entitle them to withhold. True, the incidence of claimant requests for access to claim files has not been great. But there is every reason to believe, and some claims officers report, that claimants are beginning to press for access to agency-held information as never before. Since agency handling of tort claims in any event is basically a process of continuous information exchange, those agency attorneys who make this their life's work would do well to have more than a passing familiarity with FOIA standards and the balance between legitimate private and governmental interests they are supposed to reflect.

Given its supervisory authority over both FTCA and FOIA practices, the Justice Department is uniquely situated to provide the agencies with guidance on how the FOIA relates specifically to the tort claims process. Its position cannot simply be that agency attorneys should divulge as little as possible or nothing at all, or avoid any disclosure that might tend to embarrass the Justice Department in eventual litigation. I would urge rather that it enlighten the agencies specifically on how key exemptions, like Exemption five, have been construed by the courts in cases involving tort claims or analogous problems, at least with respect to frequently recurring kinds of documents. The more subtle question -- and one on which the agencies inevitably will be more on their own -- is the extent to which more liberal disclosure than the FOIA mandates would be productive for purposes of agency-level settlement. On this, there can be no hard and fast rules. Certainly, the Justice Department, least of all, can afford to be unmindful of the impact of routine agency disclosure on eventual tort litigation. Still, the Department's responsibilities are not only to safeguard the government's litigation interests, but also to guide the agencies in properly implementing the FOIA and the FTCA at the agency level.

Let me illustrate the point by reference to the government's qualified executive privilege to protect its deliberative processes, a privilege now firmly anchored in Exemption five.[636] Most courts have held that the exemption protects "internal communications consisting of advice, recommendations, opinions, and other material reflecting deliberative or policymaking processes, but not purely factual or investigatory reports,"[637] and many take as a point of departure the notion that only predecisional materials are worthy of protection under this head.[638] But, as a vast and not unbewildering case law suggests, the outer bounds of the privilege are elusive. Courts are even increasingly fond of disparaging the distinction between factual and policy information,[639] and occasionally they candidly shield from disclosure purely factual memoranda when they conclude that not doing so would distinctly impede the free flow of information essential to the deliberative process itself.[640] Finally, compliance with the spirit and now the letter of the FOIA requires agencies to divulge nonexempt portions of otherwise exempt documents where severing the portions or eliminating identifying details makes that feasible,[641] and there is no reason why claims attorneys should consider themselves exempt from having to make conscientious and good faith efforts of this sort. I only mean by this cursory account of a single privilege incorporated in but one of the exemptions to show that claims attorneys in the different agencies probably need a few more benchmarks than they now have.[642]

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[636] Kent Corp. v. NLRB, 530 F. 2d 612 (5th Cir.), cert. denied, 429 U.S. 920 (1976); Jupiter Painting Contracting Co., Inc. v. United States, 87 F.R.D. 593 (E.D. Pa. 1980). See generally CIVIL ACTIONS AGAINST THE UNITED STATES AND ITS AGENCIES, OFFICERS AND EMPLOYEES (Shepard's/McGraw-Hill) 228 (1982).

Broadly comparable considerations arise in connection with the government's qualified privilege for documents whose disclosure would tend to reveal law enforcement investigative techniques and sources. ACLU v. Brown, 609 F. 2d 277 (7th Cir. 1979).

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[637] Soucie v. David, 448 F. 2d 1067, 1077 (D.C. Cir. 1971). Accord, EPA v. Mink, supra note 631, at 85-91; Tennessean Newspapers, Inc. v. FHA, 464 F. 2d 657, 660 (6th Cir. 1972). Not all predecisional materials are necessarily shielded from discovery. "[T]o come within the privilege and thus within Exemption 5, the document must be a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975).

[638] NLRB v. Sears, Roebuck & Co., supra note 626, at 151-52. But see supra note 637.

[639] E.g., Mervin v. FRC, 591 F. 2d 821, 826 (D.C. Cir. 1978); Montrose Chem. Corp. v. Train, 491 F. 2d 63, 67 (D.C. Cir. 1974). Jupiter Painting Contracting Co., Inc. v. United States, supra note 636, at 597.

[640] E.g., Brockway v. Department of Air Force, 518 F. 2d 1184, 1194 (8th Cir. 1975):

> [W]e do not mean to imply that we are rejecting the general fact-deliberation criterion established in the decisions of other courts. Rather, we hold that on the narrow facts presented here, specifically involving statements by witnesses to Air Force safety investigators upon assurances of confidentially, common sense . . . indicates disclosure of these statements would defeat rather than further the purposes of the FOIA.

Accord Cooper v. Department of Navy, 558 F. 2d 274, 277-78 (5th Cir. 1977), modified on other grounds, 594 F.2d 484, cert. denied, 444 U.S. 926 (1979) (safety and accident prevention report containing information obtained on promise of confidentiality not subject to mandatory disclosure; factual report made for possible legal or administrative action presumptively subject to disclosure). Miles v. Department of Labor, 546 F. Supp. 437, 439-40 (M.D. Pa. 1982); Lloyd & Henniger v. Marshall, 526 F. Supp. 485, 486-87 (M.D. Fla. 1981); American Fed'n of Gov't Employees v. Department of Army, 441 F. Supp. 1308, 1314 (D. D.C. 1977); Rabbitt v. Department of Air Force, 401 F. Supp. 1206, 1209 (S.D. N.Y. 1974). See also Mead Data Cent., Inc. v. Department of Air Force, 566 F. 2d 242, 256 (D.C. Cir. 1977) and cases cited therein; Machin v.

(Footnote Continued)

A good illustration of the potential impact of the FOIA on the tort claim process is the case of United States v. Weber Aircraft Corporation,[643] which, while not arising under the FTCA, involves access to just the kind of document that figures prominently in that setting. The case grew out of an accident allegedly caused by the failure of certain military parachute equipment. An Air Force captain brought a damage action for his injuries against the designer and manufacturer of the equipment. After the suit was filed, the defendants requested copies of all Air Force investigative reports on the incident. The Air Force released the complete record of its so-called collateral investigation conducted to preserve evidence for use in any subsequent actions or proceedings,[644] as well as factual portions of a second Mishap Report, a document produced solely for the purpose of taking corrective action in the interest of accident prevention. It withheld under Exemption five the balance of the Mishap Report, consisting mostly

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(Footnote Continued)
Zuckert, 316 F. 2d 336 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963); Kanter v. IRS, 496 F. Supp. 1004, 1006-07 (N.D. Ill. 1980). Cf. National Parks & Conservation Ass'n v. Morton, 498 F. 2d 765, 767 (1974) (FOIA trade secrets exemption).

[641] 5 U.S.C. § 552(b) (1977); Federal Open Mkt. Comm. v. Merrill, supra note 103, at 364; EPA v. Mink, supra note 631, at 91-92; Ryan v. Department of Justice, 617 F. 2d 781, 790 (D.C. Cir. 1980); Mead Data Cent., Inc. v. Department of Air Force, supra note 640, at 256; Deering Milliken, Inc. v. Irving, 548 F. 2d 1131, 1138 (4th Cir.; 1977); Wu v. NEH, 460 F. 2d 1030, 1033 (5th Cir. 1972), cert. denied, 410 U.S. 926 (1973); Kreindler v. Department of Navy, 363 F. Supp. 611, 613-14 (S.D. N.Y. 1973). Disclosure of factual matter is exempted where "inextricably intertwined" with protected material. Mervin v. FTC, 591 F. 2d 821, 826 (D.C. Cir. 1978).

[642] The case is probably even stronger with respect to the attorney work product privilege likewise incorporated in Exemption five. See infra note 661, and cases cited therein. One court described application of that privilege in an FOIA context as "a task that would challenge the fabled Procrustes." Fonda v. CIA, 434 F. Supp. 498, 505 (D. D.C. 1977).

[643] 52 U.S.L.W. 4351 (U.S. Mar. 20, 1984), rev'g 688 F. 2d 638 (9th Cir. 1982).

[644] See supra note 590.

of statements by the accident victim and a colleague, and a certain medical report.[645]

The agency's action, though invalidated in the court of appeals on the ground that the government's executive privilege does not extend to purely factual material, was sustained recently by the Supreme Court.[646] The Court essentially held, contrary to the ruling below, that the privileges in civil discovery incorporated by analogy in Exemption five to the FOIA are not limited to those expressly identified by Congress in the legislative history of the Act. Specifically, it ruled that because statements made to air crash safety investigators upon express promises of confidentiality have been held to be entirely privileged in pretrial discovery,[647] they are also within the scope of Exemption five. But this particular privilege -- whose merits the Court incidentally did not examine -- is limited to statements made under a promise of confidentiality. Though the distinction between factual and deliberative material is no longer applicable to them,[648] it has not lost its more general significance among principles governing agency disclosure of information.

(iv) Some Preliminary Thoughts on Exemption Five

Although a detailed analysis of the application of Exemption five or any other exemption to the claims process is best left to another day, I do believe that claims attorneys are generally apt to exaggerate the extent to which that particular exemption cloaks the materials they gather in the course of investigating a tort claim. I therefore conclude this section by hazarding just a few preliminary thoughts on the matter.

First, a further word about executive privilege that seems to me especially apt in the tort claim setting. Sometimes the courts seem to be influenced in applying this privilege by their estimate of the extent to which a given disclosure would adversely affect the government's competitive position in an ongoing proceeding, and that estimate increases when the proceeding in question can be described as a bargaining transaction.[649] Among the best non-tort examples to arise in

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[645] The medical report contained findings and recommendations of the "life sciences member" of the aircraft accident investigation board.

[646] See supra note 643.

[647] Machin v. Zuckert, 316 F. 2d 336 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963).

[648] 52 U.S.L.W. at 4353 n. 17.

[649] Federal Open Mkt. Comm. v. Merrill, 443 U.S. 340, 358 (1979); Hoover v. Department of Interior, supra note 626 at 1140. The Hoover opinion rests both on the executive privilege protecting an agency's decisionmaking process and on the qualified privilege for the report of an expert witness. FED. R. CIV. P. 26(b)(4)(1972).

FOIA litigation are requests for information during negotiations over the compulsory purchase of land[650] or during bargaining over a contract purchase price between the government and the lessee of surplus government-owned property.[651] The courts seem to be saying that full government disclosure in such cases is at variance with the competitive arm's length character of the underlying transaction.[652] I have the impression that many claims officers view the tort claim process at the agency level just that way. Are they justified in doing so?

Claims officers and claimants doubtless engage in very many situations in what can only be described as bargaining, each starting from exaggerated if barely tenable negotiation postures and working their way if possible to some middle ground. On the other hand, tort claims of a decidedly routine character may involve little if any real negotiation, especially where the claimant is unrepresented. One simply cannot say that all tort claimants are bargainers or all tort settlements the product of a bargain. More important, to draw a strict analogy between agency tort claims adjudication and the rather stark bargaining processes that characterize the government's commercial transactions[653] does a certain degree of violence to Congress' basic purpose in enacting and amending the FTCA. Congress intended adequate compensation of meritorious claims, not a bargaining or negotiating process as such.

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[650] Hoover v. Department of Interior, supra note 626.

[651] Martin Marietta Aluminum, Inc. v. Administrator, GSA, 444 F. Supp. 945 (C.D. Cal. 1977).

[652] Both Hoover and Martin Marietta, supra notes 650-51, involved FOIA requests for disclosure of appraisal reports during pending negotiations, and in both cases disclosure was denied. The courts distinguished cases in which appraisals were sought and obtained after the transaction had been fully consummated. Tennessean Newspapers, Inc. v. FHA, supra note 637, at 660; Philadelphia Newspapers, Inc. v. HUD, 343 F. Supp. 1176, 1178 (E.D. Pa. 1972).

[653] "There is little doubt that the appraiser's opinion on value would most likely set the ceiling price offered by a purchaser, thereby effectively preventing the agency from obtaining through arms-length bargaining a more favorable price -- one presumably obtainable by a private seller negotiating competitively with a prospective purchaser." Martin Marietta Aluminum, Inc. v. Administrator, GSA, supra note 651, at 950. Accord Government Land Bank v. GSA, 671 F. 2d 663, 665 (1st Cir. 1982) ("Exemption 5 protects the government when it enters the marketplace as an ordinary commercial buyer or seller . . ..[The] FOIA should not be used to allow the government's customers to pick the taxpayers' pockets").

The Supreme Court in Federal Open Mkt. Comm. v. Merrill, supra note 649, at 359-60, stressed the particular emphasis in the legislative history of Exemption five on "confidential commercial information," and concluded that the exemption "incorporates a qualified privilege for confidential commercial information . . . to the extent that this information is generated by the Government itself in the process leading up to awarding a contract."

So long as the agency claims process retains the pervasive ambiguity I have identified periodically throughout this report, it will show strong elements, depending on the case, both of an objective-entitlement and an adversarial-bargaining model. The scope of executive privilege under Exemption five is just one of many areas where the tension shows up. In view of this, one should not suppose that Exemption five can be applied with perfect uniformity throughout the agency claims process as currently organized, without regard to the nature of a particular claim or the character of an agency's ongoing dealings with a particular claimant. On the contrary, the combination of these important variations in the claims setting with an important if subtle element of entitlement suggest that any blanket characterization of the process as bargaining pure and simple -- whether for the purpose of limiting claimant access to information or any other -- should be avoided.

My second preliminary observation on Exemption five in the claims context relates to the absolute attorney-client privilege likewise incorporated in that exemption. More than one claims officer expressed to me the view that, as the agency's attorney, he or she is bound not to disclose any information that may be described as confidential. I suspect that other officers, without couching the matter quite so clearly, act on much the same view. True, agencies have been held to constitute clients, and agency lawyers their attorneys, for purposes of the attorney-client privilege.[654] But surely not every communication between agency and agency attorney is privileged. At least one court has squarely recognized that protecting under Exemption five every statement made by agency personnel to one of the agency's attorneys in a government such as ours that is "top-heavy with lawyers"[655] would do considerable violence to the FOIA. Claims attorneys need to be reminded that the attorney-client privilege fairly extends only to disclosures necessary in order for the client to obtain informed legal advice or legal services, and even then only to disclosures that but for the privilege would not otherwise be made.[656] The materials that a tort claimant is most likely to seek at the agency level will have been assembled by an agency lawyer not chiefly in order to render legal services or advice, but to discharge an obligation, under Justice Department and agency regulations, to investigate properly filed administrative tort claims; as such, they constitute disclosures that would otherwise be made. Interposing the attorney-client privilege as a wholesale obstacle to disclosure in the setting of an administrative tort claim is thus quite unwarranted.

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[654] Coastal States Gas Corp. v. Department of Energy, 617 F. 2d 854, 863 (D.C. Cir. 1980); Mead Data Central, Inc. v. Department of Air Force, supra note 640, at 252-53; Thil Sec. Corp. v. New York Stock Exch., 57 F.R.D. 133, 138 (E.D. Wis. 1972).

[655] Jupiter Painting Contracting Co., Inc. v. United States, supra note 636, at 598 (deliberately construing the privilege narrowly in the governmental context). Cf. Kent Corp. v. NLRB, supra note 636, at 623 (not everything the government's "uncountable and ever-growing number of attorneys" put on paper can possibly constitute work product). Clearly, in order to assert the privilege successfully, an agency lawyer must have acted at the time in the capacity of provider of legal advice rather than administrator or policymaker. Coastal Corp. v. Duncan, 86 F.R.D. 514, 521 (D. Del. 1980); Gulf Oil Corp. v. Schlesinger, 465 F. Supp. 913, 917 (E.D. Pa. 1979).

Similarly, agency attorneys should not routinely take the factual information they assemble in consideration of an administrative tort claim to fall within the privilege for facts known and opinions held by experts not expected to testify which have been acquired or developed in anticipation of litigation or for trial.[657] Arguably, every administrative claim filed under the FTCA is by definition in anticipation of litigation, especially since the agencies may only settle claims that fall within the FTCA's waiver of immunity to suit,[658] and since a prior claim is now a prerequisite to suit. This view has a wide following among both agency and Torts Branch attorneys,[659] but I question its validity. As I suggested earlier,[660] the handling of tort claims has become a conventional responsibility of agency counsel and a highly professionalized and standardized operation. Though it has not evolved into a wholly distinct and alternate dispute resolution mechanism, the truth is that it keeps all but a small percentage of administrative claims out of litigation. Granted, the case for treating an agency's investigation of tort claims as not done in anticipation of litigation is not as strong as the case for so treating its investigation of claims to a statutory entitlement; but it still has considerable merit. Agency claims attorneys should no more suppose that they have in the expert witness privilege than in the attorney-client privilege a general refuge from their duties of factual disclosure to claimants under the FOIA.

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[656] Fisher v. United States, 425 U.S. 391, 403 (1976); United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950). The privilege is not limited to communications made in the context of litigation or even a specific dispute, but must relate to a situation where an attorney's counsel is sought on a legal matter. Coastal States Gas Corp. v. Department of Energy, supra note 654, at 862. The court in Coastal States found the privilege did not extend to the communication of "neutral, objective analyses of agency regulations." Id. at 863.

[657] FED. R. CIV. P. 26(b)(4)(B)(1972). Air Force disclosure regulations expressly exempt such material. Air Force Regulation No. 112-1, supra note 581, § 12-17b(3) ("While portions of the claim files are releasable, the following are exempt . . . (b) Lawyer's notes of interviews, (c) Expert's statements obtained in the investigation").

[658] See text at notes 87-88, supra.

[659] One attorney put it this way: the only time factual material in a tort claim file is not gathered in anticipation of litigation is when a statute or regulation specifically requires that an investigation and report be made irrespective of whether a tort claim is filed.

[660] See text at notes 309-10, supra.

Beyond all doubt, however, it is the qualified attorney work product privilege that dominates thinking about the limits of mandatory disclosure to tort claimants;[661] this privilege too has taken on inflated proportions and contributed to an irresponsibly casual assumption that the contents of files on pending tort claims are entirely off limits to claimants. More than one claims officer takes the position that a claim file may be withheld in its entirety under the work product privilege on the theory that every agency tort claim proceeding is potential if not imminent litigation, that the file would not be prepared if not for that prospect, and that its disclosure would expose the government's case in any litigation that might occur.[662]

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[661] FED. R. CIV. P. 26 (b)(3)(1972). In order to obtain through discovery material properly characterized as attorney work product, the requester must show substantial need for the material in preparing his case and an inability, without undue hardship, to obtain the substantial equivalent by other means. The courts are divided over whether such work product as constitutes "the mental impressions, conclusions, opinions or legal theories of an attorney" is absolutely or qualifiedly privileged. CIVIL ACTIONS AGAINST THE UNITED STATES, ITS AGENCIES, OFFICERS AND EMPLOYEES, supra note 636, at 248, and cases cited therein. On work product generally, see Upjohn v. United States, 449 U.S. 383 (1981); NLRB v. Sears, Roebuck & Co., supra note 626; Hickman v. Taylor, 329 U.S. 495 (1947); Jordan v. Department of Justice, 591 F. 2d 753, 774-76 (D.C. Cir. 1978); Note, Discovery of Government Attorney Work Product under the FOIA, 71 KY. L. J. 919, 926-31 (1983).

[662] Under this view, no distinction is drawn between routine accident investigations that an agency is bound to perform whether or not claims are ever filed and investigations performed only for the purpose of considering actual claims.

Several agency regulations essentially codify this viewpoint. E.g., Veterans Administration Regulation No. M-02-1, supra note 591, § 18.04(c)(2) ("It is not contemplated that any investigative reports, reports of untoward incidents, or investigative reports prepared by or for [counsel] will be released since these are considered work products not subject to disclosure. While they may be prepared for various reasons and uses, they are considered as an essential element of the defense of a malpractice claim or suit") (emphasis added). Others prefer to leave the notion of what is prepared in anticipation of litigation quite undefined. E.g., Air Force Regulation No. 112-1, supra note 581, § 12-17b(3) ("[T]he following are exempt . . . (a) Legal memoranda containing opinions, conclusions, and recommendations on disposition of the claim. (b) Lawyer's notes of interviews. (c)

(Footnote Continued)

This sweeping resort to the work product concept, which happily is not widely had by those with whom I spoke, seems to me quite wide of the mark.

For the reasons just stated, I seriously doubt that the information assembled by an agency attorney in consideration of a claim filed under the FTCA can fairly be characterized en bloc as assembled in anticipation of litigation, as the work product privilege would require.[663] True, agency tort claims generally meet the test of an "articulable claim likely to lead to litigation,"[664] depending of course on the emphasis given the word "likely;" and asserting the work product privilege for material in this context does not constitute "withhold[ing] any document prepared by any person in the Government with a law degree simply because litigation might someday occur."[665]

(Footnote Continued)
Expert's statements obtained in the investigation. (d) Other statements or materials assembled in contemplation of litigation").

Agencies have specifically advised claims attorneys to gather witness statements and other factual material into an attorney memorandum which can then be withheld en bloc as attorney work product. The Air Force manual for judge advocates investigating medical malpractice claims, for example, does so, and suggests use of the following somewhat self-serving introductory legend:

> This memorandum has been prepared by an Air Force Judge Advocate while investigating a claim or potential claim for damages against the United States. The attorney's impressions and observations summarized herein were obtained in anticipation of future litigation involving the same incident, and this memorandum would not have been prepared in the normal course of Air Force business activities but for the possibility that litigation might ensue.

Office of the Judge Advocate General, United States Air Force, Handbook for Judge Advocates: "Investigating Medical Malpractice Claims, _supra_ note 591, § 3.41.

[663] Coastal States Gas Corp. v. Department of Energy, _supra_ note 654, at 864-65; Jordan v. Department of Justice, _supra_ note 661, at 775; Coastal Corp v. Duncan, _supra_ note 655, at 522; Hercules Inc. v. Exxon Corp., 434 F. Supp. 136, 150-51 (D. Del. 1977). According to the court in _Coastal States_, _supra_, "to argue that every audit is potentially the subject of litigation is to go too far."

[664] Coastal States Gas Corp. v. Department of Energy, _supra_ note 654, at 865. _See also_ Kent Corp. v. NLRB, _supra_ note 636, at 623 (NLRB regional office reports on possible unfair labor practices constitute work product, even though drawn up before knowing whether charges have substance, because office's basic function is to litigate and it investigates on the assumption that any charge might ripen into litigation).

[665] Coastal States Gas Corp. v. Department of Energy, _supra_ note 654, at 865. _Cf_. Hoover v. Department of Interior, _supra_ note 626, at
(Footnote Continued)

Still, I think it a gross exaggeration to view agency handling of tort claims as a simple prelitigation exercise.[666] Agency claims officers and claimants alike have come to look upon agency-level consideration of tort claims as a genuine administrative task mandated by Congress and characterized by an increasingly well-defined administrative procedure cut loose from its litigation origins.[667] The practices of administrative settlement, as well as the statistics, bear them out.

I know of no case squarely addressing the place of work product in tort claims investigations. But analogous cases strongly support my conclusions. The plaintiff in a tax refund suit, for example, sought access to relevant documents that had been prepared by IRS officials at various points in the administrative settlement procedure established for such claims. In resisting discovery, the government emphasized that, although there are several stages in the administrative process at which refund claims may be settled, a certain number of disputes inevitably go to court. The possibility of litigation over any one tax refund claim, the government argued, means that documents prepared by the IRS in the course of handling all such claims are documents prepared in anticipation of litigation. Conceding that the documents in question had reference to mental impressions and legal theories of the claim, the court squarely rejected the notion that they had been prepared in anticipation of litigation.[668] Everything the court said about the tax refund papers in reaching this conclusion would apply equally well to reports assembled by agency tort claims attorneys under the FTCA. They are routinely prepared for every claim presented to the agency, and well before any lawsuit is filed; they are not prepared by or at the direction of the attorney who will actually try the case if it goes to litigation; they purport to be factual and objective in content; they do not necessarily define the legal strategy of the government in eventual litigation; and they do not result exclusively from the government's own investigative efforts, but at least in part from material provided by the claimant.[669] The court also quoted language from an opinion in a practically identical case that is well worth repeating here:

> Generally, it is this court's belief that IRS appellate conferee reports and IRS field agent reports are not prepared

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(Footnote Continued)
1146 (Vance, J. dissenting) (appraisal report in compulsory purchase of property not prepared in anticipation of litigation, but for ordinary business transaction).

[666] See supra note 310 and accompanying text.

[667] The drafters of the Federal Rules did not anticipate that work product would cover materials "assembled in the ordinary course of business or pursuant to public requirements unrelated to litigation or for other nonlitigation purposes." FED. R. CIV. P. 26(b)(3) advisory committee note, 48 F.R.D. 487, 501 (1969).

[668] Abel Inv. Co. v. United States, 53 F.R.D. 485 (D. Neb. 1971).

[669] Id. at 489.

> in anticipation of litigation or for trial. Presumably they are prepared in the assessment and review process and, if they be held to be in anticipation of litigation, it is hard to see what would not be. Litigation cannot be anticipated in every such case when relatively few result in litigation.[670]

Finally, even if one were to take the view that tort claims are investigated at the agency level essentially in anticipation of litigation, a suitably narrow definition of work product would still allow the agencies to accommodate most requests for information. The language of Rule 26(b), to which the courts look in applying Exemption five, strongly suggests that what lies at the heart of the privilege is the confidentiality of "the mental impressions, conclusions, opinions, or legal theories of [the] attorney."[671] More to the point, the Supreme Court case that definitively recognized a place for work product in Exemption five could not have stated more plainly what lies at the core of work product protection in the FOIA context. "Whatever the outer boundaries of the attorney's work-product rule are, the rule clearly applies to memoranda . . . which set forth the attorney's theory of his case and his litigation strategy."[672] To be sure, the claimant who seeks access to the file on his or her claim during the agency phase of the FTCA would be interested to know the claims attorney's "theories and perspectives"[673] on the claim, or legal strategy in the event of litigation, but his or her immediate objective will be access to factual information about the circumstances of the incident, the issue of negligence, or the extent of loss. The requester is above all a claimant, and at best only a potential litigant. What he or she presumably seeks is a fair administrative settlement in consideration of the claim, and not some putative advantage in litigation that may or, far more likely, may not ever take place.

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[670] 53 F.R.D. at 489, quoting Peterson v. United States, 52 F.R.D. 317, 320-21 (S.D. Ill. 1971) (emphasis added). (IRS appellate conferee reports and field agent reports not prepared in anticipation of litigation merely because they contain mental impressions, conclusions, opinions or legal theories of the claim). See also United States v. San Antonio Portland Cement Co., 33 F.R.D. 513, 515 (W.D. Tex. 1963).

[671] FED. R. CIV. P. 26(b)(3) (1972). Technically, work product covers any document or tangible thing prepared by the attorney in anticipation of litigation or trial, not simply materials setting forth the attorney's theory of the case or litigation strategy; but the privilege as to this broader category of materials is only qualified, not absolute. Upjohn Co. v. United States, supra note 661, at 400; Moody v. IRS, 654 F.2d 795, 798 n. 10 (D.C. Cir. 1981); United States v. Leggett & Platt, Inc., 542 F. 2d 655, 660 (6th Cir. 1976); Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 509 F. 2d 730 (4th Cir. 1974), cert. denied, 420 U.S. 997 (1975). So-called "opinion" work product as opposed to "ordinary" work product has been described as "the primary focus of the doctrine." Note, Discovery of Government Attorney Work Product under the FOIA, 71 KY. L. J. 919, 928 (1983).

[672] NLRB v. Sears, Roebuck & Co., supra note 626, at 154. Some courts have implied that factual material may not normally be withheld under Exemption five of the FOIA, even where work product privilege is claimed and might be sustained in a civil discovery setting. Deering Milliken, Inc. v. Irving, supra note 641, at 1137-38; Fonda v. CIA, supra note 114, at 505. Cf. Mervin v. FTC, supra note 641, at 825. According to one recently formulated view, factual work product should be shielded from view under the FOIA, whatever the case may be in civil discovery, only when its disclosure would tend to reveal protected opinion work product. Note, supra note 671, at 929-30.

H. A Preliminary Evaluation of the Claim

At some point, within a highly elastic time frame, the claims officer has to come to some judgment about the merit and the value of a claim. This report, prepared as it is for the Administrative Conference, skirts issues of substantive tort law as such. But a subject like governmental tort liability, by its very nature basically remedial in concern, in a very real sense straddles the divide between procedure and substance. Some comment on a claims officer's standards of judgment seems in order.

(i) Standards under the Federal Tort Claims Act

I have already hinted earlier in this report at the basic standard of judgment, so far as the FTCA is concerned. Essentially, agency claims officers take as their touchstone for determining the merits of an administrative claim the probable exposure of the United States to liability on the claim were it to be litigated under the Act. This requires in effect that the officer determine, with more or less rigor, a whole range of largely substantive questions: whether the elements of a cause of action in tort under the applicable state law are present;[674] whether the facts warrant a conclusion that the loss claimed proximately resulted from the conduct at issue; whether the same facts justify a finding of contributory or comparative negligence, assumption of risk, the existence of a valid release, or any other state law defense; whether the employee responsible for the injury was acting within the scope of employment at the time;[675] and, not least of all, whether any of the FTCA exemptions, express or implied, may be applicable,[676] to single out only the most salient recurring issues. A host of narrower and more technical issues too numerous and diverse to mention may also arise.[677]

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[673] Kent Corp. v. NLRB, supra note 636, at 623.

[674] The number of potential issues -- the law of dangerous instrumentalities, res ipsa loquitur, recreational use statutes, and so on -- is legion.

[675] On this, the report of the employee's supervisor will play a crucial role.

[676] The dominant practice among claims officers evidently is to assert any and all of the exemptions even if only "colorable," to borrow the term used by several of them. (At Justice Department seminars on the FTCA, United States attorneys and agency claims officers are

(Footnote Continued)

If a claim is in principle compensable, the claims officer still must determine what elements of damage are by law recoverable and evaluate the proximately caused loss in monetary terms. These operations, too, will be performed in light of state law and local damages standards, unless all that is involved is adding up medical bills or taking the lower of two car repair estimates. The agency then probably will reduce the amount by some factor to reflect the extent to which the claim is a doubtful one either in law or in fact. In this respect, if none other, the claims officer's evaluation differs from a judge's. Having overcome factual or legal doubts in order to find for the plaintiff, the judge may well proceed to award full value; that the claims officer rarely will do. In fact, whether because every reasonably complex claim entails some element of risk on the basis of which to discount its judgment value, or because the agencies follow the dubious practice of discounting even unquestionably valid claims to reflect a claimant's time and expense saved, or because agency officials are simply more careful with government money than judges tend to be, agencies are reported to be more conservative than the courts in evaluating the same claims.[678] With these nuances kept in mind, I think it fair to say that unless an agency has at its disposal also an ancillary or meritorious claims statute conferring a broader range of settlement authority, the dimensions of FTCA litigation exposure -- as the claims officer sees them -- fundamentally define the agency's willingness to settle.[679] A corollary of this principle is that

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(Footnote Continued)
instruced to raise every "tenable" defense.) I take this to mean that an officer will normally deny a claim on the basis of an exemption even if not persuaded that it is applicable, provided a court could plausibly hold that it is. One attorney, pressed to state a formula, acknowledged that he would invoke an exemption if there were a thirty to forty percent chance of being sustained in court.

[677] The local collateral source rule, rights of representation under state law, and wrongful death limitations come to mind by way of example.

[678] 1 L. JAYSON, supra note 595, at p. 1-14.

[679] The analytic framework I have sketched probably strikes the agencies as so self-evident that generally speaking they have not reduced it to writing. The Air Force is an exception:

> Compromise -- An agreed equitable settlement is based on practical factors - trial risk, the uncertainties of the facts (bona fide dispute), an evaluation of the credibility of witnesses, the availability of witnesses and other evidentiary support, and related practical considerations -- including the application of the law to the facts in determining either liability or damages and

(Footnote Continued)

agencies do not settle cases purely for their nuisance value.[680] I shall have more to say about settlement philosophy generally in the next section.

Plainly, not every federal tort claim lends itself to quite so neat an analytic framework. A given claim may raise a highly novel point of law that neither the agency nor the Justice Department wants to submit to the usual "prediction of judicial outcome" approach. Especially if it alleges a regulatory or program-related tort, a claim may raise important policy questions going to the central mission of the agency. It may be a matter of judgment whether the agency should resist settlement in order to secure an early judicial decision on the point or whether it should entertain settlement more readily in the expectation that a subsequent claim will provide a better vehicle for bringing the issue to a head in the courts. Obviously, the circumstances of the event, the strength or weakness of the claimant's case, the qualities of the anticipated judicial forum, the extent to which the agency's program-related interests have become clarified, and a host of other considerations will have a role to play in this calculation. On the other hand, if the legal and policy reasons for resisting payment seem strong enough, settlement will be rejected at any price as a matter of

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(Footnote Continued)

> the precedent value of settlement . . ..
>
> The claim file should clearly reflect the questions of legal liability, proof, etc., and the probability of the claimant's prevailing on the legal and factual issues involved, and estimates of the cost to the Government of litigation, so the decision to compromise is fully supported. The approving authority will always consider the following essential factors in determining whether a compromise is desirable.
>
> (a) Whether there was any negligent or wrongful act or omission of an Air Force employee that was a proximate or a contributing cause of the accident or incident and the risk of Government liability if litigated.
>
> (b) Reasonableness of the claimant's current demand or offer (damages, nature of injuries, substantiation of claim, claimant's risk of litigation, and possible costs).

32 C.F.R § 842.110(d)(1983).

[680] This attitude to nuisance value claims is firmly maintained by virtually every claims officer with whom I spoke, and usually justified in terms of fidelity to legislative intent under the FTCA. One officer, however, also mentioned the possibility of personal liability should the GAO disallow the account. See supra note 63.

As to whether there might ever be an exception to the policy against the administrative settlement of nuisance value claims, one officer allowed that if one arose out of an incident of acute embarrassment to the agency, it might possibly be paid. Another officer actually reported an exception for the entirely meritless claim that the government, by reason of lamentable recordkeeping, likely cannot defeat in court. It is a matter of definition whether one considers the latter an example of a nuisance value claim.

law or principle or in consideration of agency morale. Such cases must arise if claims officers in fact believe as they profess that, though decisions to settle or not settle do not as such constitute binding precedent, essentially like cases must be treated alike. An agency also may view the denial of a claim as a legitimate means of testing and seeking to have overruled or discredited an earlier judicial ruling it believes to be plainly wrong. In all these situations, the Justice Department may be expected to have something to say.[681] I think we can safely conclude that while the vast majority of tort claimants may see little more to their claim than its dollar value, the government cannot help but have an eye on and occasionally be decisively moved by its larger litigation and program-related strategies.

To the extent that the outcome of a tort claim turns on the substance of local law and practice -- and by no means is this always the case -- the agency attorney has several sources of guidance. Experienced claims adjudicators are their own best sources, especially in high-volume agencies with recurrent kinds of claims. Officer upon officer spoke of having developed by dint of experience an educated "feel" for certain kinds of cases and especially for isolating an appropriate range of value. The busier the officer, the larger the number of colleagues, and years of experience, to tap. By nearly all accounts, though, those officers who adjudicate claims on a local or regional level have the advantage when it comes to acquiring knowledge of local law, for their cases grow out of but a handful of jurisdictions.

Whatever the level at which adjudication takes place, the local United States Attorney's office is invariably described as the agencies' leading consultant on such matters. The United States Attorneys draw freely from their own tort litigation experience, their familiarity with local law and their sense of local judgment values: a reservoir that normally answers an agency claims attorney's needs. Still, other sources of enlightenment are available. Claims officers, again especially local and regional ones, reportedly have recourse to members of the local tort bar, to the local bar association library and, as trained professionals, to all the conventional sources of local law -- reported judgments, digests, textbooks and loose-leaf services. When it comes to valuation questions in particular, there exists an abundance of published aids -- Verdicts and Settlements, Speiser's Recovery for Wrongful Death, The Modern Federal Practice Digest on Damages, The Personal Injury Valuation Handbook, the American Medical Association's Guide to the Evaluation of Permanent Impairment and so on -- showing, by geographic area, judgments and judgment valuation ranges for every recurring kind of injury or loss under different stated circumstances. Though kept reasonably in tune with developments in local law and practice, they are all viewed with the most profound of skepticism by the majority of officers with whom I spoke. But they are apparently widely relied upon at least as an aid to judgment which is all they are really meant to be.[682]

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[681] _See_ text at notes 734-47, _infra_.

All the sources available to the local and regional claims attorneys are also available, in some instances less directly, to those who are Washington-based. One does not need to sit in the same city as the local United States Attorney in order to draw on his or her wisdom. Still, headquarters attorneys have their own networks such as the United States Attorneys in the District of Columbia, particularly on questions of general tort law. And when it comes to the law of the Federal Tort Claims Act itself, the Torts Branch is the acknowledged expert. Finally, before a claim file ever reaches Washington, it will have passed through many hands: investigators and inspectors; liaison officers and coordinators; agency real estate officers, economists and medical constultants; initial decisionmakers and recommending authorities. Each of these, even the nonlawyers, has his or her experience and contacts on which to make more or less informed legal judgments, and each will leave his or her trace on the claim file. At some point in the process, a formal report and recommendation on the legal as well as the factual aspects of the claim will be prepared and serve as centerpiece for the analysis to follow. Thus, even when a claim requires adjudication in Washington, it comes with certain legal moorings.

(ii) Standards under the Meritorious Claims Statutes

Something remains to be said about standards under statutes other than the Federal Tort Claims Act. I can be brief about what I have called statutes ancillary to the FTCA, particularly those waiving the foreign claims exemption. The legal analysis does not appear to be very distinctive. For example, the State Department enforces the usual statute of limitations, the usual exemptions (except of course for that covering claims that arise abroad) and the usual reference to local law, though the last of those tends to require some extra effort.[683] Where research on the substance of foreign law is indicated, the Assistant Legal Advisor has recourse to a foreign mission, to the foreign law section of the Library of Congress, to foreign counsel or to any other source of foreign law advice, preferably one that is free. A memorandum on the applicable foreign law will appear in the investigative file.

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[682] The agencies are well aware of the difficulties of valuation, particularly in personal injury and death claims. A Veterans Administration claims manual states:

> In personal injury claims, actual expenses for medical care, loss of wages, earnings or profits, if allowable, and other allowable out-of-pocket costs proximately resulting from the injury may be determined readily. Difficulties frequently arise, however, in arriving at the value of a claim where loss of future earning power, loss of consortium, procreative loss, cosmetic defects, pain and suffering, and other elements which cannot be assessed by resort to a formula are involved. In death claims, such factors as loss of parental guidance and other intangibles may present problems. Knowledge of amounts allowed by the courts in similar situations and of amounts awarded as compromises in cases which did not proceed to judgment is essential if negotiations are expected to result in a fair and equitable settlement for both parties.

Veterans Administration Regulation No. M-02-1, supra note 591, § 18.12(e). Dissatisfied with the commercial valuation guides, one agency claims officer urges the Justice Department to compile for the agencies a district-by-district guide to judgment values, or simply publish systematically summary reports of actual settlements and verdicts by claim type.

Of greater interest are the meritorious claims statutes which, as the partial listing in chapter two suggests, give certain agencies limited authority to settle and sometimes pay claims for injury to person or property that for one reason or another are not compensable under the FTCA. To what extent have the agencies that enjoy this added measure of settlement authority articulated substantive standards for its exercise?

My impression is a checkered one, based on the handful of agencies whose practices I examined. At one extreme are agencies that, to judge by conversations with individual claims attorneys, have no familiarity whatsoever with the meritorious claims statutes at their disposal, and that have been at their disposal for some time; not surprisingly, standards for the exercise of discretion under those statutes simply do not exist. In other cases, a claims attorney will have what can best be described as some vague recollection of meritorious claims settlement authority, but substantial difficulty recollecting any case in which it was used.

A variant on this theme is the United States Postal Service. Though favored with a sweeping meritorious claims statute,[684] the Law Department reports rarely using it; evidently it finds sufficient elasticity in the Federal Tort Claims Act to reach most appealing cases. Offhand, the Assistant General Counsel could recollect only one specific instance in which the statute was actually used, namely the case of the good Samaritan injured while attempting to rescue the driver of a burning postal vehicle. The situation, like another in which the Postal Service came close to using its meritorious claims authority,[685] represents an extremely narrow class of cases in which a private party suffers personal injury or property damage in furtherance of the best interests of the Postal Service. The agency has consciously avoided using the statute as a basis for a sweeping assumption of no-fault liability.[686]

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[683] Foreign tort claims settled in recent years under the statute have involved such allegations as medical malpractice, false imprisonment and the negligent giving of advice.

[684] See text at notes 171-73, supra.

[685] The case arose when a mail carrier destroyed a pool cue he was delivering when he used it in driving off an attacking dog. The claim, however, was not pressed.

The apparent reticence of the Postal Service may be explained by the difficulty of arriving at standards that would allow it to keep its no-fault liability within reasonable bounds or, better yet, confined to truly exceptional nonrecurring circumstances. Some ten or twelve years ago, the Assistant General Counsel himself reportedly tried to draw up a set of narrow no-fault standards and abandoned the effort. The Law Department also avoids using its meritorious claims statute in order to circumvent particular limitations of the FTCA on recovery in tort. Even if there were not an apparent statutory bar,[687] the Service has difficulty discerning in what specific ways Congress would have wanted it to do so.

Other agencies see their way more easily to using meritorious claims authority for no-fault purposes, and this may have more to do with the nature of their activities than anything else. The Federal Bureau of Investigation is a good example. That agency invokes its statute, authorizing it to settle claims not amenable to settlement under the FTCA,[688] as many as a dozen times a year. In each such case, the FBI injured or distroyed property non-negligently in the course of its investigative activities. In one instance, it removed an innocent person's car door for use as evidence; in another, it drilled a hole in a safe to get to its contents; in a third, the fingerprint dust it scattered did permanent damage to a table top. In principle, all that the FBI requires for recovery under these kinds of circumstances is a showing of proximate cause; it applies the scope of employment concept only in a loose way. What most disconcerts claimants and the FBI alike is the five hundred dollar limitation on recovery for any single incident. But though the FBI is prepared to put its meritorious claims statute to limited no-fault uses, it does not look upon the statute as a means of expanding the specific limits of the Federal Tort Claims Act for claims sounding in tort. Like the Postal Service, it takes the FTCA as a comprehensive definition of the federal government's tort liability.[689]

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[686] By way of example, the Postal Service would not use the statute to pay a claim for injury or damage proximately caused by a postal driver suffering a heart attack at the wheel. Interestingly, a study of Post Office claims adjudication conducted some thirty years ago likewise observed a tendency to use the FTCA wherever possible, to the exclusion of the agency's meritorious claims statute. Gellhorn & Lauer, Federal Liability for Personal and Property Damage, 29 N.Y.U. L. REV. 1325, 1359 (1954).

[687] See supra note 171.

[688] See text at notes 147-48, supra.

[689] The Chief of the FBI Civil Litigation Unit allowed that he had

(Footnote Continued)

Another agency that makes periodic use of its meritorious claims statute as the occasion arises is the National Aeronautics and Space Administration. Like the FBI, it has issued no substantive standards under the Act, but that does not mean that its exercise of authority is either unguided or unprincipled. Judging by available figures, the agency's meritorius claims statute -- known internally as the Space Act[690] -- has been used as a basis for payment some ten times over the past three fiscal years.[691] Some occasions are truly one of a kind: for example, the mysterious disappearance of a painting on loan to a NASA facility. Others fit squarely within what the General Counsel's Office takes to have been Congress' central purpose in enacting the Space Act, namely providing compensation when, through the fault of no one in particular, hazardous or otherwise unusual space program operations inflict injury on isolated individuals. An example is the shrimper who received compensation under the Space Act when his nets were torn by concrete capsules dropped from the Gemini craft over the waters off Galveston. Standards become necessary in frequently recurring situations such as claims of structural damage allegedly due to sonic boom or overpressure in connection with rocket firings. NASA does not insist on proof of causation beyond peradventure, but it has informally required a showing from NASA records that a space vehicle was traveling at a speed and a location at the relevant time that would make it possible for it to have caused the damage in question or, in the case of overpressure, that the pressure in fact exceeded a certain more or less arbitrary cutoff applied evenly in the case of all such claims. The Space Act itself contains a statute of limitations, and it is strictly observed. On the other hand, not only is a showing of fault not required, but the concept of scope of employement is more or less politely ignored. One can conclude from the NASA and the FBI examples alike, I think, that agencies are capable of using meritorious claims authority in a discreet and principled manner, even while proceeding essentially on a case by case basis.

Where the volume of claims warrants it, however, agencies should consider developing written standards for their exercise of discretion under meritorious claims statutes. The military departments have undertaken to do this with respect to their authority under the Military

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(Footnote Continued)
never even entertained the idea that the statute might be used to settle a tort claim falling within an FTCA exemption or otherwise not cognizable under the Act. It is telling that the Civil Litigation Unit commonly describes the statute as applying "without regard to negligence."

[690] See supra note 161 and accompanying text.

[691] The incidence of use is less sparing than it may appear, for in the same period actual settlements under the Federal Tort Claims Act only numbered about fifty.

and Foreign Claims Acts.[692] As indicated earlier, the services have a common understanding of what Congress meant by the cryptic statutory reference to noncombat activities, namely those that are peculiar to the military and its operations;[693] and they share the view that technicalities of scope of employment should not stand in the way of recovery in an otherwise appealing case involving such activities.[694] I would quarrel on policy grounds,[695] on the other hand, with the apparent decision to limit their authority under the Military Claims Act -- even with respect to noncombat activities -- by so heavy a borrowing of the FTCA exemptions,[696] but there is no denying that they have thereby channeled their discretion. Both reading the regulations and talking with the people involved persuade me that the military departments have made considerable sense of the claims statutes at their disposal. They have assigned each a more or less distinct purpose and made of them collectively a more or less coherent whole.[697]

If some of the agencies have failed to use or rationalize their use of meritorious claims authority, the fault probably cannot be laid entirely at their feet. Congress itself has done a mixed job of explaining to those agencies that have meritorious claims authority why they have it and others do not, or, as to those that have it, for what purposes it was given them. What particular limitations on FTCA coverage -- the requirement of fault, reference to state tort law and its many wrinkles, action by an officer or employee within the scope of office or employment, proximate causation, any or all of the FTCA exemptions -- did Congress specifically expect or hope an agency would feel free to disregard in wielding its meritorious claims authority? Or did it give these agencies a carte blanche to do the right and good thing? In the special case of meritorious claims statutes that predate the FTCA, I entertain serious doubt, despite the savings clause in that Act,[698] whether Congress really knew what it was saving those statutes for and whether it would have bothered to enact them in the first place if the FTCA had preceded them into the statute books.

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[692] Air Force Regulation No. 112-1, supra note 581, ch. 7; 32 C.F.R. §§ 84.50-.54 (1983) (Air Force); Army Regulation No. 27-20, supra note 22, ch. 3. For an earlier study of substantive standards, as well as procedures, under the forerunner of the Military Claims Act, see Gellhorn & Lauer, supra note 686, at 1350-58.

[693] See supra note 183 and 185, and accompanying test. The services also agree that the "scope of employment" branch of the Military Claims Act should be limited to claims involving wrongful acts and that all the FTCA exemptions but the one barring foreign claims should be applicable. See supra note 181.

[694] See supra notes 177 and 184, and accompanying text.

[695] See, by way of analogy, the discussion, text at notes 88-94, supra, of whether agencies should have authority under the FTCA to pay exempted tort claims even if suit upon them is barred.

[696] See supra note 663. The services do show certain differences. Air Force regulations do not include the FTCA's discretionary function exemption; Army regulations do, but only allow the Chief of the Claims Service to invoke it. The regulations contain other self-imposed limitations, either based upon the existence of adequate alternative remedies or certain catchall policy considerations. See supra notes 198 and 198a, respectively.

[697] It is a measure of this coherence that claims officers at the military departments routinely examine a claim filed specifically under the FTCA or under one of the ancillary statutes to see if it should also be considered under some other statute as well. This also appears to be the case in the Federal Bureau of Investigation and the National Aeronautics and Space Administration.

The answers to these questions must await another day, after the meritorious claims statutes as a group have been closely studied from a substantive point of view. I mean only to suggest that the very uneven fortune of these statutes in the agencies' hands is to some extent a function of genuine and understandable ignorance by the agencies of their why and wherefore. Evidently, some agencies manage to make sense as well as principled use of their meritorious claims statutes, though they simply may be the ones that had more direction from Congress to begin with. One cannot quarrel with the idea that the agencies should develop standards for the exercise of statutory discretion, but the fact remains that many meritorious claim statutes give every appearance of being either historical relics or idiosyncratic excrescences on the Federal Tort Claims Act. The time has come for Congress to take a look at the claims settlement statutes it has episodically put on the books.

I. Agency Settlement Philosophy: Still an Open Question

Traces of a basic ambiguity in the nature of the Federal Tort Claims Act have surfaced time and again in the course of this report, and I have tried to show at each point the implications for the way agency claims officers go about their work. This section of the report, following directly on my discussion of the analytic framework for evaluating a claim, seems a useful place at which to put the problem squarely on the record.

One way of looking at the process is to view claimants as having an entitlement of sorts to an unliquidated sum of money, subject to their proving each of the elements of a compensable claim. In fact, one rarely looks at tort claims this way, however strong and meritorious they may be. This is not because the conditions of a valid tort claim are so numerous or complex -- eligibility requirements for a statutory entitlement may be no less so -- but because they are so often indeterminate and subjective by nature. At a minimum, tort claims entail a showing of wrongfulness, imponderables like proximate cause, well- and not so well-understood statutory exemptions, speculation over many of the injuries claimed and, above all, a high degree of indeterminacy in damages. The assertions that may be made in the guise of a tort claim are almost boundless. Among the differences between tort claims and entitlements proper is the fact that no agency at the federal level has primary responsibility for handling government tort claims; by contrast, entitlement programs are the business of the agencies that administer them, and usually the very reason for their being.[699]

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[698] See supra notes 88-89, and accompanying text.

Still, a claims attorney may view just compensation for government torts as an affirmative agency obligation, with himself or herself the dispenser of inchoate entitlements of sorts. If so, the attorney would tend to approach the job in a spirit of strict impartiality and commitment to achieving the result that in fact and law is objectively correct. Despite the prominence of fault in the FTCA setting, and all the elements of indeterminacy I have mentioned, claims officers have no more reason to assume an adversarial relationship with claimants, at least at the outset, than he or she would with social security, welfare or food stamp applicants at the initial application stage. If deserving tort claimants are meant to recover against the government, as indeed appears to have been Congress' intent, and are meant to do so if possible in the agencies rather than the courts, then the parties share an interest in the fair determination and valuation of claims.

In fact, no claims officer I spoke with described the FTCA as conferring an entitlement,[700] though quite a number referred to what a claimant is "owed" much in the manner of veterans' benefits or food stamps.[701] But consider the following description of the claims process offered by a former chief of the Army Claims Division well before the 1966 amendments made exhaustion of that process a prerequisite to suit:

> The adjudication by an approving authority is in every sense a judicial act. The judge advocate, a trained attorney and a member of the bar, weighs and considers the evidence in the light of the law and precedents of the jurisdiction in which the claim arose. His function parallels that of the judge of the district court where the claimant has the alternative of presenting his demand.[702]

Some commentators would take matters a step further, arguing that the government has a continuing duty to deal with a claim fairly and objectively even after it has gone to litigation, the notion being that government should always temper its pursuit of advantage with a firm commitment that justice be done.[703] But whatever one may expect of government lawyers when they defend the government in tort claims litigation, they can reasonably be expected to act fairly and objectively when they consider a Standard Form 95 in the nonadversarial setting of an agency-level claim.[704]

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[699] See supra note 619 and accompanying text.

[700] Consistent with this attitude is the uniform policy among claims officers of not under any circumstances awarding tort claimants a greater sum of money than claimed.

[701] Officers at several of the agencies -- the Army and Air Force come most readily to mind -- referred to their having "dual" obligations.

[702] Williams, The $2500 Limitation on Administrative Settlements under the Federal Tort Claims Act, 1960 INS. L. J. 669, 672 (1960).

The government claims attorney, of course, can be looked at in a different way. Again, I draw from the literature, in this case an account of the typical municipal claims attorney:

> In a way, the city attorney to whose desk comes a claim against his city is in the same position as the lawyer who represents the claimant. Both represent adversaries in a legal battle and the law theoretically provides a system by which the decision will go in favor of the combatant with the law on his side. The lawyer with a public body for his client can, with good logic, say that his job consists of using all legally proper means of preventing recovery by the claimant -- initial rejection of every claim, the use of all legitimate methods of delay and obstruction, and a defense of the action to the bitter end.

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[703] "Generally . . . the settlement of government cases is governed by consideration of principle and reasonableness, rather than convenience and money . . .. The thought is that the Government . . . took its position out of principle, and not for the purpose of later bargaining. Government lawyers are enforcing the law and not merely seeking judgments for their client." D. SCHWARTZ & S. JACOBY, LITIGATION WITH THE FEDERAL GOVERNMENT 26 (1970).

This is not my impression of how the Justice Department conducts its tort litigation business. By his own account, the Torts Branch Director takes the Department to be bound, like most any private lawyer vigorously representing his or her client, to advance every tenable argument in support of the cause (regardless of how he or she may believe the issues would fairly be decided), to exploit any and every weakness in the claimant's case and, so far as the bottom line in litigation settlement or judgment is concerned, always to part with the fewest dollars possible. See infra note 708.

[704] See 2 L. JAYSON, supra note 595, at p. 17-18.

The stated attitude of the General Accounting Office is that it has a responsibility, whenever passing on the merits of a monetary claim, to make whatever factual and legal findings are necessary to determine the validity of the claim and the amount if any due. It disclaims authority to bargain or compromise. "[A] claim determined to be valid should be paid in full. Likewise, public funds should not be used to pay any part of a claim determined not to be valid." GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW p. 11-6 (1982).

> Relaxation of the rules of battle need to be made only where it would cost the city more to go on fighting than to compromise.[705]

This second model casts the government attorney squarely in the mold of private counsel in relentless pursuit of a client's personal advantage and, judging by my conversations at the federal agencies, may be something of an exaggeration. But it also contains an element of truth. One agency attorney described the tort claimant as "entirely on his own."[706] Another roundly disavowed any obligation to the claimant. Still a third confessed that defeating tort claims at the administrative level is a certain way of "keeping professional score," at least where the claimant has representation. And, for his part, the Torts Branch Director posits a squarely adversarial model for the administrative tort claim process. "Justice emerges by way of the invisible hand from the clash of opposing forces."

Whatever the situation may be in other areas of government law practice, I find something profoundly misleading about the hired hand theory of the agency claims attorney. Subject only to review by a superior officer within the same legal department and possibly to approval by the Justice Department, claims attorneys themselves -- not some ultimate client -- decide government tort claims. Except in the most unusual of circumstances, no one outside the legal department -- neither the top policymakers nor even personnel in the division whose activities gave rise to the claim -- will consider a claim as a legal matter; they will be consulted at the investigative stage, but they do not decide the claim as such. From a very practical point of view, the claims attorney is attorney _and_ client, essentially determining the government's bidding at the same time that he or she does it. One might even say that the claims attorneys in a given agency's legal department constitute that agency's policymakers, albeit in the somewhat marginal context of tort claim settlements.

What I infer from this is that agency claims attorneys bear, alongside the usual professional responsibilities of a legal representative, much the same range of ethical responsibilities as any private person who becomes enmeshed in legal difficulties and must stake out a defensible position. They can acknowledge liability where it is fairly established and pay straightaway what any fairminded person would say a given loss is worth. They can overlook some purely technical defense of which they might avail themselves if they chose to do so in the event of litigation, though probably not a defense like the statute of limitations which is assumed to define their settlement authority.[707]

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[705] French, _Research in Public Tort Liability_, 9 L. & CONTEMP. PROB. 234 (1942).

[706] According to this attorney, the only reason not to make "ludicrously low" settlement offers to claimants is that doing so may insult them to such an extent as to put an end to the negotiations.

[707] _See_ text at notes 92-94, _supra_. _See, e.g._, Augustine v. United
(Footnote Continued)

They can adopt a somewhat less generous posture and do what most in fact do, that is, offer to pay no more than some discounted probable judgment value. Finally, like any client, they can choose to fight the claim at all costs, with any available argument and means, the objective being to pay the very least possible, if indeed anything at all.[708] The only difference is that instead of directing or authorizing hired counsel to pursue such a tack, they put on the attorney's hat and pursue it themselves. Without purporting to set the moral tone of government attorneys, either as policymakers or hired hands, I wish to show that even the relatively well-defined legal environment of the FTCA, offers an enormous range of ethical postures from which to choose.

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States, 704 F.2d 1074, 1077 (9th Cir. 1983). Thus, a claims officer may no more settle and pay a time-barred tort claim than a mere "meritorious" claim in the absence of meritorious claim settlement authority. To this end, the Torts Branch has instructed government attorneys as follows:

> In FTCA cases, the statute of limitations . . . is a jurisdictional requirement. Therefore, it cannot be waived . . . .. Regardless of how meritorious the plaintiff's substantive claim might be, the statute must be raised if it is applicable.

DEPARTMENT OF JUSTICE TORTS BRANCH MONOGRAPH, VOL. E, STATUTE OF LIMITATIONS 30-31 (Mar. 1983).

Conceivably Congress could authorize the agencies to adjust an otherwise time-barred tort claim when they find that the age of the claim, though barring suit, has not deprived them of sufficient probative information to act upon it intelligently. But this would require very specific statutory language. But cf. Portis v. United States, 483 F. 2d 670, 671 (4th Cir. 1973) (court finds it "incredibl[e]" that the government would interpose a statute of limitations defense while conceding legal liability for causing the near-total deafness of a nine-year old child through medical malpractice in an Air Force hospital).

[708] The Torts Branch Director likes to give the following example. In administrative no less than litigation settlement, a grossly obese claimant will be offered substantially less on a valid claim than any other claimant in otherwise identical circumstances. This is so not because his or her actual loss is any less, but because a judge or jury might be influenced by the obesity factor and because the government has a right to take advantage of this fact. Similarly, in the hypothetical situation in which the government attorney knows that claimant's counsel, out of strictly personal financial distress, is offering quick agency-level settlement at half the true value of his or her client's clearly valid claim, the Torts Branch Director would advise that the offer be accepted.

On the other hand, the Director reports having returned a settlement as inadequate because it reflected a reduction in value based on spurious assertions of a statute of limitations defense. Not to do so, it was explained, would be to countenance deception by government personnel.

What attitudes do most claims officers in fact bring to their settlement activities? My overall impression is that claims attorneys in the federal agencies prefer not casting themselves entirely in either of the two molds pictured here. I find a subtle and fascinating variation in attitudes among officers, though almost everyone draws in some measure upon each of the models. On the one hand, virtually all recognize at some level an obligation to examine a claim fairly and give claimants their due. As one affirmed, "I stand ready to pay a valid claim." On the other hand, claims officers readily emphasize the inchoate character of so many tort claims, and they insist that claimants and claimants' attorneys alike are prone to exaggerate and to assume adversarial postures of their own. Claims officers are also conscious, at least in prospective settlements not in excess of $25,000, of standing virtually alone between claimant and the United States Treasury. The dominant attitude, again subject to subtle and fascinating variations, might best be described as "highly skeptical objectivity."

How do claims attorneys put their own inchoate attitudes into operation? In the preceding section, I outlined a purely analytic framework for assessing a government tort claim. Here I mean only to suggest how the attitude I have just described may be thought to affect the analysis. No claims attorney I met had quite contrived a verbal formula to express that impact, but I do come away with a strong intuition. Let me illustrate it by reference chiefly to the problem of placing a value on a payable claim.

I have already said that the decision whether a claim should be paid at all normally involves a prediction of judicial outcome. I also posited -- at least where valuation requires more than simply totaling doctor bills or choosing between car repair estimates -- that payment would run short of full value to the extent that a claim is less than perfectly sound in the facts or in the law.[709] Thus, an agency may be willing to settle a somewhat uncertain claim, but probably will exact a more or less stiff price for doing so. The practice only confirms the difference between a tort claim, on the one hand, and a true statutory entitlement, on the other. Decisionmakers in the entitlement arena, by contrast to the tort claims arena, will make an award even over substantial doubts if, objectively viewed, the case for doing so outweighs the case for not doing so; that is their duty and I believe they are without authority to compromise it by reduction factors or similar devices. Tort claims, for all the reasons I have stated,[710] are different creatures.

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[709] I also mentioned that in other cases of less than clear liability -- marked, for example, by novel policy issues, substantial questions of statutory interpretation, the chance to have an unfortunate precedent overruled -- the agency may well choose not to play the game of predicting judicial outcome at all, even with a discount for uncertainty, but rather deny the claim and let the court speak for itself.

Still, claims adjudication means putting a dollar value on a discrete loss. In assessing their own generosity, most claims officers like to distance themselves somewhat from insurance company claims adjusters who, one of them alleged, "settle as cheaply as they can get away with." But if agency claims officers do not emulate the insurance companies, what do they do? Most officers seem to accept as a valid characterization that they shoot for settlement at the lower end of an admittedly broad zone of reasonable compensation levels for a given claim. They do not drive settlement figures below what is conscionable under the circumstances, but neither do they seek out the generous end of the spectrum, or even necessarily dead center.[711] The former head of the Torts Branch and leading authority on the FTCA put it this way:

> Unlike many lawyers representing private defendants, the government lawyers are not as much concerned with settling a case at the very lowest possible sum as they are with effecting substantial justice. This does not mean that they will not seek bottom dollar in a settlement negotiation. What it means is that they will approach the evaluation more objectively -- more fairly -- and will not attempt to "steal" a claim for pennies when its value is in dollars.[712]

J. Negotiating the Claim

In a good many cases -- no one is in a position to say just how many -- the better part of the settlement period is spent in negotiation between the parties. This presupposes, of course, that the claim has already been fully investigated and a tentative determination made that it may be worth paying.[713] Each side gives its view of the claim, perhaps overstating by some measure the strength of its own case and the weakness of the other party's.[714] Eventually the exchange may take the form of offer and counteroffer, coupled with an exchange of argument and information, all to shore up one's own position and cast doubt on the other's.

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[710] See text at note 699, supra.

[711] Understandably, agency regulations do not really address the question. The Air Force comes closest to a formula:

> Air Force Policy on Claims:
>
> . . .
>
> b. Make prompt, just, and reasonable adjudications of all claims.
>
> c. Pay meritorious claims in the amount necessary to restore the claimant, as nearly as possible, to his or her position before the incident on which the claim is based.

Air Force Regulation No. 112-1, supra note 581, § 1-10.

[712] 2 L. JAYSON, supra note 595, at p. 15-8. Mr. Jayson was describing settlement policy at the litigation stage when he made the observation, but his comments are equally applicable to agency-level practice.

[713] An obvious reason for not conducting negotiations at an earlier stage is conservation of agency resources. A less obvious but important reason is the fear that, whatever the statute may say about the

(Footnote Continued)

Even within a single agency, the question whether to engage in this process and, if so, at what pace and rhythm, is a matter of individual style. The head of tort claims adjudication at the Postal Service, for example, finds it most productive and congenial to stake out a fair settlement figure early on and then prove hard to move. But he admires and credits with considerable success the aptitude of his supervising attorney colleague for settlement through dickering. Though ultimate settlement levels may be the same, dickering presupposes what one attorney calls "initial lowballing," which leaves plenty of room for an eventual convergence at or near the targeted amount. Dickering obviously provides greater room for maneuver, hence greater flexibility; but it takes time and carries its own risks.[715]

I do not need to emphasize, as did each and every claims officer, that even those tort claims involving prolonged negotiations are not all alike, and that the quality of negotiations depends heavily on the particularities of the claim and the working relationship that develops between the government attorney and whoever represents the claimant. In

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inadmissibility of settlement offers at trial (see supra note 501), the agency's mere willingness to negotiate may be taken as a concession of liability.

[714] Agency regulations rarely treat the negotiation process as such, but Veterans Administration is an exception:

> In most instances, the best approach requires a candid and full presentation of the reasons for the Government's position, pointing out strong points, difficulties of proof for the claimant, availability of Government medical experts, the authority of the Department of Justice to obtain the services of non-Governmental medical experts, and the amount awarded in similar situations in litigated and unlitigated claims. The basic thrust is to generate a substantial doubt in the mind of the claimant's attorney concerning liability in the United States. All related Government payments, past, present and future should be used to reduce damages. Loss of earnings should be reduced to present value whereas future Government payments should not. Inflation factors should be used to increase future Government payment figures.

Veterans Administration Regulation No. M-02-1, supra note 591, § 18.12a (emphasis added). The regulation confirms that agencies make use of the usual negotiation devices -- including perhaps a moderate amount of factual manipulation -- in negotiating with claimants.

[715] For example, if the government's "lowballing" aims excessively low or the process becomes unpleasant, the chances of settlement prior to suit will be reduced.

this respect, of course, tort claim negotiation is no different in the government setting than any other. Its outcome will be a function of what one expert aptly describes as "appropriate and realistic concessions on both sides in light of all elements of the case."[716]

K. Monitoring the Progress of a Claim

A typical claims attorney in a busy agency may have as many as eighty to a hundred claims in one stage or another of pendency at any given time. The delays entailed in delegating the investigation, in standing by while reports are prepared or examinations conducted, in waiting for the claimant to respond to a request for documentation or clarification or to the agency's latest settlement position, all make it highly probable that claims will disappear from sight or mind for relatively long stretches. The slippage of even a month or six weeks looms quite large in a settlement procedure that Congress intended in most cases not to exceed six months from start to finish. An obvious disadvantage, but hardly the only one, is that the government may find itself in court before it has really gotten its teeth into a claim.[717]

Nowhere does the situation seem to be even remotely out of control,[718] and cures like extending the six-month settlement period to a year or more may be worse than the disease. Still, matters could be improved. Many officers have personal techniques -- spread sheets, logs, charts and the like -- for tracking the progress of the claims for which they are responsible. Those that have them insist that they help keep claims from lapsing into temporary oblivion. One attorney who personally does no conscious tracking of claims handed me a file for some unrelated purpose only to discover upon opening it that he had inadvertently failed to respond to the claimant's latest communication, by then some several months old. But another who does maintain a log, and who claims to resolve finally upwards of eighty percent of his claims within six months or less, would find that his log scarcely bears out his estimate.

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[716] 2 L. JAYSON, supra note 595, at p. 15-9.

[717] So far as I know, the General Accounting Office has not studied the timeliness of the agencies in handling tort claims. However, it did examine the Justice Department's administration of swine flu claims. The GAO concluded that while the Department's procedures were reasonable, unnecessary delays resulted from inadequate follow-up efforts in the event that claimants failed to produce requested information and from an insufficient number of physicians for the conduct of medical reviews. GENERAL ACCOUNTING OFFICE, PROCESSING OF CLAIMS RESULTING FROM THE SWINE FLU PROGRAM (1981).

[718] The risk of prolonged delay approaches the vanishing point in the case of minor claims that can practically be resolved on the face of the claim itself, and in which the process from start to finish may take no more than six to eight weeks.

Also, prolonged agency silence may be deliberate, as where the agency is prepared to concede liability, but the parties are simply too far apart to warrant active negotiations. The time would not yet seem ripe for a denial letter. More questionable is the practice, admitted to by at least one claims attorney, of virtually ignoring a claim that holds no real settlement promise but as to which the agency does not relish the prospect of litigation. These may include claims that raise novel or difficult issues of law or bring embarrassment to the agency. An express denial letter could trigger litigation over an affair that otherwise might go away.

I am most impressed by those agencies that have channeled their computer capability into a systematic program of claims tracking. With appropriate programming, each officer within a claims unit can see graphically what course each pending tort claim is taking and the intervals that have passed between the usual stages in the lifetime of a claim. I can imagine no better tool for a busy claims attorney who seeks the most efficient allocation at any given time of the resources at his or her disposal. Those attorneys who are using computer techniques for monitoring the progress of their claims enthusiastically assure me that I am right. So, I might add, do supervisory personnel who find that the technology also allows them to keep track of the pace and productivity of their staff attorneys and thereby the efficiency of the entire office. To the extent that the investigation, evaluation and settlement of claims are delegated to field and regional officers, computerized claims monitoring holds that much more potential.

The program in place is the Air Force claims service -- Claims Administrative Management Program (CAMP)[719] -- illustrates an apparently successful computer operation. Each claims officer world-wide completes and mails to headquarters a new Air Force Form 176 (Appendix H) at every stage in the life of a claim from its initial filing onward. There it is keypunched and entered.[720] Once in place, according to Air Force claims personnel, CAMP immediately revealed a much higher incidence of overdue claims than had ever previously been imagined, and showed precisely what bases were most responsible. The computer has since been programmed, among other things, to produce data showing the average claims processing time for each base and even to print out an "overage list," that is, a list of claims oldest first.[721] At the same time, the information stored for claims tracking purposes is a virtual gold mine for more far-reaching statistical ends. The fact that many claims units have an astonishingly crude sense of their claims demography[722] probably implies missed opportunities for improvements in risk management. But CAMP and like systems have obvious promise above all for gauging the efficacy of an agency's claims settlement operations.[723]

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[719] For detailed regulations on the operation and uses of CAMP, program by program, see Air Force Regulation No. 112-1, supra note 581, ch. 3.

[720] Personnel in charge of CAMP estimate that some 28,000 to 30,000 such "transactions" are entered in Washington each month. The system is not used for tort claims exclusively. It also tracks other kinds of claims, debt collection efforts, military justice and clemency matters, and even inventories of supplies.

[721] The Air Force also has in place one of the most extensive networks of training sessions for claims officers, paralegals and medical-legal consultants, and on-site inspections known as "staff assistance visits" or, less euphemistically, "instructional audits."

To my surprise, I do not find any direct correlation between the claims volume in a given agency and the sophistication of its data collection system. Both the high volume Air Force and relatively low volume NASA[724] are pioneers among agencies in the kind of data management I have in mind. On the other hand, both the high volume Interior Department and low volume FBI show a certain lag. However, since all agencies stand to benefit, I would strongly urge that the Justice Department spearhead efforts to develop data collection and retrieval systems adapted to the tort claims context and promote the systematic sharing of technology by those agencies that have developed and successfully used it with those that have not.

L. Final Denials and Reconsiderations

Chapter three set out in some detail the procedural framework by which an agency may deny a claim and a claimant may request reconsideration. My conversations with claims attorneys added little to that picture. Recognizing how strict the courts have been on the question of what constitutes a proper formal denial for statute of limitations purposes,[725] most attorneys do not leave it to chance when they come to the conclusion that negotiations, if any, have irrevocably broken down. They include the same recitals required in the case of an outright rejection.[726] This is only sensible self-protection.

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[722] See text at notes 319-21, supra.

[723] Id.

[724] NASA already has in place computer tracking of all its litigation and contract appeals matters and is in the process of extending it to all categories of claims.

[725] See supra note 506.

[726] The Veterans Administration has a specific formula for situations where settlement has proved impossible only because of a failure to agree on damages. The letter will state either that "the claim appears not to be amenable to administrative resolution and is therefore denied," or that "your demand for settlement exceeds our evaluation of the injuries sustained; you may accept this letter as a final denial of your claim." It has found such a letter preferable to combining denial letter language with a last counteroffer, as in the following: "You are invited to accept our counteroffer in the amount of X dollars by [a stated future date] or else your claim is deemed denied as of the date of this communication." For an example of the latter, see Heimila v. United States, 548 F. Supp. 350, 351 (E.D. N.Y. 1982).

Most final denial letters I have seen are notably short on reasons,[727] though there are plenty of exceptions. For example, some officers will recite that a claim is not cognizable rather than cite a specific statutory exemption for denying it. Others will state, without more, that the claim fails to state a basis upon which the government has submitted to liability or, what is not much more informative, that "no tort was committed for which the government under the circumstances is responsible." Behind an explanation of that sort may lurk the statute of limitations,[728] a finding that the employee who caused the injury had acted beyond the scope of his or her authority, that government action was not the cause of injury, that no fault was proven, or any of a number of things. The examples of imprecision could be multiplied. To what extent the agencies thereby exhibit normal bureaucratic behavior, or have actually taken the Justice Department's cue that reasons are expendable, I cannot say. Of course, in some cases a statement of reasons would be formalistic and superfluous, as where the issues already were fully and explicitly ventilated. The fact remains that few officers with whom I spoke seemed to acknowledge that offering a claimant a reasonably specific ground for denying his or her claim would serve much of a useful purpose. For reasons mentioned in chapter four,[729] the Attorney General's regulations should be amended to require a brief statement of the reasons for the denial of a claim that comports with prevailing standards under the Administrative Procedure Act.

Though Justice Department regulations give disappointed claimants the right to request that an agency reconsider its denial of a claim,[730] not every agency attorney mentions this possibility in the denial letter. Veterans Administration and Interior Department denial letters, for example, typically contain such a recital, but those coming from the Departments of Agriculture, the Air Force and the Army, as well as the Postal Service, do not. The difference, at least in the case of the Veterans Administration, may have something to do with the fact that there, unlike most other agencies, reconsideration takes place at the Office of General Counsel in Washington on the basis of a de novo review.[731] If, as is the more usual case, reconsideration occurs in the same office as rendered the initial decision, the matter very often will at least be handled by a colleague of equal rank to the original decisionmaker or by an immediate superior.[732]

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[727] Though Justice Department regulations refrain from requiring a statement of reasons for a denial, specific agency regulations may impose such a requirement. E.g., 32 C.F.R. § 842.8(a)(1983) (Air Force).

Army regulations specifically direct that the explanation for a denial be general when it is issued under a statute allowing a judicial remedy or judicial review, on the curious rationale that the Justice Deparment has responsibility for explaining the government's position in such cases. Denials under statutes providing administrative remedies only are to be "much more explicit and certain." "Only in this way," the regulations state, "can the claimant be required to completely particularize his grounds for appeal." 32 C.F.R. § 536.11(a)(1983).

Several claims attorneys report that they generally give claimants represented by counsel less specific and informative denial letters than they give those who file their claims pro se.

[728] However, most claims attorneys cite the statute of limitations specifically if that is indeed the ground for denial. Doing so may have the merit of averting a pointless lawsuit.

[729] See text at notes 509-10, supra.

[730] See text at notes 511-18, supra.

Having someone upon reconsideration take a fresh look at the record has distinct advantages. Once a claim file is in order, a second in-house opinion does not present a significant marginal cost to the agency, especially as claimants generally speaking file requests for reconsideration in well below ten percent of all final denials.[733] Conceivably, an announced promise of fresh reconsideration would elevate the request rate and the number of reversals of final denials at the agency level, and thereby lower the incidence of FTCA litigation. But I am dubious. The rate of reversal on reconsideration generally appears to be extremely low and does not climb appreciably higher in agencies that put the file for reconsideration in a new set of hands. My impression is that the chief reason why reconsideration produces new results, in the rare cases where it does, is that the claimant has adduced new evidence of some significance. If that is the case, the identity of the person giving reconsideration may be quite secondary.

M. The Role of the Justice Department in Agency Claims Action

Apart from its regulatory authority under the Federal Tort Claims Act, the use of which I closely examined in chapter four of this report, the Justice Department has two principal nonlitigation functions under the FTCA. It formally approves or disapproves proposed agency settlements in excess of $25,000, as required by the Act,[734] and it provides agency attorneys upon request with informal guidance on the settlement of specific claims. For the first of these functions, the Department has developed a more or less structured procedure; the second by its very nature calls for a maximum of flexibility.

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[731] Veterans Administration Regulation No. M-02-1, supra note 591, § 18.09b. However, reconsideration is normally had on the record compiled below, with some possibility for additional investigation and direct claimant contact. By contrast, in the Agriculture Department, reconsideration is conducted in the same office as the original determination and by the same personnel.

[732] E.g., 32 C.F.R § 842.8(c)(1)(ii)(1983)(Air Force) (reconsideration by next higher authority).

[733] One claims attorney put the incidence at as low as two percent. In any event, it is low. The chief reason for this appears to be that many disappointed FTCA claimants are eager for their day in court, which reconsideration -- at best not a very promising prospect -- will only postpone for as long as six months. This theory is supported by reports that the rate of reconsideration is appreciably higher under statutes like the Military Claims Act which provides neither a judicial remedy nor even judicial review on the merits.

(i) Requests for Approval

In conformity with terms of the FTCA itself,[735] Justice Department regulations require the prior written approval of the Attorney General or his designee in the case of any proposed settlement in excess of $25,000.[736] They further require that agencies furnish the Department for this purpose "(a) [a] short and concise statement of the facts and of the reasons for the referral or request, (b) copies of relevant portions of the agency's claim file, and (c) a statement of the recommendations or views of the agency."[737] By custom, the Justice Department also specifically demands a signed settlement agreement between the claimant and agency made expressly conditional on the Justice Department approval for which it is prepared.

Agency claims attorneys are not entirely happy with the Department's requirement of an agreement in hand prior to any action on approval. It is easy to sympathize with them, for their inability to make binding concessions in the negotiation doubtless impairs their ability to win concessions from claimant or claimant's attorney in return. Yet, the Torts Branch constantly reminds them that they can only talk "tentative" settlement with a claimant when more than $25,000 may be at stake. Things become doubly awkward if and when the Justice Department withholds approval of a proposed settlement. Not only will the attorney conspicuously have failed to win the support of his or her own government colleagues for the settlement, but he or she may now have to persuade the claimant to accept what may be a substantially lower sum.[738] And why, one may well ask, should the claimant do that? If the agency attorney could be persuaded of the rightness of the higher settlement, so might a court. All in all, the attorney's credibility and leverage may no longer be entirely intact. On the other hand, the

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[734] 28 U.S.C. § 2672 (Supp. 1983).

[735] Id.

[736] 28 C.F.R. § 14.6(a)(1983).

[737] Id. § 14.7. In practice, when agencies seek approval of a settlement as a whole rather than advice on a specific issue, they refer the entire file to the Justice Department rather than just portions of it; however, the prepared introductory statement will highlight those portions of the file that are most relevant to the merits of the proposed settlement.

[738] Largely for this reason, it has happened that the Torts Branch takes over negotiation with the claimant after rejecting the initial settlement proposal.

Justice Department is understandably loath to assume the burden of bringing negotiations with the claimant that last difficult mile, or even to spend its limited resources scrutinizing what may prove to be a wholly hypothetical settlement. One solution would be to raise the agencies' level of settlement authority sufficiently high -- to $100,000, for example, as the majority of claim attorneys with whom I spoke enthusiastically urge[739] -- so that fewer settlements need Department approval in the first place. If the number of settlements is low enough, the Department may be more willing to entertain them on a more or less hypothetical basis.

The Torts Branch has well-established procedures for handling requests for approval from the agencies. Incoming requests are forwarded by subject matter to one of three assistant directors,[740] who in turn assign them to a team consisting of a Torts Branch attorney and a reviewer who is likely to be the assistant director himself or herself. They examine the claim as a team on the record, from the point of view of law, fact and policy, exercising what the Branch describes as a deferential standard of review. In other words, they will sustain the agency's disposition to settle "if it falls within the realm of reason."[741] If the attorney and reviewer support the settlement under the prevailing standard, they refer it to the Director for approval. If they do not, they consult with him in person and, should he concur, a conference with someone from the agency's General Counsel's Office and possibly the regional investigator or coordinator will be in order. The possible outcomes are several. Settlement for any sum in excess of $25,000 may be rejected, or perhaps authorized but at a lower level than initially proposed,[742] or the Torts Branch may be persuaded to go along with the proposed settlement after all.[743]

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[739] $100,000 is the current level of settlement authority of the United States Attorneys. One agency attorney complains that sometimes claimants do not seriously negotiate with the agencies because of the limits on their authority; after litigation they can win a settlement from the local United States Attorney for as much as $100,000 without need of Justice Department approval.

[740] The assistant directors have responsibility, respectively, for general torts, regulatory torts and malpractice.

[741] The stated rationale for using a deferential standard is that it operates as an incentive to the agencies to seek and achieve administrative settlements. The Torts Branch reportedly wants to strengthen that incentive. It describes the review of lower level action on tort claims arising out of the Justice Department's own activities, as well as compromise settlements by United States Attorneys, as more searching. *But see* text at notes 753-62, *infra*.

Since the Director has settlement authority only up to $150,000, any proposed settlement above that amount of which he approves must be taken at least one step further -- to the Assistant Attorney General for amounts up to $750,000 and to the Deputy Attorney General for amounts beyond. Should the Director disapprove a proposed settlement above his own settlement authority, he invites agency counsel to have him refer the matter to the Assistant Attorney General. Rarely will agency counsel press the matter that far,[744] but if he or she does, the file will be sent up along with memoranda from the Director and most likely from agency counsel, and a conference may ensue.[745] The Deputy Attorney General becomes involved only if a proposed settlement exceeds $750,000.

A final word on requests for approval by the Justice Department. Agency claims attorneys report commonly telling claimants that the need for approval can mean a substantial delay in the settlement and payment of claims. They also advert to the risk that the Department will view the claim much less sympathetically, given its stricter reading of the Act and more hard-nosed attitude to damages. Warnings of this sort reportedly induce some claimants to accept settlements of $25,000 or less where they might not otherwise do so. While in the best of all worlds the government would present a united front on what the FTCA means and how claims arising under it should be evaluated, I do see virtue in claimants knowing the actual bureaucratic risks they run in pressing for a higher sum than the agency itself can award. I have no reason to believe that the government thereby systematically coerces claimants into accepting artificially low settlements, though agency claims attorneys would not likely volunteer that view to me even if it were the case. Talking with attorneys who have had substantial experience representing FTCA claimants might disclose a somewhat different perspective.

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[742] In this event, the agency will receive advance written authorization to reopen negotiations with a view to settlement not in excess of the lower amount. If it succeeds in getting the claimant's assent, no further Justice Department action will be needed.

[743] In this event, the agency processes the settlement as usual, attaching written evidence that Justice Department approval has been obtained.

[744] The appeal is more likely to be pursued in the case where a litigation rather than an administrative settlement in excess of $150,000 has been disapproved.

[745] Matters become more complex where the Director disapproves the proposed level of settlement, but would approve a lower one that still lies beyond his final approval authority of $150,000. Agency counsel has a choice. He or she may immediately appeal to the Assistant Attorney General just as before and, if successful, the affair is virtually over. But even is he or she acquiesces in the Director's view, which is more likely, the matter is not at an end. Not only must negotiations with the claimant be reopened to secure assent to a less generous settlement, but once that is achieved, the new settlement must return to Justice for approval by the Assistant General Counsel whose views are not yet known. This scenario illustrates how each level of the Justice Department is spared having to consider a settlement until each and every necessary expression of assent at lower levels, including the claimant's and the agency's, has been secured.

There is a second set of risks associated with the perception that the Torts Branch uses its approval authority to impose on the agencies an unduly narrow interpretation of the Act and an unreasonably low measure of damages. One agency attorney confesses that he no longer seriously negotiates difficult claims that in all likelihood would yield a proposed settlement of over $25,000, because successfully doing so would then only bring on an uphill battle in the Torts Branch; he prefers to let six months pass in one fashion or another and have the Justice Department meet the claimant directly in court. He is not alone in his report.[746]

I frankly do not know what to make of these charges. To begin with, by no means did every agency voice them. But apart from that, the problem is a subtle one. To the extent that the Torts Branch insists that agencies in large settlements act under a correct view of the law, make balanced and defensible characterizations of the facts, and avoid giveaways in the form of tort claim settlements, it is only doing its job. Needless to say, agency attorneys do not enjoy, any more than any other professional, having someone else look over their shoulder, especially when it embarrasses them before disappointed and angry claimants. On the other hand, I do not believe that, in conditioning agency settlement of large claims on prior Justice Department approval, Congress meant to give the Department the power routinely to block defensible agency-level settlements simply because it would take a harsher position in litigation and might even prevail. Judging by its adoption of a deferential standard of review on requests for approval,[747] the Torts Branch, at least in principle, does not believe

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[746] Rather than ignore a claim under these circumstances, an attorney in another agency reports the even more anomalous practice of issuing an actual denial letter on the claim, though in his judgment the claim is valid and worth paying. As this attorney sees it, the claim will then go to court and likely be settled for an appropriate amount of money, up to the United States Attorney's settlement authority of $100,000, without the Torts Branch becoming involved.

An attorney in a third agency relating similar difficulties at the present time acknowledges that an opposite pressure was exerted under a previous Administration. The Justice Department then allegedly rejected proposed settlements as insufficiently generous to claimants. No agency attorney reported that kind of pressure from the current Administration.

[747] See supra note 741 and accompanying text.

Congress meant to do so either. The matter bears further examination for, apart from whatever impact the feeling of strong downward pressure from the Torts Branch may have on agency morale, the administrative process itself risks being short-circuited in claims that matter most from a dollar point of view. I do not purport to know whether the risk has materialized, and I do not see how one could possibly know if it has without conducting the close and systematic review of Justice Department approval practices that this general procedural study of the FTCA could not accomplish.

(ii) Consultation upon Request

The overwhelming majority of cases never reach the Justice Department unless a proposed settlement exceeds $25,000 or a failure to settle brings on litigation. In two closely related situations, however, the Department may nonetheless be consulted on an FTCA administrative claim. Technically speaking, referral in the first situation is mandatory, for, regardless of amount, Justice Department regulations bar agency settlement without prior consultation with the Department where:

> (1) A new precedent or a new point of law is involved; or
> (2) A question of policy is or may be involved; or
> (3) The United States is or may be entitled to indemnity or contribution from a third party and the agency is unable to adjust the third party claim; or
> (4) The compromise of a particular claim, as a practical matter, will or may control the disposition of a related claim in which the amount to be paid may exceed $25,000[748]

Consultation is also required "when the agency is informed or is otherwise aware that the United States or an employee, agent, or cost-plus contractor of the United States is involved in litigation based on a claim arising out of the same incident or transaction."[749] For all practical purposes, however, agency claims attorneys alone decide whether one of the stated conditions exists and, if so, bring the matter to the Department's attention.[750]

In practice, claims attorneys in the agencies consult one or another Torts Branch attorney on a much less formal basis than the regulations on their face would indicate. They may do so if they feel sufficiently unsure or uneasy for whatever reason about the proper course of action on a given claim. The frequency and character of such contacts is a matter of personal preference. According to the regulations, any referral or request for advice addressed to the Torts

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[748] 28 C.F.R. § 14.6(b) (1983).

[749] Id. § 14.6(c).

[750] The situation is different with the Justice Department approval required in settlements above $25,000. The General Accounting Office will not certify a tort claim in excess of $25,000 for payment out of the judgment fund without evidence of such review and approval. Id. § 14.10(a).

Branch should be in writing and contain a short and concise statement of the facts and reasons for the referral or request, copies of relevant portions of the file and a statement of the agency's own views.[751] In most cases in which referral is not obviously mandatory, however, there is neither a file transfer nor a written communication. A simple telephone call is the usual medium.

I have the firm impression, both from the Torts Branch Director and the agencies, that the channels of communication are wide open, and that the Branch stands ready and willing to guide agency officers on how a factual, legal or policy issue arising in any FTCA claim ought to be resolved. The Torts Branch has established a separate Aviation Litigation Unit, likewise headed by a Director, to conduct or oversee FTCA aviation litigation at the trial level and to perform in this area the same consultative functions that the Torts Branch performs more generally.

By way of more structured guidance, the Torts Branch conducts Federal Tort Claims Act seminars roughly on an annual basis for United States Attorneys and agency claims personnel. It also publishes well-documented and up-to-date manuals, in the form of seventeen separate monographs, presenting the relevant case law on every significant substantive and procedural issue arising under the Act. Widely circulated among the agencies and United States Attorneys offices, the manuals are a rich source of guidance for anyone in government called upon to consult the Act.[752]

N. Effectuating the Settlement

(i) Mode and Source of Payment

Settlement normally takes the form of a lump sum amount, making payment a reasonably simple and straightforward matter. Settlements of $2500 or less are paid out of available agency appropriations.[753] In most agencies the claimant receives a voucher -- Standard Form 1145 (Appendix B) -- to which reference has already been made,[754] together with a formal notice of approval of the claim. He or she signs and returns the voucher to the agency; a fiscal officer then arranges for the Treasury to issue a check, which normally takes a week or two. The Standard Form contains release language, mirroring that contained both in the FTCA and in Justice Department regulations.[755]

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[751] Id. § 14.7.

[752] In the belief that the manuals, though not prepared in anticipation of any particular piece of litigation, reflect the Department's legal theories and strategies for FTCA litigation, the Torts Branch Director looks upon them as attorney work product not for release to the general public. However, he graciously allowed the author to examine a complete set on Torts Branch premises.

[753] 28 U.S.C. § 2672 (Supp. 1983), substantially restated in 28 C.R.F. § 14.10(a) (1983). However, settlements of claims against the Postal Service are by law payable from postal revenues. See supra note 173.

[754] See supra note 498.

If the amount of settlement exceeds $2500, the amended FTCA provides for payment in the same manner as final judgments and litigation settlements under the Act, that is, out of the judgment fund.[756] According to the regulations, if the claimant is represented by an attorney, Standard Form 1145 should designate both the claimant and attorney as payees. The agency sends the form, once executed and returned by the claimant, to the Claims Group of the General Accounting Office (together with evidence of Attorney General approval in settlements in excess of $25,000).[757] The time for processing the payment of awards of over $2500 -- from certification to the GAO to receipt of the check -- runs between six and eight weeks.[758]

The difference in source of payment for large and small settlements is largely historical, reflecting the fact that until 1966 agencies could only settle claims of $2500 or less, and paid such settlements themselves.[759] Though processing payments from the judgment fund may take slightly longer than from agency appropriations, it has certain advantages, for the judgment fund is continually and automatically replenished, while agency funds are not. It has happened, quite rarely, that agency funds available for the payment of tort claims run so low toward the end of the fiscal year that claimants do not get paid until the agency receives either a supplemental appropriation or, worse yet, its appropriations for the next fiscal year.[760]

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[755] 28 U.S.C. § 2672 (Supp. 1983); 28 C.F.R. § 14.10(b) (1983). Acceptance of an award constitutes a complete release of the United States and any federal employee whose act or omission gave rise to the claim on account of the same subject matter.

[756] 28 U.S.C. §§ 2414, 2672 (Supp. 1983); 31 U.S.C. § 1304(a)(3)(A) (1983). Again, postal service claims are payable from postal revenues. See supra note B111.

[757] 28 C.F.R. § 14.10(a) (1983). In lieu of a Standard Form 1145 executed by the claimant, the agency may send GAO an 1145 accompanied by either a claims settlement agreement or an executed Standard Form 95.

[758] For the better portion of that period, the paperwork is at the GAO for review of the documentation, preparation of the GAO's own documents, an investigation into any possible setoffs and entry into the computer system. At the Treasury, there is additional paperwork, followed by issuance of a check through the disbursing office. However, should the Torts Branch request expedited action, the entire operation can be reduced to ten working days.

[759] See supra note 299, and accompanying text.

More interesting is the question whether and, if so, how the difference in source of payments might affect an agency's assessment of a claim. One critic of the 1966 amendments charged that the system gives agency officials an incentive to inflate settlements to just in excess of $2500 so as to husband agency funds, and even flatly to deny deserving claims that simply cannot be brought above the threshold.[761] The assertion, though plausible, remains undocumented. Still, to avoid any possible distortion of this kind, Congress should discard the provision that settlements of up to $2500 be paid from agency funds. Given its very low threshold, the provision cannot do very much to advance agency accountability. Any substantial administrative settlement necessarily comes from the judgment fund, as do tort judgments and litigation settlements regardless of amount.[762]

(ii) The Structured Settlement

The attraction in litigation circles over the last five to ten years of structured as opposed to lump sum settlements is now being felt in the FTCA setting. So far as I can tell, the Justice Department fully accepts the idea of structured administrative settlement in an appropriate case.[763]

The two leading models for structured settlement are (a) the combination of a direct cash payment with an annuity for a stated number of years or, more likely, for life, and (b) a similar combination of direct cash payment with a reversionary trust.[764] Structures of this sort are thought to protect vulnerable claimants against the possibility of early dissipation of a large award, while offering the government a hedge against the unjust enrichment that may result from using unrealistic life expectancies and including unknown future medical expenses in the calculation of lump sum damages. The first of these considerations may take on special importance where the award essentially represents replacement of income over a lifetime. The second becomes an issue when the injuries suffered take on a life-threatening character.

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[760] I. GOTTLIEB, A NEW APPROACH TO THE HANDLING OF TORT CLAIMS AGAINST THE SOVEREIGN 40 (1967)

[761] Corboy, The Revised Federal Tort Claims Act: A Practitioner's View, 2 THE FORUM 67, 76-77 (1967).

[762] Prior to the 1966 amendments, all settlements, whether administrative or litigation, were paid out of funds of the agency whose employee was responsible for the tort. 28 U.S.C. § 2672 (1964 ed.). In an apparent effort to lighten the burden on agency appropriations, the amendments made all litigation settlements, as well as all administrative settlements in excess of $2500, payable out of the judgment fund. See supra note 302 and accompanying text.

If Congress were truly interested in promoting the fiscal accountability of agencies for incidents giving rise to tort claims, it would do essentially what it did in the Contract Disputes Act of 1978, that is, provide that payment of monetary awards and judgments be reimbursed to the judgment fund by the agency whose acts gave rise to the liability.

[763] However, only 18 of the 120 administrative settlements approved by the Torts Branch in 1983 took structured form. Of these, all but three were medical malpractice claims.

Given the number of possible elements in the equation, agreement on a structured settlement may not be an easy matter.[765] Still, tailoring a settlement to fit the particular needs and risks associated with the parties should be no more costly or difficult or otherwise less desirable in the government tort context than any other. Judging by my conversations, as well as by the prominence of structured settlement on the agenda of the Justice Department's annual FTCA seminars, the Department is actively trying to educate government attorneys in the use and utility of this settlement mode.

At least one court has opined that the FTCA does not authorize a court to issue an award in the form of a judicially established trust or, for that matter, in any form other than outright lump sum damages.[766] While admitting that Congress probably never thought about the matter, it preferred not to endorse "novel types of awards" until Congress expresses itself affirmatively in their favor.[767] As a strictly practical matter, one court's unwillingness to order or even entertain the structured resolution of an FTCA lawsuit does not bar agencies and claimants from coming to terms administratively on such a basis. But if the view should come to prevail that the FTCA as a matter of law simply does not allow structured settlement, that could not help but affect agency practice. However, the case I refer to is widely viewed as aberrant,[768] and in any case confined to the situation where the government presses for a trust or annuity over a claimant's objection. Whatever its bearing on the willingness of courts to make structured awards, its bearing on agency-level settlement should be negligible.[769]

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[764] Typically, the United States supplies the corpus of the trust in an amount settled upon by the parties (or, in the case of litigation, ordered by the court) and undertakes to supplement the fund as needed. However, any amount remaining in the trust at the victim's death reverts to the government.

[765] Structured settlement can also complicate the calculation of allowable attorneys' fees. _See_, _e.g._, Robak v. United States, 658 F. 2d 471 (7th Cir. 1981), _rev'g in part_ 503 F. Supp. 982, 983-85 (N.D. Ill. 1980). On attorneys' fees limitations, _see_ text at notes 770-74, _infra_.

[766] Frankel v. Heym, 466 F. 2d 1226, 1228-29 (3d Cir. 1972).

[767] _Id._ at 1229. The court alluded secondarily to "the continuing burden of judicial supervision that would attend a judgment creating a life trust." _Id._

(iii) The Attorney's Fee

The FTCA specifically requires that attorneys' fees come out of the award and not exceed twenty percent of the award in the case of prelitigation settlement (or twenty-five in the case of compromise settlement or judgment).[770] An attorney who violates the limitation, by collecting or even by demanding a larger fee than is allowable, is subject to punishment by a fine of up to $2000 and/or imprisonment of up to one year.[771] The ceiling, found in one form or another in a number of federal statutes authorizing monetary recovery against the government, means to protect claimants from improvident bargains, dampen incentives to the filing of fraudulent or inflated claims against the government, and generally help ensure that public funds go chiefly to those intended to benefit from them.

Certain agency claims officers routinely remind claimants and claimants' attorneys of the existence of a fee ceiling and of the sanctions for its violation, and I would not recommend that the government do more in policing fees. The Treasury should not, for example, undertake to issue separate checks to claimant and attorney reflecting their respective shares of the award under any previously agreed upon allocation, as it has in the past. Doing so becomes awkward if not wholly impractical where the attorney has been engaged on any basis other than a fixed percentage contingent fee. In any event, the government should not interpose itself in effect as the attorney's collection agent, for a genuine dispute may exist over the quality or other aspect of the representation in which the government should absolutely avoid getting involved.

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[768] For a rather enthusiastic endorsement of the use of a reversionary trust in FTCA litigation awards, see Robak v. United States, 503 F. Supp. 982, 983 (N.D. Ill. 1980), rev'd on other grounds, 658 F.2d 471 (7th Cir. 1981). See also Gretchen v. United States, 618 F. 2d 177 (2d Cir. 1980); Foskey v. United States, 490 F. Supp. 1047 (D. R.I. 1979). The Comptroller General has expressly approved the practice with respect to administrative tort claims. Op. Comp. Gen. No. B-162924 (Dec. 22, 1967); GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW pp. 11-50 - 11-51 (1982).

[769] An agency claims attorney with perhaps the longest experience in the field strongly urges that the Act and regulations be amended specifically to embrace structured settlement.

[770] 28 U.S.C. § 2678 (Supp. 1983).

[771] Id. See generally United States v. Cohen, 389 F. 2d 689, 691

(Footnote Continued)

In the nature of things, the government has not had to face the interesting question whether the FTCA impliedly restricts the fees of an attorney who fails to produce any tort settlement in favor of his or her client. Where the parties have agreed upon a customary contingent fee, there is of course no recovery, no claim to a fee, and therefore no issue. But suppose they have agreed upon a fixed or fixed hourly fee. Does an attorney who collects or seeks to collect it violate the FTCA by exacting a fee "in excess of 20 per centum of any award, compromise, or settlement?"[772] Congress, doubtless assuming that FTCA Attorneys would typically charge fees contingent on success,[773] did not address the question. But for an attorney who is strictly forbidden to collect more than $200 on a $1000 tort claim successfully negotiated to be able to collect any amount whatsoever should he or she totally fail does seem in a sense anomalous. It could conceivably offer attorneys a greater financial reward for disserving than for serving their clients' interests. In fact, the concern is probably more theoretical than real, for customary contingent fee arrangements do prevail in government tort claims; and even where the parties set a fixed fee, an attorney rarely would find his or her long-term professional interest served by winning a client nothing on a meritorious tort claim for the sake of a higher fee in the case at hand. In any event, the government achieves its principal objective of ensuring that the lion's share of public funds spent in compensation of government torts actually reaches the victims when the ceiling applies only to fees on actual recoveries and fees, if any, in the absence of recovery are left to the wisdom of the parties directly concerned.[774]

O. The Audit and Review of Claims Settlements

That the decision whether and, if so, on what terms to settle a claim administratively under the FTCA is essentially vested in the legal departments of the agencies -- subject to possible Justice Department advice or approval -- is not inconsistent with some sort of outside audit and review. My impression, however, is that no substantial oversight occurs. The FTCA originally required each agency to report annually to Congress on the administrative payment of claims under the Act, giving a one- or two-line description of each claim paid, plus the name of the claimant, the amount claimed and the amount actually awarded.[775] Although agencies could not at that time settle a claim in excess of the modest sum of $1000, later $2500, Congress evidently thought it desirable that they account for their activities. Curiously,

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(Footnote Continued)
(5th Cir. 1967). No prosecutions have been reported under the FTCA provision.

[772] 28 U.S.C. § 2678 (Supp. 1983).

[773] D. SCHWARTZ & S. JACOBY, supra note 703, at 49.

[774] See Bulman, Federal Tort Claims: Attorney Fees and Interest, TRIAL AND TORT TRENDS 109 (M. Belli ed. 1965).

[775] 28 U.S.C. § 2673 (1964 ed).

Congress dropped the reporting requirement in 1965,[776] only one year before it made the filing of an administrative claim a prerequisite to suit and lifted the ceiling on agency-level settlements.

Apart from the occasional investigation by a congressional committee, the only real possibility for legislative review of agency tort claims activity seems to lie with the General Accounting Office. However, the role of the GAO is rather limited. In the first place, GAO's position has consistently been that, though it enjoys sweeping statutory authority to settle and adjust all claims of or against the United States,[777] it may not intervene on the merits of monetary claims where Congress has specifically vested settlement authority elsewhere.[778] Such is obviously the case for claims sounding in tort, and probably equally so for cases arising under many of the meritorious claims statutes I have mentioned in this report.[779] With a merits

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[776] Pub. L. No. 89-348, 79 Stat. 1310 (1965). Specific agencies may continue to make claims reports to particular congressional committees. The Veterans Administration, for example, reports on its claims activities periodically through its General Counsel to the Chairman of the Senate Committee on Veterans' Affairs. Veterans Administration Regulation No. M-02-1, supra note 591, § 18.14.

[777] 31 U.S.C. § 3702 (1983). Despite the sweeping statutory language, the GAO takes the view that monetary claims should normally be presented to the appropriate agency, if any, before being brought to it. Apart from audit or action upon agency request, the GAO normally intervenes, if at all, by way of review or reconsideration at the claimant's request. 4 C.F.R. § 31.4 (1983); GENERAL ACCOUNTING OFFICE, supra note 768, at pp. 1-3, 11-14 (individual claimants generally may request review or reconsideration by the Comptroller General of settlements disallowing their claims in whole or in part); Note, The Comptroller General of the United States: The Broad Power to Settle and Adjust All Claims and Accounts, 70 HARV. L. REV. 350 (1956); Note, The Control Powers of the Comptroller General, 50 COLUM. L. REV. 1199 (1956). For a description of the largely investigatory procedures and practices of GAO's Claims Group on review and reconsideration of agency settlement determinations, see 4 C.F.R. §§ 31.2-.8 (1983); GENERAL ACCOUNTING OFFICE, supra, at pp. 11-15 - 11-19; Baer, Practice Before the General Accounting Office, 19 FED. B. J. 275 (1959).

[778] Where the GAO exercises review on the merits, a six-year statute of limitations applies. 31 U.S.C. § 3702 (b)(1) (1983). GAO rulings have been held to bind the executive branch, but not private parties. United States ex rel. Skinner & Eddy Corp. v. McCarl, 275 U.S. 1, 4 n.2 (1927); St. Louis, Brownsville & Mexico Ry. Co. v. United States, 268 U.S. 169, 174 (1925); United States v. Standard Oil Co. of California, 545 F. 2d 624, 637-38 (9th Cir. 1976); Pettit v. United States, 488 F. 2d 1026, 1031 (Ct. Cl. 1973).

[779] The situation is clearest where, as under the FTCA, the agency

(Footnote Continued)

review in the tort area mostly barred, the GAO has chiefly oblique means of control: the audit of a particular claim or an agency's claims handling program in general,[780] control incident to the mechanics of payment on a claim that has already been settled,[781] and the issuance of advance decisions to an agency at the latter's request.[782] Even these avenues are not particularly well-developed in the federal tort area. Evidently, the GAO rarely conducts audit reviews of the administration of the FTCA or of other tort claim statutes;[783] as shown below, the GAO exercises a narrow scope of review incident to the mostly ministerial process of readying tort settlements for payment by the Treasury; and, as for advance rulings on agency request, they do not play an important role in implementation of the FTCA.[784] Every agency claims officer with whom I spoke reported seeking advice on the property or wisdom of settlement, like the propriety or wisdom of particular settlement terms, from the Justice Department which they take to be the expert in the field.

Looking specifically at the GAO's control incident to the payment process on tort claims, the distinction between merits and cognizability

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(Footnote Continued)
determination is by statute made final and conclusive. Op. Comp. Gen. No. B-176147 (July 5, 1972); Op. Comp. Gen. No. B-161131 (Apr. 18, 1967); Op. Comp. Gen. No. B-72568 (Apr. 19, 1948). See also Military Personnel and Civilian Employees' Claims Act, 31 U.S.C. § 3721 (1983); 41 Comp. Gen. 235 (1961) (claims under Military Claims Act are beyond GAO settlement jurisdiction); 3 Op. Comp. Gen. 22, 24 (1923) (claims under Small Claims Act are beyond GAO settlement jurisdiction).

[780] 31 U.S.C. §§ 3521-26 (1983).

[781] 28 U.S.C. § 2672 (Supp. 1983); 31 U.S.C. § 1304(a) (1983); 28 C.F.R. § 14.10(a) (1983).

[782] 31 U.S.C. § 3529 (1983). The GAO takes the view that agencies should refer any monetary claims doubtful in law or in fact to the GAO for an advance ruling. GENERAL ACCOUNTING OFFICE, supra note 768, at p. 11-14.

[783] But see GENERAL ACCOUNTING OFFICE, PROCESSING OF CLAIMS RESULTING FROM THE SWINE FLU PROGRAM (1981), discussed supra note 717.

[784] This is not to say that the GAO has not issued advance rulings on the meaning or coverage of the FTCA. E.g., 49 Op. Comp. Gen. 758 (1970); 35 Op. Comp. Gen. 511 (1956); 26 Op. Comp. Gen. 891 (1947). Certainly, it has had more frequent occasion to construe other claims legislation, presumably because the expertise and indeed the authority of the Justice Department in connection with the FTCA do not extend to these other statutes. E.g., Op. Comp. Gen. No. B-20721 (Sept. 2, 1983) (Military Personnel and Civilian Employees' Claims Act); Op. Comp. Gen. No. B-197052 (Feb. 4, 1981) (Panama Canal Act); Op. Comp. Gen. No. B-190106 (Mar. 6, 1978) (Military Personnel and Civilian Employees' Claims Act); 40 Op. Comp. Gen. 691 (1961) (Military Claims Act).

under statutes that make agency action final and conclusive largely forecloses scrutiny of the decision to pay a given tort claim. The GAO will not reexamine an issue calling for an agency's exercise of discretion or judgment, such as whether an employee acted negligently or within the scope of employment, or whether the claimant is entitled to the specific amount of damages awarded.[785] In fact, it rarely looks beyond matters that can be determined on the face of things, for example, whether an agency impermissibly seeks to pay a claim that indisputably arose in a foreign country or is plainly time-barred.[786] Analogously, review of an agency's exercise of meritorious claims settlement authority incident to payment on a claim does not involve much more than an assurance of respect for the scope and purpose of the legislation.[787] All in all, while the GAO's sweeping authority to settle monetary claims against the government, to conduct audits of agency operations, to issue advance advisory rulings, and to process the payment of FTCA settlements over $2500 give it a significant foothold in the torts area, its involvement has had a quite modest impact, much as Congress doubtless intended.

From the point of view of disappointed agency-level claimants, the lack of meaningful access to the GAO should not cause real concern; under the FTCA as we know it and are likely to continue knowing it, claimants view the courts as their refuge. On the other hand, there may be a significant vacuum so far as audits of manifestly unfounded or excessive settlements are concerned. Though watchdog activities of the Justice Department in settlements over $25,000 constitute a more than adequate safeguard against fraud and collusion in the very largest of tort claims under the FTCA, they have no application to the vastly larger number of settlements below that amount; and the Department does not figure at all in the agencies' use of the less well-defined meritorious claims statutes at their disposal. Consideration should be given to making GAO audits of tort claims a more credible prospect than they now appear to be. Alternatively, the agency Inspectors General who, I am informed at a number of the agencies, have not given the audit of agency tort settlements a significant priority on their agendas, might perform a useful deterrent function in the tort claim setting.[788]

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[785] GENERAL ACCOUNTING OFFICE, supra note 768, at p. 11-10.

[786] Application of the discretionary acts exemption is the best example of an issue sure to be avoided.

I am informed by those at GAO in charge of processing claims for payment from the judgment fund that fewer than one percent of claims presented for payment raise a substantial question. That question is most likely to be whether the claim in issue really sounds in tort, or rather reflects on an operating or program expenditure for which the agency's own funds should be used. See supra note 61.

[787] GENERAL ACCOUNTING OFFICE, supra note 768, at p. 11-10, discussing 21 Comp. Dec. 250 (1914) which involved the Secretary of Agriculture's authority to reimburse owners of horses, vehicles and other equipment lost or damaged while being used for official business. See text at notes 146-47, supra.

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[788] For a summary of the statutory provisions imposing civil and criminal penalties for the filing of false or fraudulent claims, see GENERAL ACCOUNTING OFFICE, supra note 768, at pp. 11-133 - 11-136. Agencies are also authorized to treat fraudulent presentation as entirely vitiating the claimant's rights under a claim. Id. at p. 11-134.

Chapter Six

CONCLUSION AND RECOMMENDATIONS

A study of agency handling of monetary claims presupposes a reasonably precise notion of a monetary claim. A moment's reflection suggests that the term encompasses a broad variety of phenomena including, among others, claims under government contracts, personnel-related claims of government employees, and a host of different statutory entitlements. Obviously, such diverse kinds of claims do not all call for the same kind of agency-level procedure. In this report, I have chosen to focus on agency handling of tort and tort-like claims, surveying preliminarily the authority of the agencies to entertain such claims and, in much greater depth and detail, the procedures by which they exercise it.

Agency Claims Settlement Authority

Though a plausible argument may be made that federal agencies have inherent authority to consider and pay claims for the private losses they occasion, a sounder view would be that they need express statutory authority before doing so. In fact, an examination of existing settlement authority over tort and tort-like claims reveals an extensive but haphazard collection of statutes, the most significant of which is the Federal Tort Claims Act. Some of this legislation essentially fills gaps of one kind or another in the coverage of the FTCA, thus still presupposing tortious conduct on the government's part. "Meritorious claims" provisions, on the other hand, authorize the payment of just or equitable claims irrespective of fault. Even these two categories of statutes are quite artificial, for each displays very numerous and often quite inexplicable variations in matters of scope and procedure.

I believe the time has come to conduct a comprehensive review of this proliferation of claims settlement authority, with a view to making it more rational and coherent and to clarifying the exact relationship between the various ancillary statutes and the FTCA. In this context, the exercise of meritorious claims authority by the handful of agencies possessing it warrants particular scrutiny. The fact that numerous agencies without any such authority show an interest in having it, and that others would like their payment ceilings raised, makes a study of the meritorious claims statutes especially timely. Though the examination I urge necessarily spills over the line between substance and procedure, it seems to me an appropriate one for the Administrative Conference to undertake.

A related matter only broached by the report, but worthy of further Conference consideration, is the question whether and how agencies dispose of monetary claims upon which suit may be brought, but over which they enjoy no express administrative settlement authority. I gather that in the absence of a statute specifically contemplating agency-level settlement, like the FTCA or the Contract Disputes Act, no clearly delineated authority or procedure exists for ventilating monetary causes of action before they reach the litigation stage. As noted in the report, agencies probably have the means to entertain many such claims under certain of their program-related authority, and the

Attorney General is expressly empowered to settle "imminent litigation." But appreciating the full extent to which claims settlement activity might reasonably be shifted from the litigation to the administrative process requires a more general survey than this FTCA-oriented study can possibly accomplish. Among the many elements of the landscape are the actual rule of the GAO in handling litigable claims and the use of high-level contingency funds to which a number of agency officials alluded.

Still, the main focus of this report and the recommendations that follow is agency-level procedures for handling claims under the FTCA. To a modest extent in 1946, and more spaciously in 1966, Congress authorized the agencies to settle claims in tort arising out of the negligent or otherwise wrongful acts of their employees while acting within the scope of their employment, at least insofar as the government had waived its sovereign immunity to suit with respect to them. The 1966 amendments sought to shift principal responsibility for handling federal tort claims from the courts to the agencies, much as the original Act meant to shift it from Congress to the courts.

Agency-level Procedures under the FTCA

Before he or she may bring suit under the FTCA, a tort claimant first must have presented the claim to the responsible agency within two years of its accrual. The presentation of a valid claim gives the agency a minimum of six months in which to consider and act upon it. Though neither the statute nor the Justice Department regulations issued pursuant to it give a very significant amount of structure to agency-level claims procedures under the FTCA, the agencies by their own practice and regulations have done so. The agencies vary considerably in their volume of claims, in the way they allocate responsibility internally for investigating and adjudicating them (particularly in the extent to which they have decentralized their operations), and in their apparent rates of settlement. Nevertheless, from a procedural point of view, all seem to adhere to a basically investigatory model that I find generally appropriate to the task and, given a claimant's right to full de novo trial in federal district court no later than six months from the filing of an administrative claim, entirely consonant with procedural due process.

Unfortunately, the data maintained by the agencies do not furnish a basis for saying just how far the 1966 amendments actually have shifted final disposition of tort claims from court to agency or for gauging the fairness and objectivity of agency outcomes. From the available information, however, the displacement of tort litigation by tort claim administration does seem to be meeting and most likely exceeding Congress' expectations. The agencies have accomplished this both by resolving a high proportion of claims worth paying and by exposing the meritless character of a good many of the other claims that are filed. Still, a more refined claims tracking system would afford a better picture of the efficacy of agency settlement efforts, especially as broken down among types of claims and level of compensation sought. Such a system would also improve the monitoring of pending claims and generate data of special interest from a risk management point of view.

Because tort claims adjudication is not the principal mission of any agency at the federal level, the administrative process that has developed for this purpose remains a somewhat inconspicuous one; ultimate authority in most cases rests in each agency's legal department, subject only to the requirement of Justice Department approval in the case of proposed settlements over $25,000 and Justice Department consultation in claims raising novel policy questions or related to pending litigation. Though agency procedures for handling tort claims have been allowed to develop in relative freedom from congressional or executive branch mandate, they are very important in terms both of the number of dollars at issue and of the government's relationship with individual members of the public; and they only stand to grow in importance if Congress acts to displace suits against individual federal officials and to expand the government's liability under the FTCA to encompass constitutional torts. They also have the potential for constituting an informal and relatively open means of dispute resolution.

The current procedures, as I have come to understand them, seem generally to be serving Congress' purposes, but they leave room for substantial improvement in the specific ways set out in the recommendations that follow. Basically, though the great majority of claims attorneys appear to be fair-minded, the system risks operating in an inappropriately adversarial manner and thereby both offending notions of fairness and equity and jeopardizing the efficiency and quality of prelitigation settlement. To a considerable extent, the difficulties grow out of a residual ambiguity in the identity of the administrative tort claim process itself. On the one hand, Congress, both in 1946 and 1966, left the process closely tied to litigation under the FTCA. For example, despite respectable arguments that could be made to the contrary, Congress almost certainly did not mean to give agencies settlement authority any broader than the government's exposure to liability in litigation. Thus time-barred, statutorily exempt or otherwise infirm administrative claims may not properly be settled by the agencies under the FTCA. More important, by preserving a de novo action in federal court as the claimant's fundamental remedy in tort against the government, Congress also imparted to the entire process -- including the administrative phase -- a distinctly adversarial flavor.

On the other hand, Congress clearly expressed the policy view that deserving tort claimants should receive fair and adequate compensation for their losses, preferably at the administrative level. To that extent, it created something of an entitlement, albeit an entitlement marked by so many imponderables -- proof of fault and proximate causation, the determination of what is a compensable loss, and problems of valuation, to name a few -- that it can only be described, by contrast to veterans benefits and food stamps, for example, as highly inchoate. The fact remains also that, however strong the litigation origins and premises of the FTCA, the agencies have developed a distinct administrative process for handling tort claims and that the great bulk of claims are disposed of in these channels rather than in the stark adversarial setting of litigation.

In other words, administrative tort claim settlement lies somewhere between, on the one hand, an autonomous dispute resolution process in which the claims officer approximates a neutral decisionmaker and, on the other, a simple prelude to litigation in which officer and claimant already stand in a squarely adversarial relationship. The extent to which the features of these objective-entitlement and adversarial-bargaining models predominate in any given situation depends on all the circumstances of the case.

Few agency claims officers appear to be unaware of or insensitive to the tensions between these competing models, though each has found his or her own particular mode of resolving them. In fact, I do not urge the Administrative Conference to recommend that Congress radically restructure the agency claims process in order to eliminate the ambiguity. As a practical matter, such restructuring would necessitate either turning back on the trend toward agency-level disposition of claims or developing a quasi-judicial mechanism in the agencies or in a separate government-wide tribunal that would sharply segregate the function of agency advocate from that of decisionmaker. The first kind of change is plainly undesirable as a matter of basic policy. The second seems to entail unwarranted burdens of an administrative character -- including most likely a fleet of administrative law judges or their equivalent -- and a probable loss in the efficiency and informality that characterize the current investigatory model.

On the contrary, most of the difficulties I discern in the current operations could be avoided by a less ambitious reform that accepts ambiguity as inherent in the system but seeks to mitigate the less wholesome aspects that have produced misunderstandings and occasional hardship for claimants. An example of such improvement would be a greater readiness on the agencies' part to consider claims under the FTCA even though not presented in terms of that statute, and to entertain properly filed FTCA claims under other payment authority where reasonable and appropriate. This report has highlighted among questionable agency practices an overly-technical attitude to the sufficiency of a claim, a tendency to resolve doubtful procedural questions against the claimant even in the absence of any substantial prejudice to governmental interests, unduly restrictive policies on information disclosure in connection with a pending claim, and a sometimes less than fully fair and objective approach to determining the merits and monetary value of a claim.

Without doubt, striking attitudinal differences divide both the agencies and the claims personnel within a given agency. Also, claimants themselves are often represented by persons who assume an entirely adversarial posture and must be dealt with accordingly. But the administrative process as a whole could be made fairer and more effective by efforts to reduce its adversarial character and to maximize cooperation between claimant and claims officer. Confidence in the process and its outcomes in turn would increase. The challenge is to make these adjustments in the context of a system that continues to promise tort claimants full access to the courts as their basic, though no longer their first, avenue of relief.

In their accounts of agency-level procedure, a number of tort claims officers expressed concern over the Justice Department's own commitment to fair and reasonable compensation in the exercise of its approval authority in prospective settlements over $25,000; a few specifically reported that their own willingness to negotiate settlements with claimants for sums over that threshold has substantially diminished as a result. Because the charge, if founded, is a serious one, it may warrant further exploration, though to some extent the alleged problem would be eased by raising the ceiling on agency settlement autonomy as recommended below. Of somewhat less direct bearing on administrative settlement procedures, but nonetheless relevant and quite troublesome, is the Justice Department's apparent practice of raising each and every technical defect in a claim as a jurisdictional defense in FTCA litigation, even though the defect relates to regulatory rather than statutory requirements and even though the agency managed to address and deny the claim on the merits during the administrative phase.

The fact that claimants need only wait six months in order to obtain a trial _de novo_ before a judiciary that has shown itself increasingly sympathetic to them on both procedural and substantive issues gives the perceived fairness of administrative claims handling a very special importance. I therefore urge that the Administrative Conference make the following specific recommendations with respect to agency regulations and practice under the FTCA and related statutes and, to a much lesser extent, with respect to the basic legislation itself:

Specific Recommendations

A. AGENCY EXERCISE OF SETTLEMENT AUTHORITY

1. Providing Guidance to Claimants.

(a) Agency personnel should be required as part of their duties to take reasonable steps to keep a claimant who has come forward with a potentially deserving claim from innocently failing to perfect a valid statutory demand, committing technical error, or running afoul of a statute of limitations.

(b) Before disapproving a claim under a particular statute, claims officers should consider the full range of channels legally available for satisfying monetary claims and ensure that the claim is not fairly payable under the FTCA or any other basis available to the agency. Likewise, agency personnel outside the claims area who regularly process other monetary demands should inform the private party of the existence of a tort remedy and applicable requirements when appropriate. To this general end, agencies should inventory all legal means available for handling monetary claims and encourage their personnel to see that these means are explored in an expeditious and practical fashion.

(c) The Attorney General should amend his regulations to accept as sufficient substantial compliance with the formal requirements imposed on claimants. In other words, the regulations should direct agencies not to rely on technical defects in otherwise valid, intelligible, and responsibly filed administrative claims, where they are not prejudiced as a result. Even where the defect is a substantial one, the claimant should normally be specifically so apprised and allowed a reasonable opportunity to remedy it.

2. Filing the Claim.

(a) The Attorney General's regulations should be amended to treat an FTCA administrative claim as still timely though received after expiration of the statute of limitations, provided it was mailed before expiration of that period and the claimant can produce persuasive evidence of that fact. The regulations should also specify that, where a claim has been filed with the wrong agency and transferred to another agency, the original date of filing will be used for determining its timeliness. However, to help ensure that agencies have an adequate amount of time to investigate and consider claims, the six-month period given the agencies for that purpose should not commence until the claim has been received by the appropriate agency.

(b) Agencies should require claims officers to advise claimants that the absence of a sum certain for all categories of claims may preclude their consideration by both agency and court, and that, subject to timely amendment and the existing statutory exceptions, the amount of the administrative claim constitutes a ceiling on the damages that may later be sought in court.

(c) The Attorney General's regulations should afford claimants who initially fail to provide a sum certain a reasonable time in which to supply it without prejudice. Until the regulations are clarified, agency officers should be required to make clear their policy on relation back of amended claims.

(d) Agencies should not refuse to entertain a valid property damage claim supported by a sum certain simply because the personal injury or death claim arising out of the same incident and filed on the same form has not been quantified.

3. Substantiation of Claims.

(a) The Attorney General's regulations should be amended to incorporate the minimal notice standard adopted in Adams v. United States, 615 F.2d 284, on rehearing, 622 F.2d 197 (5th Cir. 1980), for purposes of agency determinations of a claim's validity.

(b) Should exchanges with a claimant reveal a pattern of serious noncooperation in furnishing substantiating data, the claims officer should promptly and clearly indicate whether he or she is inclined to view the continued nonproduction of designated information as compromising the validity of the claim under the prevailing legal standard.

4. Access to Information

(a) Where a claimant, with or without specific reference to the Freedom of Information Act and related statutes, seeks access to his or her claim file or to other information relating to a pending claim, agencies should look to these statutes as a minimum standard of disclosure. Agencies should consider release even when these statutes would not require it, if more liberal disclosure might advance settlement, and they should endeavor to establish a mutually free and open exchange of relevant information.

(b) Given his supervisory authority over both FTCA and FOIA practices, the Attorney General should provide claims officers with specific guidance on how the FOIA, as construed by the courts in analogous cases, relates to the tort claims process.

(c) When presented with a demand for information relevant to a pending tort claim, agencies should not interpose as wholesale obstacles to disclosure the government's executive privilege for deliberative materials, or the attorney-client, expert witness, or qualified attorney work product privileges. By way of example, "work product" should be construed narrowly in the FOIA context to accommodate most requests for data about the circumstances of the incident, negligence and damage issues, or other factual information not comprising the mental impressions, conclusions, opinions, litigation strategy, or legal theories of the agency's attorney.

5. Claims Decisions.

(a) Agencies should give, and the Attorney General's regulations should be amended to require that they give, a brief statement of reasons for the denial of an FTCA or other claim. (See 5 U.S.C. § 555(e).)

(b) Agency claims officers, aided by the General Accounting Office, should ensure that all payments to be made under the FTCA are properly classed as tort claims (drawn from the judgment fund) and do not constitute program-related or general operating expenses (properly charged to agency appropriations).

(c) Agencies should comply with the decision in Odin v. United States, 656 F.2d 798 (D.C. Cir. 1981), by relieving claimants of settlement terms where they have not yet signed and returned the payment voucher. However, since this policy conceivably will give claimants an unfair advantage and diminish the integrity of the administrative settlement process, agencies should be alert to instances of abuse and seek appropriate amendment of the FTCA if they become widespread.

(d) Whatever the mode in which an agency claims officer deals with claimants, the officer's ultimate goal should be a fair and objective assessment of the merits of a claim and of its monetary worth. To this end, the officer normally should refrain from raising marginal defenses and from paying claims at an unreasonably low level. Thus, for example, an unquestionably valid claim should be paid at full value without regard to extraneous factors such as savings to the claimant in avoiding litigation. On the other hand, it is not improper for a claims officer to evaluate a claim by predicting the probable outcome of litigation, discounted by the degree of factual or legal uncertainty that the claim presents.

(e) The Justice Department should not exercise its approval authority over large administrative settlements in such a way as to impose on agencies the position it would take if the claim were in the adversarial setting of court litigation, or otherwise act in a manner that would tend to discourage claims officers from making serious efforts to reach a fair and reasonable settlement with a deserving claimant.

(f) Unless nonwaivable, a defect in an administrative claim should not be raised as a jurisdictional defense in subsequent FTCA litigation if it is not a substantial one, or if it was not brought to the claimant's attention by the agency and the agency, in spite of the defect, addressed and disposed of the claim on the merits.

6. Reconsideration.

(a) Claim denial letters should inform claimants that they have the right to request the agency's reconsideration of its denial, and that such a request extends the six-month waiting period before suit on the claim may be filed in federal district court.

(b) In cases where the claimant communicates with a claims officer following a final denial, the officer should promptly indicate to the claimant whether the officer does or does not take the communication to be a request for reconsideration and state specifically the procedural implications of that determination.

(c) Where feasible, reconsideration should be conducted by agency personnel other than those principally responsible for the initial denial, though it should normally take place on the basis of the existing claim file as supplemented by the claimant.

(d) Agencies should routinely permit claimants to withdraw a request for reconsideration before the six-month waiting period is up, provided the agency has not as yet expended significant resources reconsidering the claim.

7. Claims Management.

(a) Agencies should maintain data on the volume and dollar value of tort claims. The data, which should include information on the outcomes of administrative claims and subsequent litigation, should be categorized so as to permit agencies to evaluate their handling of claims and to assess and manage risks.

(b) Agency claims officers should use some form of case monitoring, and preferably computer techniques, for tracking the progress of the claims for which they are responsible. The Attorney General should coordinate efforts to develop computerized data collection and retrieval systems adapted to the tort claims context and should promote the systematic sharing of such technology.

B. STATUTORY CHANGES

1. Enlarging and Defining Agency Settlement Authority.

(a) Congress should conduct a comprehensive reexamination of the meritorious and other ancillary claims statutes in force to ensure that each of them is warranted and that together they form a coherent whole both on their own terms and in relation to the FTCA. In the course of oing so, Congress systematically should raise ceilings on agency uthority to settle claims where inflation has rendered them obsolete.

(b) Congress should take particular care in enacting legislation that would enlarge an agency's authority to satisfy claims for loss or injury -- whether those claims are "meritorious" or sound in tort -- to be precise about the scope of that authority, especially in relationship to the agency's existing authority under the FTCA. A good example of legislative precision in this regard is the Swine Flu Immunization Act, 42 U.S.C. § 247 b(k)(2), 90 Stat. 1113 (1976).

(c) Congress should codify an agency's settlement authority, rather than leave it in the agency's annual appropriation, whenever it has become a more or less permanent feature.

(d) Congress should revise the exemptions section of the FTCA specifically to reflect exemptions found in or inferred from other statutory provisions.

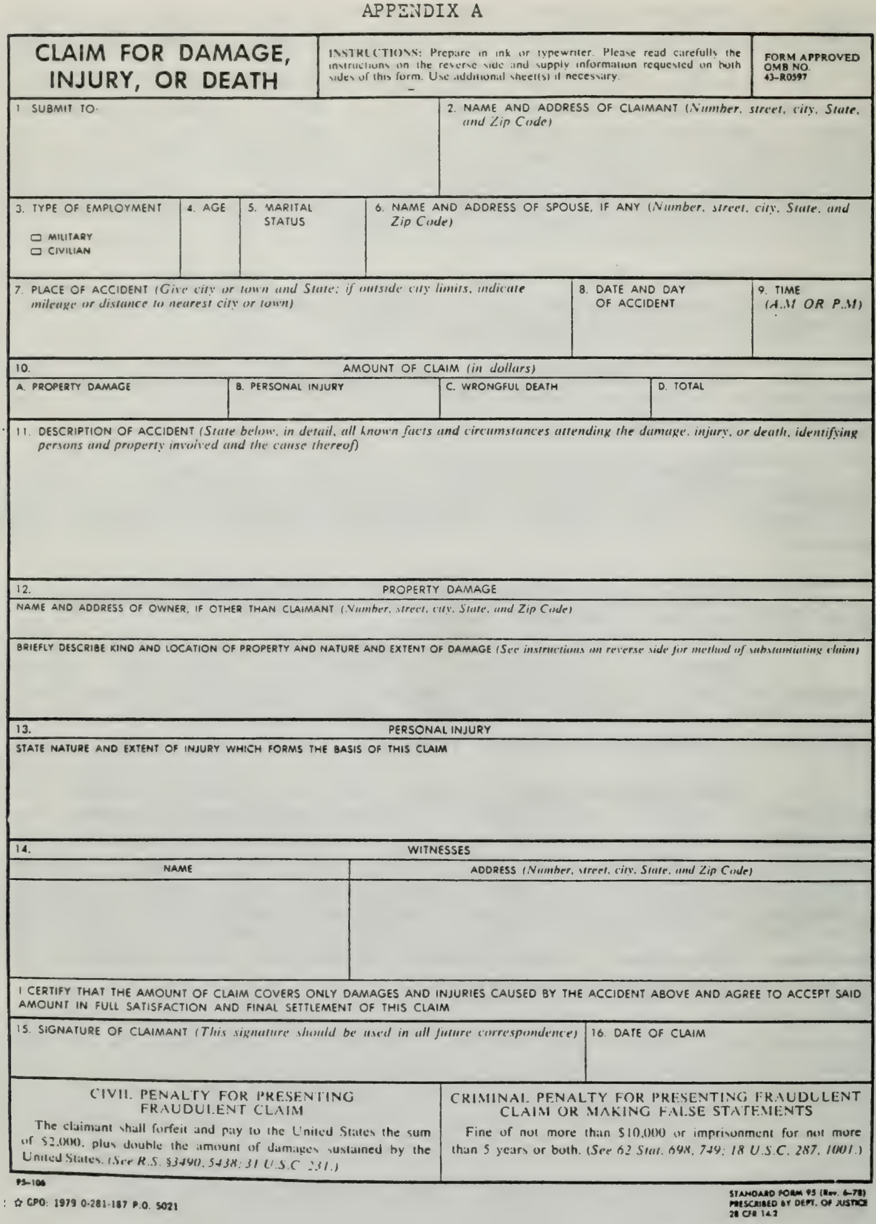
(e) Congress should consider raising the level of agency settlement authority under the FTCA sufficiently high -- to $100,000, for example -- to encourage claimants to negotiate seriously with agencies.

(f) Congress should discard the provision that FTCA settlements of up to $2500 be paid from agency funds.

2. Statute of Limitations. Congress should amend the FTCA to postpone accrual of a claim for statute of limitations purposes until the claimant first knows or should reasonably have known of the government's connection with the claim.

3. Substantiation of Claims. Congress should monitor the magnitude of conflict and foregone settlement traceable to disputes over the substantiation of claims under the minimal notice standard (see Paragraph A.3.(a)) and, if it remains a serious problem, consider putting administrative settlement negotiations on a more candid and productive footing by requiring as a condition of sufficiency of a claim that claimant and agency fully disclose to the other on request all pertinent information. Congress should enforce any such requirement by suitable sanctions for noncooperation.

APPENDIX A



CLAIM FOR DAMAGE, INJURY, OR DEATH

INSTRUCTIONS: Prepare in ink or typewriter. Please read carefully the instructions on the reverse side and supply information requested on both sides of this form. Use additional sheet(s) if necessary.

FORM APPROVED
OMB NO.
43-R0597

1. SUBMIT TO:

2. NAME AND ADDRESS OF CLAIMANT (*Number, street, city, State, and Zip Code*)

3. TYPE OF EMPLOYMENT
☐ MILITARY
☐ CIVILIAN

4. AGE

5. MARITAL STATUS

6. NAME AND ADDRESS OF SPOUSE, IF ANY (*Number, street, city, State, and Zip Code*)

7. PLACE OF ACCIDENT (*Give city or town and State; if outside city limits, indicate mileage or distance to nearest city or town*)

8. DATE AND DAY OF ACCIDENT

9. TIME (*A.M OR P.M*)

10. AMOUNT OF CLAIM (*in dollars*)

A. PROPERTY DAMAGE

B. PERSONAL INJURY

C. WRONGFUL DEATH

D. TOTAL

11. DESCRIPTION OF ACCIDENT (*State below, in detail, all known facts and circumstances attending the damage, injury, or death, identifying persons and property involved and the cause thereof*)

12. PROPERTY DAMAGE

NAME AND ADDRESS OF OWNER, IF OTHER THAN CLAIMANT (*Number, street, city, State, and Zip Code*)

BRIEFLY DESCRIBE KIND AND LOCATION OF PROPERTY AND NATURE AND EXTENT OF DAMAGE (*See instructions on reverse side for method of substantiating claim*)

13. PERSONAL INJURY

STATE NATURE AND EXTENT OF INJURY WHICH FORMS THE BASIS OF THIS CLAIM

14. WITNESSES

NAME	ADDRESS (*Number, street, city, State, and Zip Code*)

I CERTIFY THAT THE AMOUNT OF CLAIM COVERS ONLY DAMAGES AND INJURIES CAUSED BY THE ACCIDENT ABOVE AND AGREE TO ACCEPT SAID AMOUNT IN FULL SATISFACTION AND FINAL SETTLEMENT OF THIS CLAIM

15. SIGNATURE OF CLAIMANT (*This signature should be used in all future correspondence*)

16. DATE OF CLAIM

CIVIL PENALTY FOR PRESENTING FRAUDULENT CLAIM

The claimant shall forfeit and pay to the United States the sum of $2,000, plus double the amount of damages sustained by the United States. (*See R.S. §3490, 5438; 31 U.S.C 231.*)

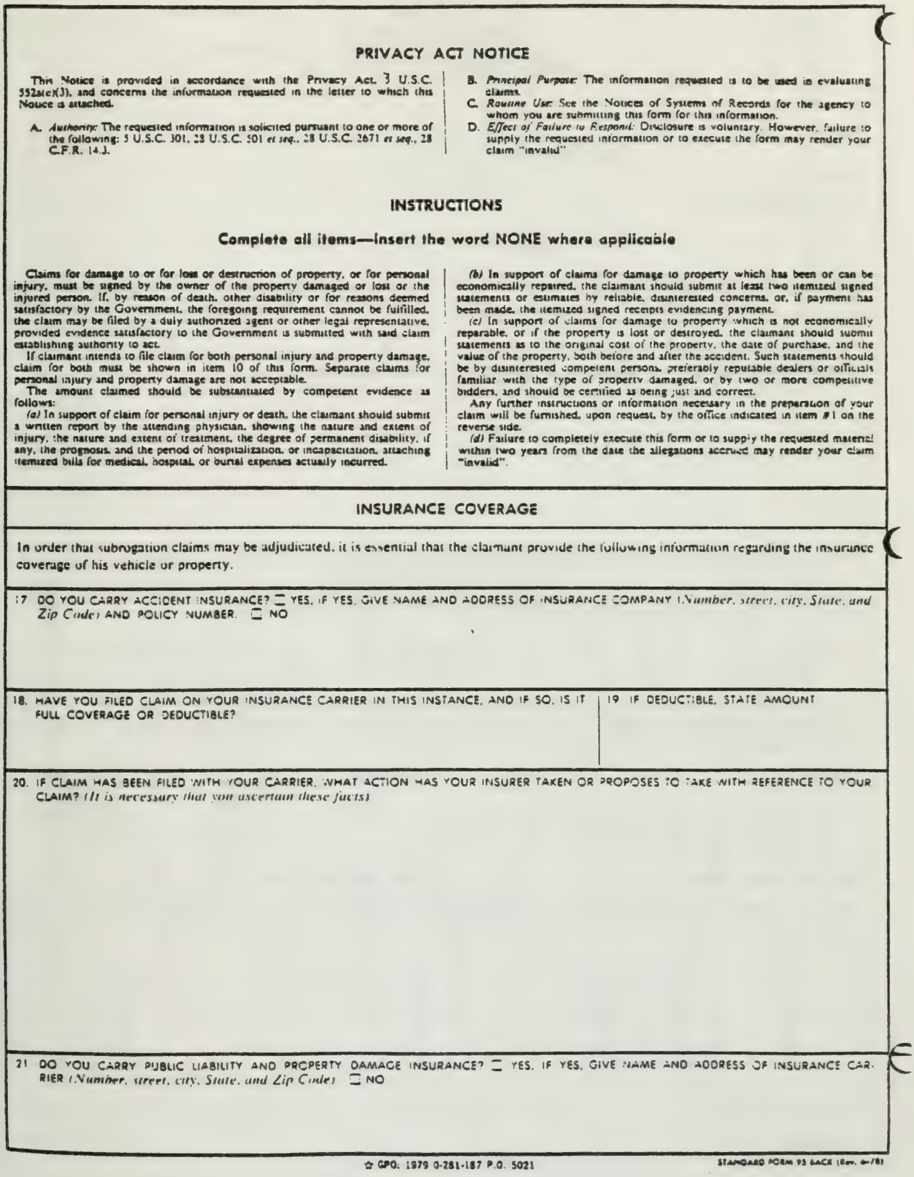
CRIMINAL PENALTY FOR PRESENTING FRAUDULENT CLAIM OR MAKING FALSE STATEMENTS

Fine of not more than $10,000 or imprisonment for not more than 5 years or both. (*See 62 Stat. 698, 749; 18 U.S.C. 287, 1001.*)

95-106

☆ GPO: 1979 0-281-187 P.O. 5021

STANDARD FORM 95 (Rev. 6-78)
PRESCRIBED BY DEPT. OF JUSTICE
28 CFR 14.2



PRIVACY ACT NOTICE

This Notice is provided in accordance with the Privacy Act, 5 U.S.C. 552a(e)(3), and concerns the information requested in the letter to which this Notice is attached.

A. *Authority:* The requested information is solicited pursuant to one or more of the following: 5 U.S.C. 301, 28 U.S.C. 501 *et seq.*, 28 U.S.C. 2671 *et seq.*, 28 C.F.R. 14.2.

B. *Principal Purpose:* The information requested is to be used in evaluating claims.

C. *Routine Use:* See the Notices of Systems of Records for the agency to whom you are submitting this form for this information.

D. *Effect of Failure to Respond:* Disclosure is voluntary. However, failure to supply the requested information or to execute the form may render your claim "invalid"

INSTRUCTIONS

Complete all items—Insert the word NONE where applicable

Claims for damage to or for loss or destruction of property, or for personal injury, must be signed by the owner of the property damaged or lost or the injured person. If, by reason of death, other disability or for reasons deemed satisfactory by the Government, the foregoing requirement cannot be fulfilled, the claim may be filed by a duly authorized agent or other legal representative, provided evidence satisfactory to the Government is submitted with said claim establishing authority to act.

If claimant intends to file claim for both personal injury and property damage, claim for both must be shown in item 10 of this form. Separate claims for personal injury and property damage are not acceptable.

The amount claimed should be substantiated by competent evidence as follows:

(a) In support of claim for personal injury or death, the claimant should submit a written report by the attending physician, showing the nature and extent of injury, the nature and extent of treatment, the degree of permanent disability, if any, the prognosis, and the period of hospitalization, or incapacitation, attaching itemized bills for medical, hospital, or burial expenses actually incurred.

(b) In support of claims for damage to property which has been or can be economically repaired, the claimant should submit at least two itemized signed statements or estimates by reliable, disinterested concerns, or, if payment has been made, the itemized signed receipts evidencing payment.

(c) In support of claims for damage to property which is not economically reparable, or if the property is lost or destroyed, the claimant should submit statements as to the original cost of the property, the date of purchase, and the value of the property, both before and after the accident. Such statements should be by disinterested competent persons, preferably reputable dealers or officials familiar with the type of property damaged, or by two or more competitive bidders, and should be certified as being just and correct.

Any further instructions or information necessary in the preparation of your claim will be furnished, upon request, by the office indicated in item #1 on the reverse side.

(d) Failure to completely execute this form or to supply the requested material within two years from the date the allegations accrued may render your claim "invalid".

INSURANCE COVERAGE

In order that subrogation claims may be adjudicated, it is essential that the claimant provide the following information regarding the insurance coverage of his vehicle or property.

17. DO YOU CARRY ACCIDENT INSURANCE? ☐ YES. IF YES, GIVE NAME AND ADDRESS OF INSURANCE COMPANY (*Number, street, city, State, and Zip Code*) AND POLICY NUMBER. ☐ NO

18. HAVE YOU FILED CLAIM ON YOUR INSURANCE CARRIER IN THIS INSTANCE, AND IF SO, IS IT FULL COVERAGE OR DEDUCTIBLE?

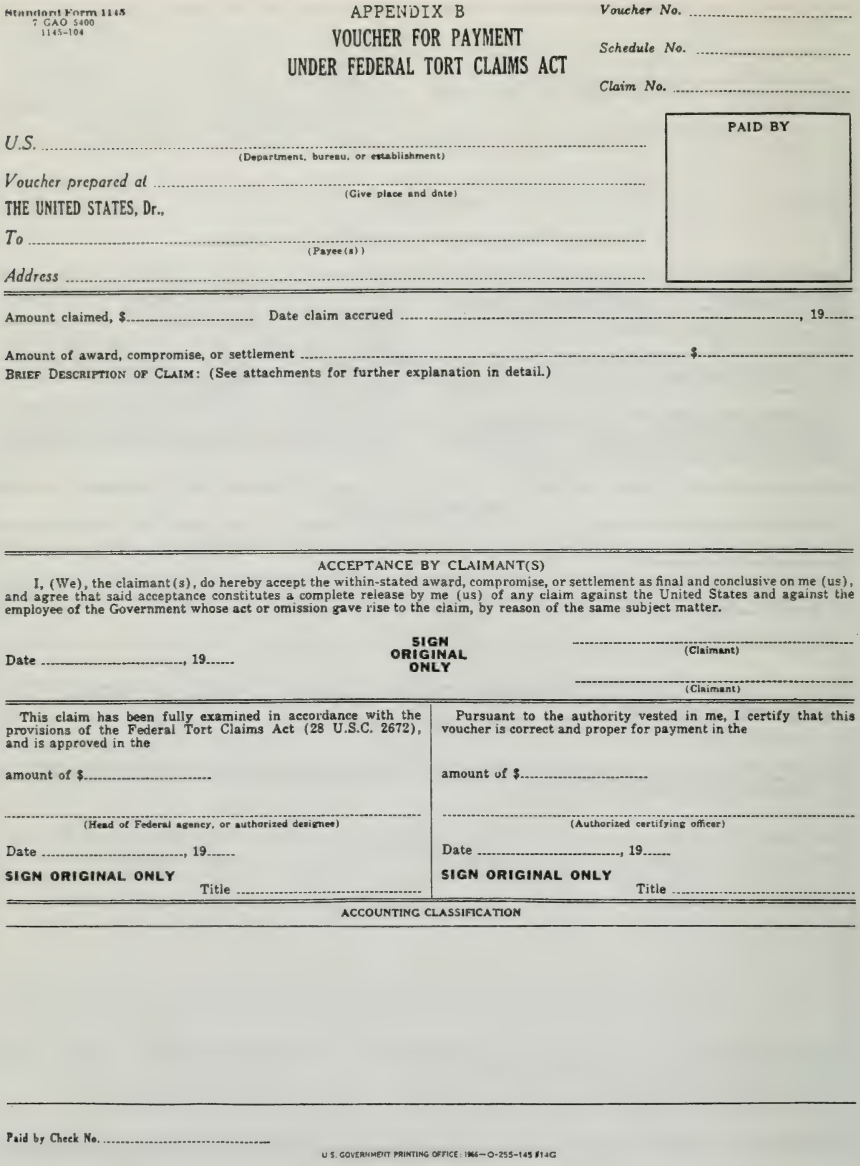
19. IF DEDUCTIBLE, STATE AMOUNT

20. IF CLAIM HAS BEEN FILED WITH YOUR CARRIER, WHAT ACTION HAS YOUR INSURER TAKEN OR PROPOSES TO TAKE WITH REFERENCE TO YOUR CLAIM? (*It is necessary that you ascertain these facts*)

21. DO YOU CARRY PUBLIC LIABILITY AND PROPERTY DAMAGE INSURANCE? ☐ YES. IF YES, GIVE NAME AND ADDRESS OF INSURANCE CARRIER (*Number, street, city, State, and Zip Code*) ☐ NO

☆ GPO: 1979 0-281-187 P.O. 5021

STANDARD FORM 95 BACK (Rev. 6-78)



Standard Form 1145
7 GAO 5400
1145-104

APPENDIX B

VOUCHER FOR PAYMENT UNDER FEDERAL TORT CLAIMS ACT

Voucher No. ....

Schedule No. ....

Claim No. ....

PAID BY

U.S. ....
(Department, bureau, or establishment)

Voucher prepared at ....
(Give place and date)

THE UNITED STATES, Dr.,

To ....
(Payee(s))

Address ....

Amount claimed, $.......... Date claim accrued ...., 19.....

Amount of award, compromise, or settlement .... $..........

Brief Description of Claim: (See attachments for further explanation in detail.)

ACCEPTANCE BY CLAIMANT(S)

I, (We), the claimant(s), do hereby accept the within-stated award, compromise, or settlement as final and conclusive on me (us), and agree that said acceptance constitutes a complete release by me (us) of any claim against the United States and against the employee of the Government whose act or omission gave rise to the claim, by reason of the same subject matter.

Date ...., 19.....

SIGN ORIGINAL ONLY

....
(Claimant)

....
(Claimant)

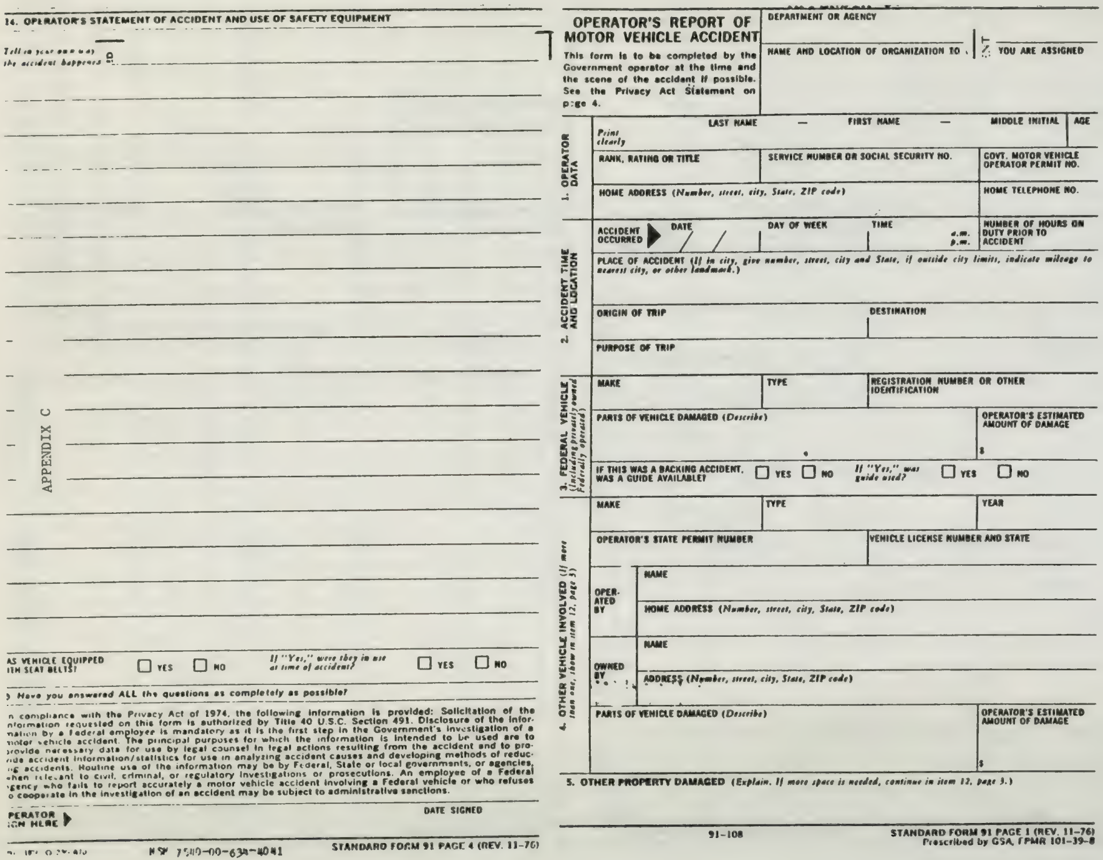
This claim has been fully examined in accordance with the provisions of the Federal Tort Claims Act (28 U.S.C. 2672), and is approved in the	Pursuant to the authority vested in me, I certify that this voucher is correct and proper for payment in the
amount of $..........	amount of $..........
.... (Head of Federal agency, or authorized designee)	.... (Authorized certifying officer)
Date ...., 19.....	Date ...., 19.....
SIGN ORIGINAL ONLY	**SIGN ORIGINAL ONLY**
Title	Title ....

ACCOUNTING CLASSIFICATION

Paid by Check No. ....

U S. GOVERNMENT PRINTING OFFICE : 1966—O-255-145 #14G

APPENDIX C



14. OPERATOR'S STATEMENT OF ACCIDENT AND USE OF SAFETY EQUIPMENT

Tell in your own way the accident happened

AS VEHICLE EQUIPPED ITH SEAT BELTS? ☐ YES ☐ NO *If "Yes," were they in use at time of accident?* ☐ YES ☐ NO

) *Have you answered ALL the questions as completely as possible?*

n compliance with the Privacy Act of 1974, the following information is provided: Solicitation of the nformation requested on this form is authorized by Title 40 U.S.C. Section 491. Disclosure of the infor- nation by a Federal employee is mandatory as it is the first step in the Government's investigation of a notor vehicle accident. The principal purposes for which the information is intended to be used are to provide necessary data for use by legal counsel in legal actions resulting from the accident and to pro- ride accident information/statistics for use in analyzing accident causes and developing methods of reduc- ng accidents. Routine use of the information may be by Federal, State or local governments, or agencies, when relevant to civil, criminal, or regulatory investigations or prosecutions. An employee of a Federal gency who fails to report accurately a motor vehicle accident involving a Federal vehicle or who refuses o cooperate in the investigation of an accident may be subject to administrative sanctions.

PERATOR IGN HERE ▶ DATE SIGNED

NSN 7540-00-634-4041 STANDARD FORM 91 PAGE 4 (REV. 11-76)

OPERATOR'S REPORT OF MOTOR VEHICLE ACCIDENT

This form is to be completed by the Government operator at the time and the scene of the accident if possible. See the Privacy Act Statement on page 4.

DEPARTMENT OR AGENCY

NAME AND LOCATION OF ORGANIZATION TO WHICH YOU ARE ASSIGNED

1. OPERATOR DATA

Print clearly LAST NAME — FIRST NAME — MIDDLE INITIAL			AGE
RANK, RATING OR TITLE	SERVICE NUMBER OR SOCIAL SECURITY NO.	GOVT. MOTOR VEHICLE OPERATOR PERMIT NO.	
HOME ADDRESS (*Number, street, city, State, ZIP code*)		HOME TELEPHONE NO.	

2. ACCIDENT TIME AND LOCATION

ACCIDENT OCCURRED ▶ DATE / /	DAY OF WEEK	TIME a.m. p.m.	NUMBER OF HOURS ON DUTY PRIOR TO ACCIDENT
PLACE OF ACCIDENT (*If in city, give number, street, city and State, if outside city limits, indicate mileage to nearest city, or other landmark.*)			
ORIGIN OF TRIP		DESTINATION	
PURPOSE OF TRIP			

3. FEDERAL VEHICLE (*Including privately owned Federally operated*)

MAKE	TYPE	REGISTRATION NUMBER OR OTHER IDENTIFICATION
PARTS OF VEHICLE DAMAGED (*Describe*)		OPERATOR'S ESTIMATED AMOUNT OF DAMAGE $
IF THIS WAS A BACKING ACCIDENT, WAS A GUIDE AVAILABLE? ☐ YES ☐ NO	*If "Yes," was guide used?* ☐ YES ☐ NO	

4. OTHER VEHICLE INVOLVED (*If more than one, show in item 12, page 3*)

MAKE	TYPE	YEAR
OPERATOR'S STATE PERMIT NUMBER	VEHICLE LICENSE NUMBER AND STATE	
OPER-ATED BY	NAME	
	HOME ADDRESS (*Number, street, city, State, ZIP code*)	
OWNED BY	NAME	
	ADDRESS (*Number, street, city, State, ZIP code*)	
PARTS OF VEHICLE DAMAGED (*Describe*)		OPERATOR'S ESTIMATED AMOUNT OF DAMAGE $

5. OTHER PROPERTY DAMAGED (*Explain. If more space is needed, continue in item 12, page 3.*)

91-108

STANDARD FORM 91 PAGE 1 (REV. 11-76)
Prescribed by GSA, FPMR 101-39-8

	NAMES	HOME ADDRESSES
6. PERSONS INJURED		
7. OCCUPANTS IN YOUR VEHICLE		
8. OCCUPANTS IN OTHER VEHICLE(S)		
9. WITNESSES AND POLICE		

POLICE OFFICER	BADGE NUMBER	PRECINCT OR HEADQUARTERS

10. ACCIDENT CONDITIONS

INDICATE:	FEDERAL VEHICLE *(Includes privately owned Federally operated)*	OTHER VEHICLE (2)
DIRECTION OF TRAVEL		
SIDE OF STREET OR HIGHWAY		
APPROXIMATE SPEED	MILES PER HOUR	MILES PER HOUR

CONDITION OF ROADWAY *(Wet or dry, icy, etc.)*	WEATHER *(Clear, foggy, rain, snow, etc.)*	TYPE OF ROADWAY *(concrete, macadam, etc.)*

OTHER INFORMATION *(Explain stop signs, traffic signals, obstructions, etc.)*

OTHER VEHICLE OWNER'S
INSURANCE INFORMATION

STANDARD FORM 91 PAGE 2 (REV. 11-76)

11. EVENTS AFTER ACCIDENT

STATE WHO GAVE MEDICAL AID, IF ANY WAS GIVEN	WHERE WAS INJURED TAKEN

CONDITION OF OTHER DRIVER

If other driver or persons injured made statements as to cause of accident and extent of personal property damage, relate conversation, also, give names and addresses of others hearing such statements.

12. OTHER VEHICLE OR PROPERTY INVOLVED CONTINUATION—*(If more than one vehicle involved)*

MAKE	TYPE	YEAR
OPERATOR'S STATE PERMIT NUMBER	VEHICLE LICENSE NUMBER AND STATE	

OPERATED BY	NAME
	HOME ADDRESS *(Number, street, city, State, ZIP code)*
OWNED BY	NAME
	ADDRESS *(Number, street, city, State, ZIP code)*

PARTS OF VEHICLE DAMAGED *(Describe)*	OPERATOR'S ESTIMATED AMOUNT OF DAMAGE $

OTHER PROPERTY DAMAGED *(Explain)*

13. DIAGRAM WHAT HAPPENED BY USING THESE SYMBOLS, BELOW

a. Number Federal vehicle as 1, other vehicle as 2, additional vehicle as 3, and show direction of travel by arrow (Example ——➔ ⊂1⊃ ⊂2⊃ ←——)

b. Use solid line to show path before accident ——— ⊂1⊃
Broken line after accident - - - - - - - ⊂2⊃

c. Show pedestrian as by ————————➔

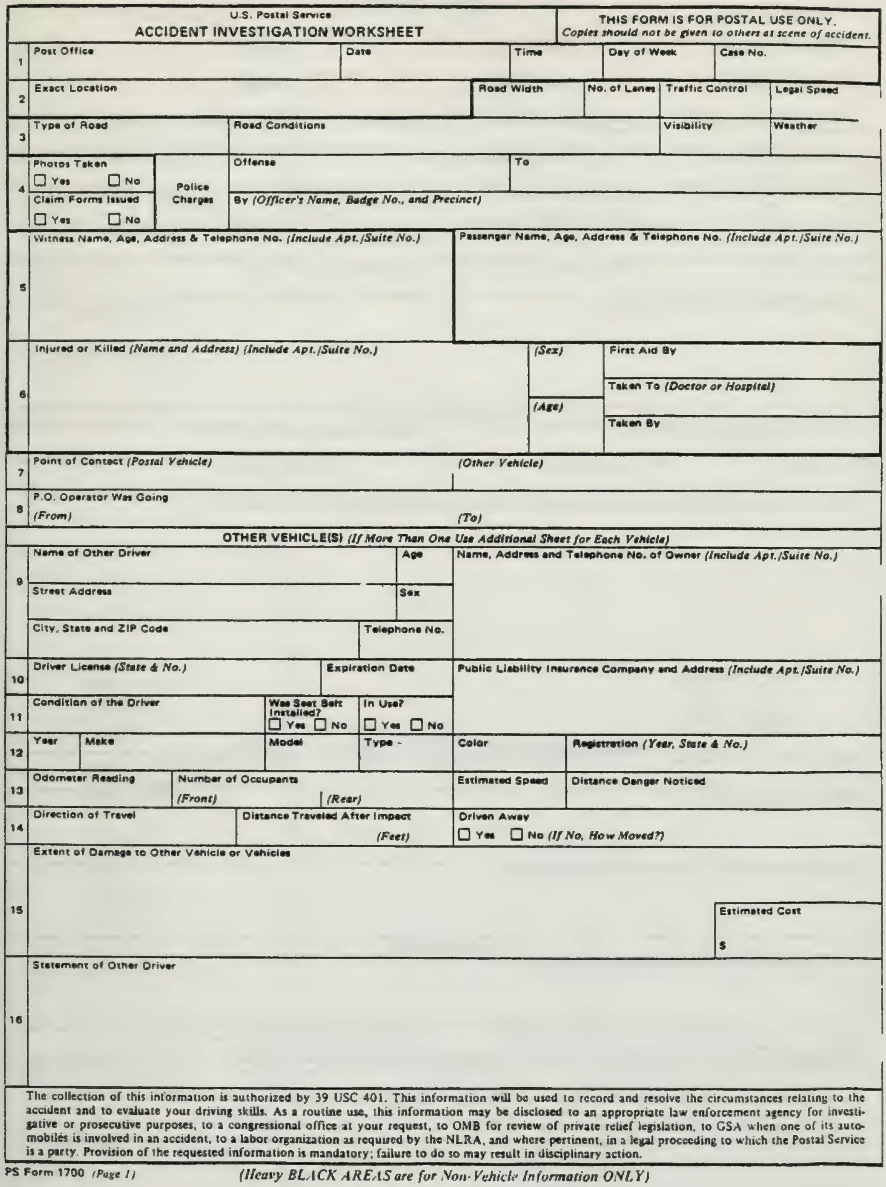
d. Show railroad by ┼┼┼┼┼┼┼┼┼┼

e. Give names or numbers of streets or highways

f. Indicate north by arrow in this circle ○

STANDARD FORM 91 PAGE 3 (REV. 11-76)

APPENDIX D



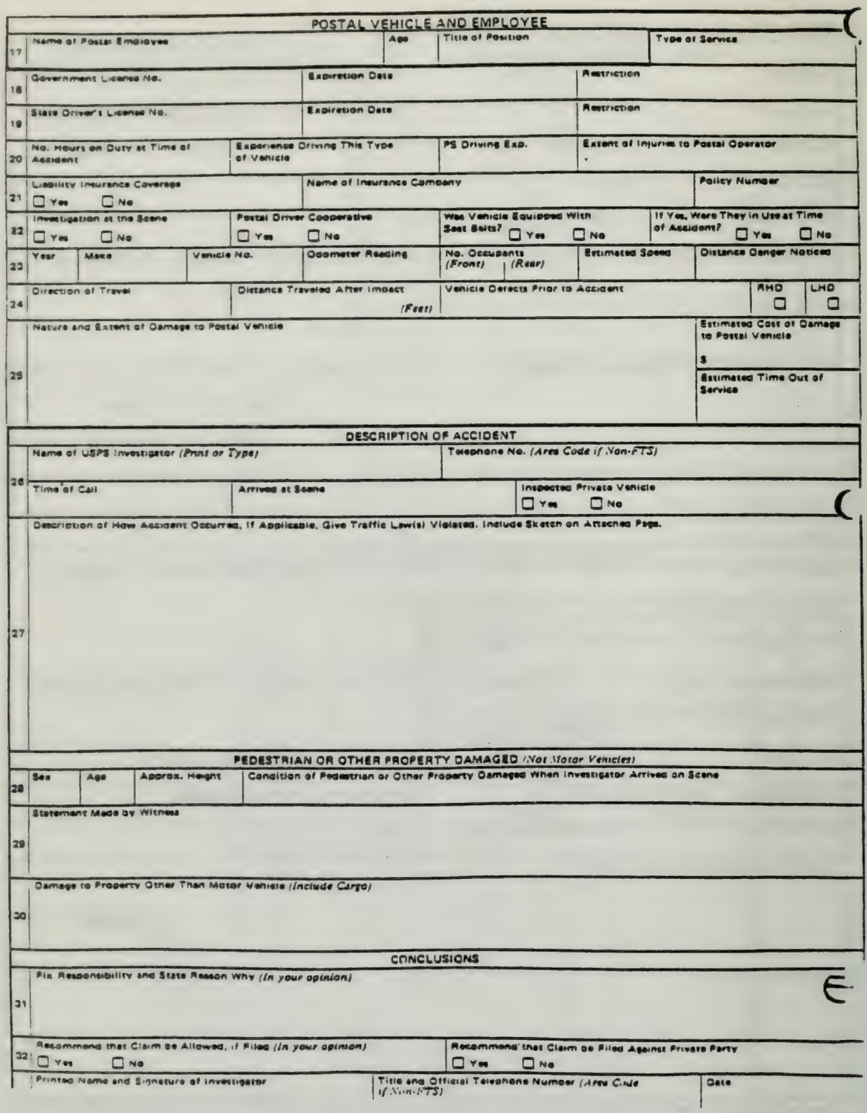
U.S. Postal Service
ACCIDENT INVESTIGATION WORKSHEET

THIS FORM IS FOR POSTAL USE ONLY.
Copies should not be given to others at scene of accident.

1	Post Office	Date	Time	Day of Week	Case No.	
2	Exact Location	Road Width	No. of Lanes	Traffic Control	Legal Speed	
3	Type of Road	Road Conditions	Visibility	Weather		
4	Photos Taken ☐ Yes ☐ No Claim Forms Issued ☐ Yes ☐ No	Police Charges	Offense By *(Officer's Name, Badge No., and Precinct)*	To		
5	Witness Name, Age, Address & Telephone No. *(Include Apt./Suite No.)*	Passenger Name, Age, Address & Telephone No. *(Include Apt./Suite No.)*				
6	Injured or Killed *(Name and Address) (Include Apt./Suite No.)*	*(Sex)* *(Age)*	First Aid By Taken To *(Doctor or Hospital)* Taken By			
7	Point of Contact *(Postal Vehicle)*	*(Other Vehicle)*				
8	P.O. Operator Was Going *(From)*	*(To)*				
	OTHER VEHICLE(S) *(If More Than One Use Additional Sheet for Each Vehicle)*					
9	Name of Other Driver Street Address City, State and ZIP Code	Age Sex Telephone No.	Name, Address and Telephone No. of Owner *(Include Apt./Suite No.)*			
10	Driver License *(State & No.)*	Expiration Date	Public Liability Insurance Company and Address *(Include Apt./Suite No.)*			
11	Condition of the Driver	Was Seat Belt Installed? ☐ Yes ☐ No	In Use? ☐ Yes ☐ No			
12	Year	Make	Model	Type	Color	Registration *(Year, State & No.)*
13	Odometer Reading	Number of Occupants *(Front)* *(Rear)*	Estimated Speed	Distance Danger Noticed		
14	Direction of Travel	Distance Traveled After Impact *(Feet)*	Driven Away ☐ Yes ☐ No *(If No, How Moved?)*			
15	Extent of Damage to Other Vehicle or Vehicles	Estimated Cost $				
16	Statement of Other Driver					

The collection of this information is authorized by 39 USC 401. This information will be used to record and resolve the circumstances relating to the accident and to evaluate your driving skills. As a routine use, this information may be disclosed to an appropriate law enforcement agency for investigative or prosecutive purposes, to a congressional office at your request, to OMB for review of private relief legislation, to GSA when one of its automobiles is involved in an accident, to a labor organization as required by the NLRA, and where pertinent, in a legal proceeding to which the Postal Service is a party. Provision of the requested information is mandatory; failure to do so may result in disciplinary action.

PS Form 1700 *(Page 1)*   *(Heavy BLACK AREAS are for Non-Vehicle Information ONLY)*



POSTAL VEHICLE AND EMPLOYEE

17	Name of Postal Employee	Age	Title of Position	Type of Service				
18	Government License No.	Expiration Date	Restriction					
19	State Driver's License No.	Expiration Date	Restriction					
20	No. Hours on Duty at Time of Accident	Experience Driving This Type of Vehicle	PS Driving Exp.	Extent of Injuries to Postal Operator				
21	Liability Insurance Coverage ☐ Yes ☐ No	Name of Insurance Company	Policy Number					
22	Investigation at the Scene ☐ Yes ☐ No	Postal Driver Cooperative ☐ Yes ☐ No	Was Vehicle Equipped With Seat Belts? ☐ Yes ☐ No	If Yes, Were They in Use at Time of Accident? ☐ Yes ☐ No				
23	Year	Make	Vehicle No.	Odometer Reading	No. Occupants *(Front)*	*(Rear)*	Estimated Speed	Distance Danger Noticed
24	Direction of Travel	Distance Traveled After Impact *(Feet)*	Vehicle Defects Prior to Accident	RHD ☐	LHD ☐			
25	Nature and Extent of Damage to Postal Vehicle	Estimated Cost of Damage to Postal Vehicle $ Estimated Time Out of Service						

DESCRIPTION OF ACCIDENT

26	Name of USPS Investigator *(Print or Type)*	Telephone No. *(Area Code if Non-FTS)*	
	Time of Call	Arrived at Scene	Inspected Private Vehicle ☐ Yes ☐ No
27	Description of How Accident Occurred, If Applicable, Give Traffic Law(s) Violated, Include Sketch on Attached Page.		

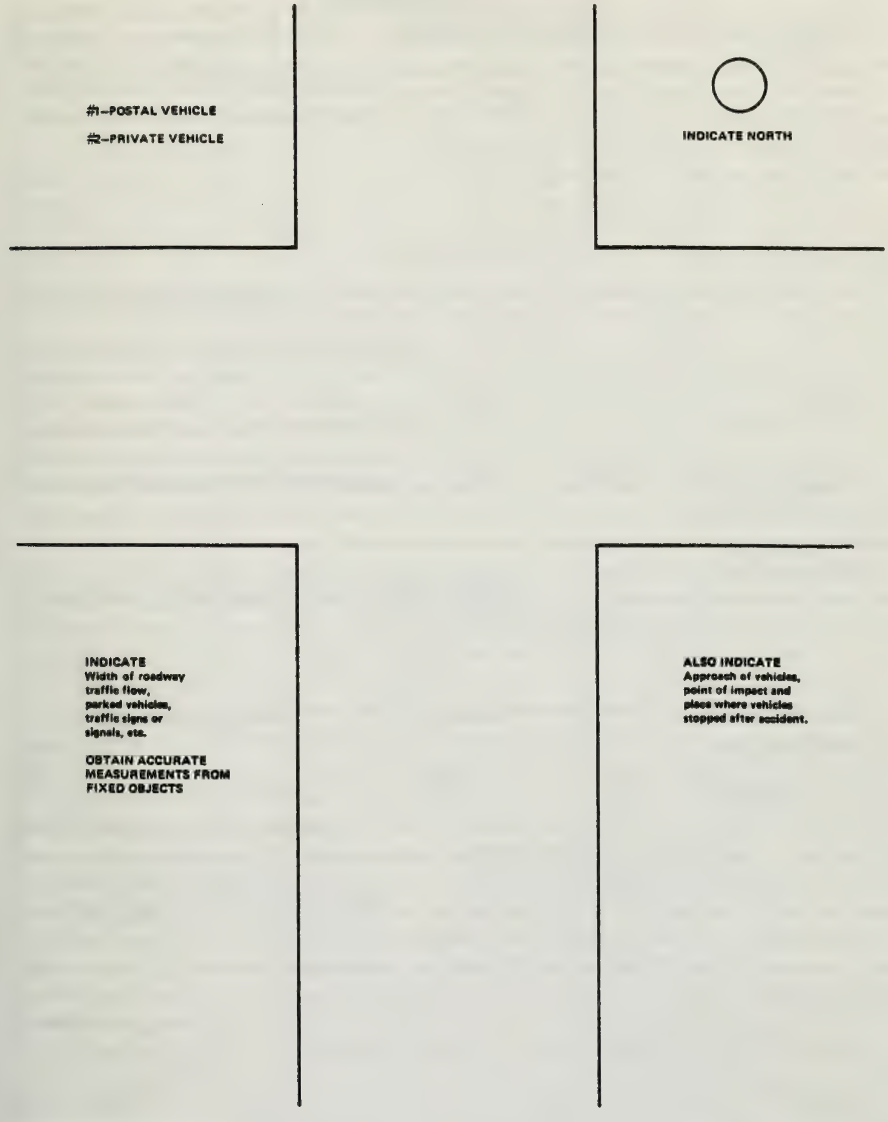
PEDESTRIAN OR OTHER PROPERTY DAMAGED *(Not Motor Vehicles)*

28	Sex	Age	Approx. Height	Condition of Pedestrian or Other Property Damaged When Investigator Arrived on Scene
29	Statement Made by Witness			
30	Damage to Property Other Than Motor Vehicle *(Include Cargo)*			

CONCLUSIONS

31	Fix Responsibility and State Reason Why *(In your opinion)*		
32	Recommend that Claim be Allowed, if Filed *(In your opinion)* ☐ Yes ☐ No	Recommend that Claim be Filed Against Private Party ☐ Yes ☐ No	
	Printed Name and Signature of Investigator	Title and Official Telephone Number *(Area Code if Non-FTS)*	Date

FIELD SKETCH *(Use appropriate one. See reverse.)*



#1–POSTAL VEHICLE

#2–PRIVATE VEHICLE

INDICATE NORTH

INDICATE
Width of roadway
traffic flow,
parked vehicles,
traffic signs or
signals, etc.

OBTAIN ACCURATE MEASUREMENTS FROM FIXED OBJECTS

ALSO INDICATE
Approach of vehicles,
point of impact and
place where vehicles
stopped after accident.

PS Form 1700, Dec. 1981 (Page 2)

PS Form 1700, Dec. 1981 *(Page 4)*

U S GOVERNMENT PRINTING OFFICE 829-679

APPENDIX E

STATEMENT OF WITNESS *(Attach additional sheets if necessary)*	1. DID YOU SEE THE ACCIDENT?	2. WHEN DID THE ACCIDENT HAPPEN? a. TIME a.m. p.m.	b. DATE	FORM APPROVED O.M.B. NUMBER 29-RO246

WHERE DID THE ACCIDENT HAPPEN? *(Give street location and city)*

4. TELL IN YOUR OWN WAY HOW THE ACCIDENT HAPPENED

5. WHERE WERE YOU WHEN THE ACCIDENT OCCURRED?

6. WAS ANYONE INJURED, AND IF SO, EXTENT OF INJURY IF KNOWN?

7. DESCRIBE THE APPARENT DAMAGE TO PRIVATE PROPERTY

8. DESCRIBE THE APPARENT DAMAGE TO GOVERNMENT PROPERTY	9. IF TRAFFIC CASE GIVE APPROXIMATE SPEED OF: a. GOVERNMENT VEHICLE *Miles per Hr.* b. OTHER VEHICLE *Miles per hr.*

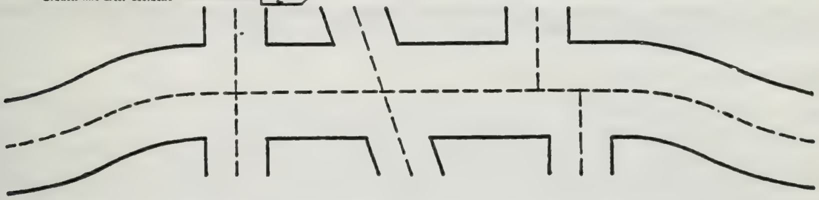
10. GIVE THE NAMES AND ADDRESSES OF ANY OTHER WITNESSES TO THE ACCIDENT *(If known)*

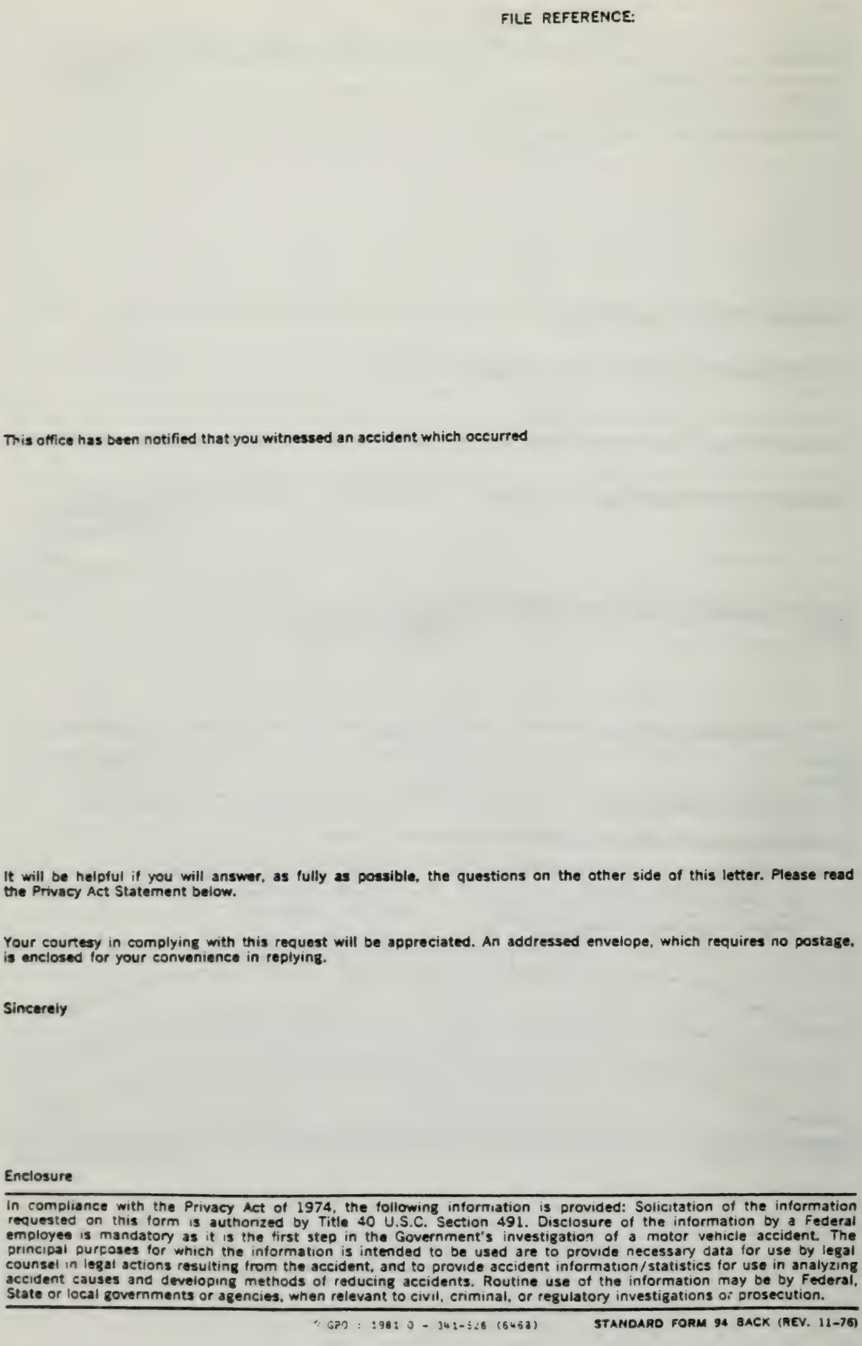
a. NAMES	b. ADDRESSES *(Include ZIP Code)*

WITNESS COMPLETING THIS FORM	11. HOME ADDRESS *(Include ZIP Code)*	12. WITNESS *Sign here* ►	a. HOME TELEPHONE NO. b. TODAY'S DATE
	13. BUSINESS ADDRESS *(Include ZIP Code)*		TELEPHONE NO.

14. INDICATE ON THE DIAGRAM BELOW WHAT HAPPENED:

1. Number Federal vehicle as 1—other vehicle as 2—additional vehicle as 3, and show direction of travel by arrow (*Example:* ⟶ 1 ▷ ◁ 2 ⟵)
2. Use solid line to show path before accident ——— 2 ▷
   Broken line after accident – – – – – – – 2 ▷
3. Show pedestrian by ⟶ ○
4. Show railroad by ┼┼┼┼┼┼┼┼┼┼┼┼┼┼┼
5. Give names or numbers of streets or highways
6. Indicate north by arrow in this circle ○





FILE REFERENCE:

This office has been notified that you witnessed an accident which occurred

It will be helpful if you will answer, as fully as possible, the questions on the other side of this letter. Please read the Privacy Act Statement below.

Your courtesy in complying with this request will be appreciated. An addressed envelope, which requires no postage, is enclosed for your convenience in replying.

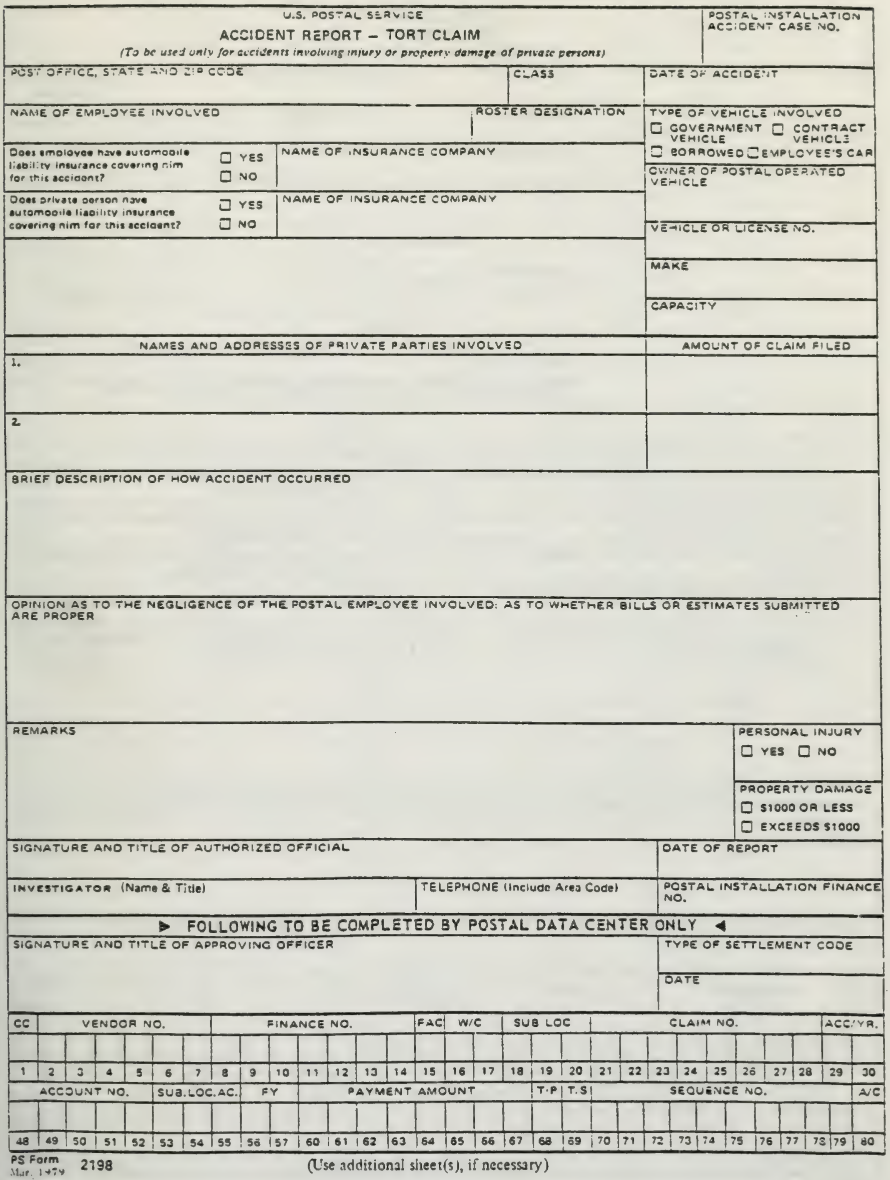
Sincerely

Enclosure

In compliance with the Privacy Act of 1974, the following information is provided: Solicitation of the information requested on this form is authorized by Title 40 U.S.C. Section 491. Disclosure of the information by a Federal employee is mandatory as it is the first step in the Government's investigation of a motor vehicle accident. The principal purposes for which the information is intended to be used are to provide necessary data for use by legal counsel in legal actions resulting from the accident, and to provide accident information/statistics for use in analyzing accident causes and developing methods of reducing accidents. Routine use of the information may be by Federal, State or local governments or agencies, when relevant to civil, criminal, or regulatory investigations or prosecution.

☆ GPO : 1981 O - 341-526 (6468) **STANDARD FORM 94 BACK (REV. 11-76)**

APPENDIX F



U.S. POSTAL SERVICE

ACCIDENT REPORT – TORT CLAIM

(To be used only for accidents involving injury or property damage of private persons)

POSTAL INSTALLATION ACCIDENT CASE NO.

POST OFFICE, STATE AND ZIP CODE

CLASS

DATE OF ACCIDENT

NAME OF EMPLOYEE INVOLVED

ROSTER DESIGNATION

TYPE OF VEHICLE INVOLVED
☐ GOVERNMENT VEHICLE ☐ CONTRACT VEHICLE
☐ BORROWED ☐ EMPLOYEE'S CAR

Does employee have automobile liability insurance covering him for this accident? ☐ YES ☐ NO

NAME OF INSURANCE COMPANY

OWNER OF POSTAL OPERATED VEHICLE

Does private person have automobile liability insurance covering him for this accident? ☐ YES ☐ NO

NAME OF INSURANCE COMPANY

VEHICLE OR LICENSE NO.

MAKE

CAPACITY

NAMES AND ADDRESSES OF PRIVATE PARTIES INVOLVED	AMOUNT OF CLAIM FILED
1.	
2.	

BRIEF DESCRIPTION OF HOW ACCIDENT OCCURRED

OPINION AS TO THE NEGLIGENCE OF THE POSTAL EMPLOYEE INVOLVED: AS TO WHETHER BILLS OR ESTIMATES SUBMITTED ARE PROPER

REMARKS

PERSONAL INJURY
☐ YES ☐ NO

PROPERTY DAMAGE
☐ $1000 OR LESS
☐ EXCEEDS $1000

SIGNATURE AND TITLE OF AUTHORIZED OFFICIAL

DATE OF REPORT

INVESTIGATOR (Name & Title)

TELEPHONE (Include Area Code)

POSTAL INSTALLATION FINANCE NO.

▶ FOLLOWING TO BE COMPLETED BY POSTAL DATA CENTER ONLY ◀

SIGNATURE AND TITLE OF APPROVING OFFICER

TYPE OF SETTLEMENT CODE

DATE

CC | VENDOR NO. | FINANCE NO. | FAC | W/C | SUB LOC | CLAIM NO. | ACC/YR.

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30

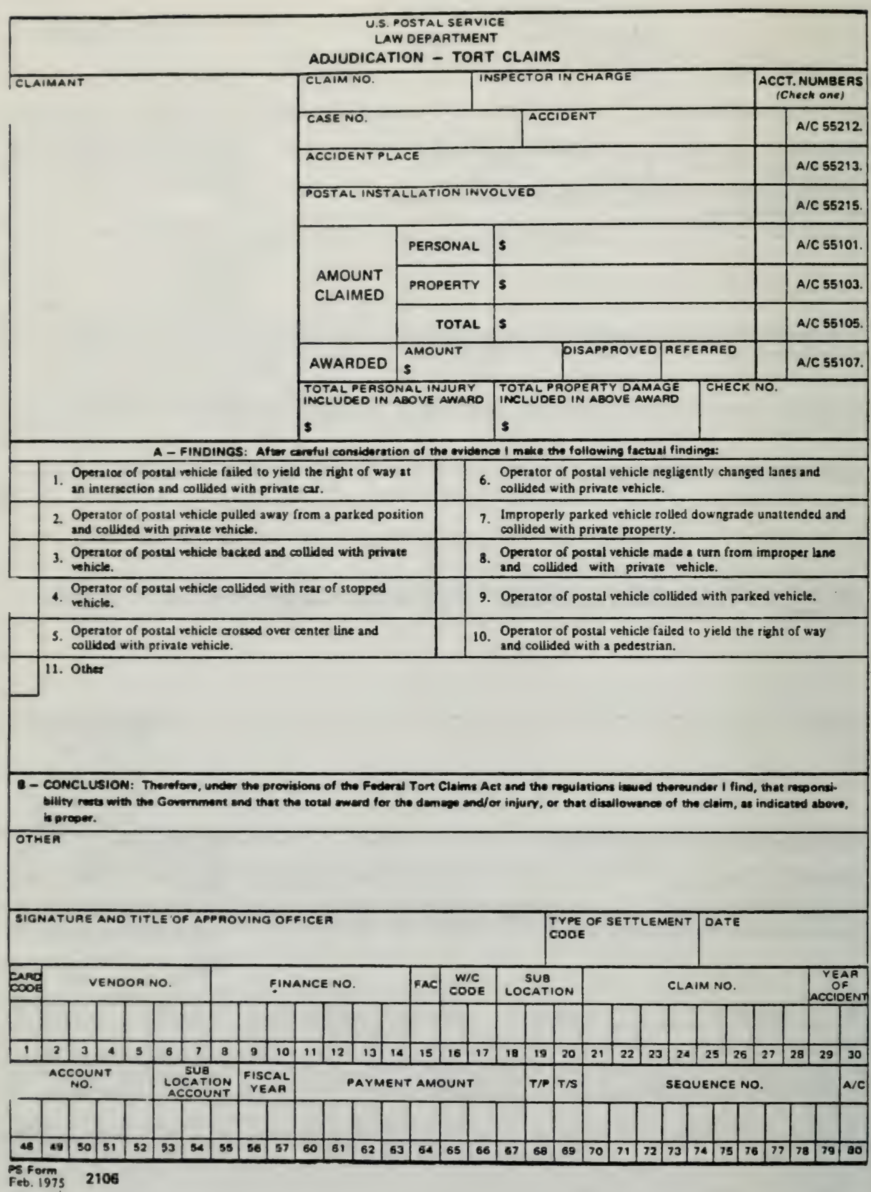
ACCOUNT NO. | SUB.LOC.AC. | FY | PAYMENT AMOUNT | T·P | T.S | SEQUENCE NO. | A/C

48 49 50 51 52 53 54 55 56 57 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80

PS Form 2198
Mar. 1979

(Use additional sheet(s), if necessary)

APPENDIX G



U.S. POSTAL SERVICE
LAW DEPARTMENT
ADJUDICATION — TORT CLAIMS

CLAIMANT	CLAIM NO.	INSPECTOR IN CHARGE	**ACCT. NUMBERS** *(Check one)*
	CASE NO.	ACCIDENT	☐ A/C 55212.
	ACCIDENT PLACE		☐ A/C 55213.
	POSTAL INSTALLATION INVOLVED		☐ A/C 55215.
	AMOUNT CLAIMED	PERSONAL $	☐ A/C 55101.
		PROPERTY $	☐ A/C 55103.
		TOTAL $	☐ A/C 55105.
	AWARDED	AMOUNT $ | DISAPPROVED | REFERRED	☐ A/C 55107.
	TOTAL PERSONAL INJURY INCLUDED IN ABOVE AWARD $	TOTAL PROPERTY DAMAGE INCLUDED IN ABOVE AWARD $	CHECK NO.

A — FINDINGS: After careful consideration of the evidence I make the following factual findings:

☐	1. Operator of postal vehicle failed to yield the right of way at an intersection and collided with private car.	☐	6. Operator of postal vehicle negligently changed lanes and collided with private vehicle.
☐	2. Operator of postal vehicle pulled away from a parked position and collided with private vehicle.	☐	7. Improperly parked vehicle rolled downgrade unattended and collided with private property.
☐	3. Operator of postal vehicle backed and collided with private vehicle.	☐	8. Operator of postal vehicle made a turn from improper lane and collided with private vehicle.
☐	4. Operator of postal vehicle collided with rear of stopped vehicle.	☐	9. Operator of postal vehicle collided with parked vehicle.
☐	5. Operator of postal vehicle crossed over center line and collided with private vehicle.	☐	10. Operator of postal vehicle failed to yield the right of way and collided with a pedestrian.

☐ 11. Other

B — CONCLUSION: Therefore, under the provisions of the Federal Tort Claims Act and the regulations issued thereunder I find, that responsibility rests with the Government and that the total award for the damage and/or injury, or that disallowance of the claim, as indicated above, is proper.

OTHER

SIGNATURE AND TITLE OF APPROVING OFFICER	TYPE OF SETTLEMENT CODE	DATE

CARD CODE	VENDOR NO.						FINANCE NO.							FAC	W/C CODE		SUB LOCATION			CLAIM NO.								YEAR OF ACCIDENT	
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30

ACCOUNT NO.					SUB LOCATION ACCOUNT			FISCAL YEAR		PAYMENT AMOUNT								T/P	T/S	SEQUENCE NO.										A/C
48	49	50	51	52	53	54	55	56	57	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80

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APPENDIX H

1-2 CC	3 GC	4-7 LOC	8-9 FY	10-14 CLAIM NO	15 S	16-18 TYPE	19-23	24-39 CLAIMANT NAME	40-47 GBL NO
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(8A)	(8B)

48-53 TRANS DATE	54-55 ST/CD	56 PI	57-58 PROP	59-64 DATE OF INCIDENT	65-73 AMOUNT CLAIMED	74-79 DATE PRESENTED	80 JL
(9)	(10)	(11)	(12)	(13)	(14)	(15)	(16)

PART 1

48-53 TRANS DATE	54-55 ST/CD	56-62 AMT EMRG PAY	63-64 DC	65-68 DLOC
(9)	(10)	(17)	(18)	(19)

PART 2

48-53 TRANS DATE	54-55 ST/CD	56-61 DATE SETTLED	62-70 AMOUNT PAID
(9)	(10)	(20)	(21)

PART 3

AF FORM JUL 78 176

CLAIMS RECORD

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CONSULTANT REPORTS

IMPLEMENTATION OF THE FEDERAL DEBT COLLECTION ACT OF 1982

A Report to the Administrative Conference
of the United States

Prepared By
Jacqueline C. Leifer
Boasberg, Klores, Feldesman & Tucker
Washington, D.C.

This report was prepared for the Committee on Administration, Administrative Conference of the United States. It represents only the views of the consultant, not necessarily those of the Committee or the Conference as a whole. The report should not be quoted or attributed without reference to this disclaimer.

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INTRODUCTION

The Debt Collection Act of 1982, Pub. L. 97-365 (October 25, 1982), was the result of increasing and intensifying concern expressed in Congress and the Executive Branch over the mounting backlog of unpaid debts owed the federal government. Efforts to identify the magnitude of this problem began in October 1978, when the General Accounting Office (GAO) issued a series of reports criticizing agency collection procedures and stressing the necessity of overhauling the current process.1/

Shortly thereafter, a Debt Collection Project was created within the Office of Management and Budget (OMB) to work with the various departments and agencies to identify government-wide problems impeding collection efforts and to develop effective collection procedures. OMB released its findings at a November 1980 Senate Governmental Affairs Committee hearing that, as of September 30, 1979, the federal government was owed $175 billion, of which 72% or $126 billion was domestic debt (mostly long-term loans) owed by individuals, businesses, educational institutions, State and local governments, and other organizations.2/ Furthermore, the amount of delinquent debt was staggering and growing at a rapid rate.

The Senate Governmental Affairs Committee, in its Report accompanying the Debt Collection Act, outlined the following reasons for these problems:

> Agencies do not have the motivation, resources, or tools to be aggressive and effective debt collectors. Serious problems exist throughout the entire credit cycle, from the initial screening of debtors to ultimate collection.
>
> Generally, credit extension procedures do not provide for proper screening of applicants; resources dedicated to the collection process are invariably insufficient, and, in some cases, nonexistent; the litigation process is sluggish and ineffective; only limited use is made of interest charges to compensate for the government's cost of the money in the hands of the debtor; and, rarely are penalties imposed for late payment. Most

> important, perhaps, is that federal agencies are unable to use the same techniques and tools commonly used in private sector credit management and debt collection due to the Privacy Act and other legal restrictions.
>
> * * *
>
> The ramifications of these substantial losses are both serious and wide-ranging. When delinquent debts are not collected, debtors receive benefits to which they are not entitled. In addition, the financial burden of delinquent and defaulted debt increases the cost of government. For example, assuming a 12 percent interest rate, the government is paying over $10 million each day for interest on these uncollected debts. Finally, these uncollected debts contribute to a loss of confidence in the government and its programs by the taxpayers.

Sen. Rep. No. 97-378, *supra* at 3-4, reprinted in 1982 U.S. Code Cong. & Ad. News 3379-3380.

These overwhelming problems inevitably prompted the enactment of legislation, resulting in the Debt Collection Act on October 25, 1982. The avowed purpose of this Act was to increase the efficiency of government-wide efforts to collect federal debts and to facilitate additional and substantially improved debt collection procedures. Toward this end, Congress added several weapons to the Executive's collection arsenal -- among others, involuntary offset against federal employee salaries, administrative offset,3/ mandatory and permissive assessment of interest, penalties and administrative costs.4/

At the same time, Congress was acutely sensitive to the need to balance strong collection efforts with procedural protections for debtors.5/ Accordingly, provision was made in the Act for affording due process prior to effecting salary or administrative offsets.

Although implementation of the Act is consigned to individual agencies, their debt collection regulations must conform to joint standards issued by GAO and the Department of Justice (DOJ). See 31 U.S.C. §3711(e). The agencies' regulatory task is further complicated by the fact that GAO/DOJ's standard-setting authority with respect to salary offsets has been delegated to the Office of Personnel Management (OPM).6/

Certain provisions of the Act, as well as the standards set by GAO/DOJ and OPM, are controversial. This report is designed to survey the statute, implementing standards, and the major issues as perceived by affected agencies, interested parties and the consultant.

MAJOR ISSUES RAISED BY THE DEBT COLLECTION ACT OF 1982

I. SALARY OFFSET

A. The Statute

Section 5 of the Debt Collection Act of 1982 amended the Civil Service Code, 5 U.S.C. §5514, which restricts the conditions under which a federal employee's salary may be withheld to satisfy unpaid debts owed to the federal government.

Section 5 gives federal agencies specific statutory authorization which the Comptroller General had insisted was the necessary underpinning to involuntary offsets against federal employees' current salaries.7/ This provision allows each federal agency to collect, by offset against the employee's current pay account, debts owed by a federal employee to that agency or any other agency. The deductions may be made from basic pay, special pay, incentive pay, retirement pay, retainer pay or other authorized pay; however, without the individual's consent, the amount deducted for any period may not exceed 15 percent of disposable pay. Upon termination of employment (for whatever reason, *e.g.* retirement, resignation), deduction of any remaining indebtedness may be made from any subsequent payments due the individual.

Prior to initiating involuntary set-off of a federal employee's salary, the creditor agency must provide the individual with:

(1) a minimum of 30 days written notice, informing the individual of the nature and amount of the debt, the agency's intention to make salary deductions to satisfy the debt, and an explanation of the individual's rights (as set forth below);

(2) an opportunity to inspect and copy relevant government records;

(3) an opportunity to enter into a written agreement to establish a repayment schedule (on terms agreeable to the agency);

(4) an opportunity for a hearing regarding the existence or amount of the debt, or with respect to any repayment schedule not established pursuant to paragraph (3) above.

The hearing must be provided if the individual requests one within 15 days of receiving the required notice. Such a request stays all collection activities. The hearing must not be conducted by an individual under the supervision or control of the agency head. A final decision must be issued within 60 days after the hearing request is filed.

The legislative history of Section 5 stresses congressional intent that the salary setoff procedure "be used primarily as a last resort action where other administrative steps have been taken to collect the debt."8/

B. Issues Raised

1. Scope of Applicability

The extensive procedural protections offered to debtors under the salary offset provision of the Debt Collection Act prompted immediate requests from several agencies for clarification (*i.e.* restriction) of this provision's scope of applicability. Specifically, these agencies requested GAO and DOJ to exempt from the statute's purview, so-called "routine administrative adjustments" to individual pay accounts. A problem surfaced immediately -- different agencies viewed different situations as "routine," resulting in requests for three different types of exemptions.

First, several agencies sought an exemption for offsets to recoup unused travel and moving expense advances.9/ The justification offered for exempting such adjustments from the due process strictures of the Act is that these adjustments do not arise from any error committed either by the individual or the agency. Rather, they arise solely because of brief, inevitable and normal processing delays. The validity of the repayment obligation is beyond reasonable dispute and the amount due is readily ascertainable.

Second, the Department of Air Force called for an exemption for routine erroneous pay adjustments.10/ It provided the following illustrations:

> [I]f a member's regular pay includes one day's overpayment of BAQ because of unanticipated termination of assignment to Government quarters, the overpayment could not be collected from the member without the comprehensive due process protections imposed by the Act ... if

> the Air Force mistakenly paid an enlisted member medical incentive pay available only to certain skilled surgeons, and the member's earnings statement clearly noted the payment, then even if it were uncontroverted that the member was aware of the error, collection could not be made until, among other things, the member was given 30 days' notice and offered the opportunity for a hearing before an impartial examiner.

Non-exemption would spell disaster, claimed the Air Force, because it makes roughly 91,000 routine, usually small-amount, adjustments of pay and allowances each month.

Third, OPM recommended that an exemption be made for routine "catch-up" retroactive collections which are necessitated solely because of brief, necessary and inevitable processing delays.11/ This involves situations in which an individual elects coverage or changes coverage under one of the various benefit programs for which federal pay or pension deductions are made. In such cases, pay adjustments usually have to be made, but a "modest" lapse of time occurs between the effective date of the change and the actual pay adjustment. Accordingly, additional deductions often have to be made for the period where coverage was extended but before the pay or pension level could be adjusted. OPM justifies such an exemption by pointing out that: (1) such obligations are always incurred voluntarily by the individual in electing coverage or a change in coverage; (2) the individual is aware (or reasonably should be) from information in forms or brochures, experience and common sense that the election will cause a change in withholding and that there will be a lapse between the effective date and the appropriate pay adjustment; and (3) because the rates applicable to the elective change are generally fixed by or under statute or regulation, there is no genuine basis for dispute as to the amount owed.

The various exemption requests soon became the subject of intense debate between GAO and DOJ. In the early stages of drafting the joint standards implementing the Act, GAO proposed to exempt "routine administrative overpayments which result from clerical or administrative errors or delays in the processing of pay documents." GAO argued that, although the statute contains no such exemption, it

"... is so eminently practical that the Congress must have intended the section to be so interpreted."12/ This exception was ultimately deleted because DOJ concluded that it could not be reconciled with the plain language of the statute and there was no legislative history to support a contrary position. As a result of their irreconcilable differences on this issue, the GAO/DOJ rules implementing the Debt Collection Act declare involuntary salary offsets beyond the scope of the rules altogether.

The Air Force strenuously objected to the refusal of GAO/DOJ to resolve this issue, pointing to a recent case in which the Army was enjoined from pursuing collection action against several civilian employees because of its failure to comply with the due process provisions of the Act. See Alford v. March, File No. S-83-209 MLS (E.D.Cal.). In its comment on GAO/DOJ's proposed rule, the Air Force made the following recommendation:

> If DOJ and GAO cannot solve our dilemma by regulations we do not believe DOD or the individual services can do it. The only effective solution we can see is amendatory legislation to accomplish what GAO earlier hoped to do by regulations.

Suggested language was provided.

On September 26, 1983, OPM issued proposed rules regarding involuntary employee offsets which would accommodate some of the agencies' exemption requests, but not all. The proposed rule would exempt from the definition of "debt" (and thereby exempt from the Act's salary offset protections):

> intra-agency overpayments (adjustments are limited to no more than four pay periods) arising due to normal processing delays when --
>
> > (a) an employee elects coverage or a change in coverage under a Federal benefits program requiring periodic deductions in pay; or
> >
> > (b) ministerial adjustments in pay rates or allowances which cannot be placed in effect immediately.

See proposed amendment to 5 C.F.R. §550.1103, 48 Fed. Reg. 43689 (Sept. 26, 1983). The preamble to the proposed rules justifies these exclusions on the grounds that the Act does not define what a "debt" is, leaving room for exclusions. 48 Fed. Reg. at 43687. This rationale is hardly persuasive from a legal standpoint (or so federal employee unions commented); however, OPM plans to maintain these exclusions in the soon-to-be published final rules. The agency does not intend, however, to accommodate the Air Force by excluding erroneous overpayments, stressing that both categories of proposed exclusions involve obligations which do not arise as a result of any error on the part of the government or the employee.13/

2. Procedural Protections

OPM's proposed rules set out the minimum requirements that agency rules governing salary offset must meet before being approved by OPM, as required by 5 U.S.C. §5514(b)(1). For the most part, these minimum requirements fairly conform to the Act and in some respects, even exceed the required protections.14/ However,in other key respects, the rules provide cursory guidance at best.

The proposal that the form and content of hearings "will depend on the nature of the transactions giving rise to the debts" is particularly vague. See proposed 5 C.F.R. §550.1104(h). The explanatory statement in proposed §1104(h)(2) that "[o]rdinarily, hearings may consist of informal conferences before a hearing official in which the employee and agency will be given full opportunity to present evidence, witnesses and argument," although a good start, does not address crucial questions such as: who bears the burden of proof, what standard of review applies, the availability of discovery, cross-examination, right to counsel, and so forth. Instead, the proposed rules would leave such matters to each agency, stating that:

> Each agency regulation shall define the form and content of written notices, hearings, written responses, and written decisions to be provided ...

Proposed §550.1104(h)(1).

II. ADMINISTRATIVE OFFSET

A. The Statute

Section 10 of the Debt Collection Act amended the Federal Claims Collection Act to authorize the collection of claims by means of "administrative offset," defined as "the withholding of money payable by the United States to or held by the United States on behalf of a person to satisfy a debt owed the United States by that person..." See 31 U.S.C. 3701(a)(1) (1983). The agencies are required first to prescribe regulations for such offsets, "based on the best interests of the United States, the likelihood of collecting a claim by administrative offset, and, with respect to the collection of claims after the six-year period ... [provided in 28 U.S.C. §2415] has expired ... the cost-effectiveness of leaving such claim unresolved for more than six years." 31 U.S.C. §3716(b).

Before collecting any claim through administrative offset, the agency must afford the debtor protections similar to, but somewhat less extensive than those afforded federal employees under 5 U.S.C. §5514, as amended by Section 5 of the Debt Collection Act. See Section I, supra. Specifically, the debtor must be given:

(1) written notice of the nature and amount of the claim, the agency's intent to collect the claim through administrative offset, and an explanation of the debtor's rights (detailed below);

(2) an opportunity to inspect and copy the records of the agency regarding the claim;

(3) an opportunity for review [not a hearing], within the agency [not specifically a hearing before an independent arbiter], of the agency's determination regarding the claim; and

(4) an opportunity to enter into a written repayment agreement with the agency.

The administrative offset provision of the Act is specifically made inapplicable "in any case in which a statute either explicitly provides for or prohibits the collection through administrative offset of the claim or type of claim involved." 31 U.S.C. §3716(c)(2). In addition, for purposes of defining "persons" against whom administrative offset is authorized under the Act, agencies of the United States or of any State or local government are excluded. See 31 U.S.C. §3701(c).

B. *Issues Raised*

1. *Offset Versus Ordinary Demand*

In adding various new weapons to the government's collection arsenal, the Debt Collection Act establishes certain priorities. For example, the Act specifically provides that administrative offset may be used only *after* the agency has tried to collect the claim [15] directly from the debtor.[16]

The GAO/DOJ rules implementing the Act mandate that the agencies use offset "on all claims which are liquidated or certain in amount in every instance in which such collection is determined to be feasible and not otherwise prohibited." *See* 4 C.F.R. §102.3(a), in 49 *Fed*. *Reg*. 8898 (March 9, 1984). The rules further provide that the agency may avoid the ordinary demand cycle altogether. *See* 4 C.F.R. §102.2(e).

In the preamble to the rules, GAO/DOJ explain that deviation authority is appropriate under certain limited circumstances, and the following example of a justified deviation is offered:

> For example, if an agency has not begun collection action until the statute of limitations is about to expire, the agency should not be required to follow the demand cycle if doing so would result in loss of the Government's ability to sue on the debt.

49 *Fed* *Reg*. at 8890. However reasonable this approach may appear, it has three major flaws. First, the Act nowhere authorizes such a deviation. Second, although the preamble states that the deviation authority is "limited," the rules themselves are not qualified in any way. Rather, they provide categorically that:

> If, either *prior to the initiation of*, at any time during, or after completion of the demand cycle, *an agency determines to pursue offset*, then the procedures specified in §102.3, §102.4, or 5 U.S.C. §5514 [relating to collection by salary offsets] as applicable, should be followed. *The availability of funds for offset and the agency's determination to pursue it release the*

> *agency from the necessity of further compliance with paragraphs (a), (b), and (c)* of this section [governing the ordinary demand cycle]. (Emphasis added.)

See 4 C.F.R. §102.2(e). Seemingly, the agency could forego demand for any reason. Third, agency delays resulting in a statute of limitations problem, should not be, in effect, blamed on the potential debtor.

The rules tend to camouflage the underlying problem by providing that the agency's notification of intended offset must give the debtor an opportunity to avoid offset by making voluntary payment. *Id.* The preamble states in this regard: "We do not think the law requires more than this, especially where doing more would result in loss of the offset opportunity." 49 *Fed Reg.* at 8890. As stated earlier, however superficially appealing this argument may be, the rules do not limit the agencies to waiver of the demand cycle in such ill-defined "emergencies" (assuming *arguendo* that deviations are legal in the first place).

2. *Expedited Offset*

One key feature of the Act is the provision of basic procedural safeguards to potential debtors *prior* to effecting administrative offsets. One federal agency commented in this regard that provision should be made for expediting the process when necessary to protect the government's ability to collect the debt.

Agreeing with the agency's concerns, GAO/DOJ went one step further to permit the agencies to effect offset *prior* to completion of the required procedures if:

> (1) Failure to take the offset would substantially prejudice the Government's ability to collect the debt, and
>
> (2) The time before the payment is to be made does not reasonably permit the completion of those procedures.

4 C.F.R. §102.3(b)(5). The rules further provide that prior offset must be "promptly" followed by the completion of the procedures, and any amounts recovered but found not owing must "promptly" be refunded.

GAO/DOJ hasten to point out that this rule only allows for "deviation" from the *timing* of the Act's procedural protections, not "elimination." However, in the due process arena timing can be crucial.17/

GAO/DOJ's departure from the explicit statutory command for pre-offset due process appears to have no basis in the statute or legislative history. Moreover, GAO and DOJ advance this deviation authority for the first time in their *final* rule, not before, and no criteria are established by which to assure a narrow interpretation of "substantial prejudice" to warrant invoking the deviation. Furthermore, as demonstrated in the present consultant's study of agency grant dispute resolution for the Administrative Conference which gave rise to Recommendation 82-2,18/ the agencies experience frequent and lengthy delays in resolving disputes. This forces one to question whether, in fact, offset procedures will be completed and the victims of wrongful prior offset reimbursed "promptly." Significantly, the rules do not require the agency to pay interest, penalties and costs to a person against whom offset has been wrongfully taken.

3. Interagency Offsets

Often one agency holds funds payable to a person in debt to another federal agency. For example, a physician receiving Medicare reimbursements from the Department of Health and Human Services may have defaulted on a student loan from the Department of Education. Which agency is responsible for providing the procedural safeguards and how is the offset effected? A few agencies requested the issuance of uniform interagency offset procedures in order to avoid confusion and prevent inconsistencies in making and processing interagency offset requests. GAO/DOJ chose not to accommodate, on the grounds that "adding detail at this point would be premature and somewhat speculative." 49 *Fed. Reg.* at 8891. Instead, the agencies are advised generally to cooperate with each other,19/ and to establish their own regulatory procedures for interagency offsets. *See* 4 C.F.R. §102.3(b)(2).

GAO/DOJ's "hands-off" approach seems less than satisfactory in view of the fact that OPM has proposed uniform guidance with respect to interagency salary offsets. *See* proposed 5 C.F.R. §550.1106, 48 *Fed. Reg.* at 43692 (Sept. 26, 1983). If there are any reasons why the mechanism for requesting and processing interagency offsets should differentiate between salary and administrative offsets, GAO and DOJ should identify them. If no differentiation is warranted, GAO/DOJ's rules should be amended so as to help the agencies prevent inconsistencies, and, at least in one respect, simplify the complicated regulatory tasks assigned to the agencies under the Act.

Questions raised by the agencies in this regard include: which agency should bear the expense of the administrative review? Which agency selects the time, place and date of the hearing? How much documentation does the agency holding the funds need from the creditor agency that due process requirements have been met and the debt properly established? What if one agency disagrees with another over the debt determination (e.g. on indirect cost issues)?

4. Form of Hearings

Although the GAO/DOJ rules do address whether the required reviews must be oral or written,20/ they do not address several other key issues such as: who bears the burden of proof, what standard of review applies, the availability of discovery, right to counsel, what constitutes a "paper hearing," who should hear the cases, and so forth. While agencies are not totally without guidance (e.g. Recommendation 82-2 of the Administrative Conference deals with some of these issues in the grants context), uniform guidance with respect to these procedural questions would be useful.

III. INTEREST AND PENALTY CHARGES

A. The Statute

Section 11 of the Debt Collection Act amended the Federal Claims Collection Act to provide for assessment of interest on debts owed the federal government, as well as penalties and other charges on delinquent debts. Prior to enactment of this provision, either there was no assessment of interest and penalties on debts due the federal government or the assessment was at rates considerably lower than market rates.21/ To remedy this situation, Section 11 of the Debt Collection Act requires the agencies to charge a specified minimum rate of interest on outstanding debts. However, interest may not be charged if the amount due is paid within 30 days after the date from which interest accrues. In addition, interest may not be assessed on charges.

The agency also must assess charges to cover the costs of processing and handling delinquent claims, and, further, must assess a penalty charge (not to exceed 6 percent per year), on any debts more than 90 days past due. The agency may waive the assessment of interest and charges pursuant to regulations identifying appropriate waiver circumstances, promulgated in conformity with standards as may be jointly issued by the Attorney General and Comptroller General.

Section 11 provides that interest and charges may not be assessed if an applicable statute, a regulation required by statute, a loan agreement, or a contract, either prohibits the charging of interest or charges, or explicitly fixes the rate applicable to claims involved. Further, this provision is inapplicable to any claim under a contract executed prior to October 25, 1982. Finally, as with the administrative offset provision, the term "person" (against whom interest and charges may be assessed under section 11), excludes any agency of the United States or any State or local government.

B. Issues Raised

1. Rates

a. Interest

Section 11 of the Debt Collection Act specifies that a minimum annual rate of interest equal to the "average investment rate for the Treasury tax and loan accounts" must be charged on outstanding debts. The DOJ/GAO implementing rules authorize each agency to charge at a higher rate "if it reasonably determines that a higher rate is necessary to protect the interests of the United States." 4 C.F.R. §102.13(c). When this language appeared in the proposed rules objections were raised, with which GAO/DOJ agreed (see 49 Fed. Reg. at 8893), that this provision raises the undesirable possibility of unequal treatment of similarly situated debtors. However, rather than change the rules, or at least qualify them, GAO and DOJ simply state in the preamble:

> It is our intent that agencies charge a higher interest rate only under the most compelling circumstances.

Assuming that the agencies carefully comb through the preamble to these rules to ascertain their responsibilities, what criteria should they use?

b. Penalties

The Act states that the maximum penalty rate is 6 percent per year. Stating that, as with interest, penalty rates should be consistent throughout the government, GAO/DOJ's preamble indicates that 6 percent should be the minimum as well as the maximum rate, absent compelling circumstances. This inflexible approach is problematic in that the rules themselves provide no guidance to the agencies concerning "compelling circumstances," and, more significantly, it appears contrary to Congress' intent. If Congress wanted all delinquent debtors to pay at least 6 percent in penalty charges, it easily could have said so. A more logical reading of the statute would be to have the agencies develop criteria for applying various penalty rates, *e.g.* perhaps escalating the rate as the delinquency period lengthens.

This is particularly troublesome under GAO/DOJ's view that interest accrues from the date of initial "claim" notification, and penalties accrue 90 days thereafter. Persons choosing to avail themselves of appeal rights will almost certainly face the prospect of paying the maximum/minimum penalty as well as interest, since agency appeals mechanisms often do not resolve disputes in less than one year, much less 3 months.

2. Charging Interest on Interest and Penalties

The Debt Collection Act provides that interest shall not accrue on penalties and administrative cost charges. It is hardly surprising that objections were raised when GAO/DOJ proposed to permit the charging of interest on charges (as well as interest) where a debtor has defaulted on a previous repayment agreement.[22] Nonetheless, GAO and DOJ decided to retain this authority, offering the following rationale:

> The regulation [§102.13(c)], as does the Debt Collection Act, explicitly prohibits the charging of interest on penalties and administrative costs, as a general proposition. The regulation permits interest on interest and related charges in only one limited situation -- where a debtor has defaulted on a previous repayment agreement. We do not think this is unreasonable, and have retained it.

49 *Fed. Reg.* at 8893.

3. Administrative Charges

In addition to interest and penalties, agencies are required to "assess charges to cover the costs of processing and handling delinquent claims," 31 U.S.C. §3717(e)(1). Responding to numerous agency comments requesting guidance as to what costs constitute permissible charges, GAO and DOJ have defined such charges as "the additional costs incurred in processing and handling the debt because it became delinquent..." Section 102.13(d). This section provides further guidance as follows:

> Calculation of administrative costs should be based upon actual costs incurred or upon cost analyses establishing an average of actual additional costs incurred by the agency in processing and handling claims against other debtors in similar stages of delinquency. Administrative costs may include costs incurred in obtaining a credit report or in using a private debt collector, to the extent they are attributable to delinquency.

In the preamble, GAO and DOJ state that further detail is not feasible, but they do provide another example of permissible charges, *i.e.*, if the agency must hire additional personnel solely to process delinquent debts, then their salaries might be included.

> The test agencies must use is whether the particular cost was incurred by virtue of the delinquency or whether it would have been incurred in any event.

49 *Fed. Reg.* at 8893.

Two issues are raised by the foregoing guidance. First, it may not be fair to assess "average," rather than "actual" charges against debtors whose debts are small, have not been referred to private collection agencies, have not necessitated credit reports, or have been inexpensively processed.

Second, the regulations do not rule out the possibility that agencies will include in these charges the costs of providing administrative law judges, appeals board staff or other reviewers to hear the alleged debtor's request for reconsideration or waiver of the payment demand. In such cases, if agency review is not completed within 90 days of the payment demand, the underlying "debt" obviously becomes delinquent. The agency might then argue that "but for" the delinquency, the costs of review would not have been incurred. Such an argument appears strained, however; several agencies commented that they would be inclined to assess such charges.

It certainly has not been the agencies' practice in the past to assess costs with respect to reviews of entitlement claims, contract appeals, grant-related cost disallowances, and the like. In our view, the Debt Collection Act offers no rationale for a change in policy, particularly in view of the fact that the assessment of administrative review costs would, almost certainly, dissuade debtors from advancing what they believe to be meritorious reasons for reversal or waiver. Explicit guidance from GAO and DOJ clarifying this point would be useful.

4. Waiver

Under the Act, collection of interest must be waived if the debt is paid within 30 days. This payment deadline may be extended, according to the GAO/DOJ rules, if the agency reasonably determines, on a case-by-case basis, that such action is appropriate. *See* 4 C.F.R. §102.13(g). Perhaps one appropriate circumstance is presented when a potential debtor promptly appeals from a claim and the appeal is made in good faith. Would a provision in an agency's debt collection rules authorizing routine extensions under such circumstances pass muster with GAO and DOJ? What criteria should govern the agency determination?

Collection of interest and charges may be waived pursuant to agency regulations issued in conformity with GAO/DOJ standards. Those standards appear in 4 C.F.R. §102.13 (g), and permit waiver when: (1) the debtor is unable to pay within a reasonable time (see detailed criteria in §103.2 (b)); (2) the debtor refuses to pay and the government is unable to enforce collection in full; or (3) the agency determines that collection of these charges would be against equity and good conscience or not in the best interests of the United States.23/

The rules additionally provide examples "which agencies may consider including in their interest waiver regulations." *Id*. The examples set forth in §102.13(g) are:

> (1) Waiver of interest pending consideration of a request for reconsideration, administrative review, or waiver

> of the underlying debt under a permissive statute 24/ and
>
> (2) Waiver of interest where the agency has accepted an installment plan ... there is no indication of fault or lack of good faith on the part of the debtor and the amount of interest is large enough in relation to the size of the installments that the debtor can reasonably afford to pay that the debt will never be repaid.

As indicated in Section IV(B) infra, it seems fundamentally unfair and chills the due process rights of potential debtors to assess interest and penalties while an administrative appeal is pending. The agencies should be directed to issue routine waivers under such circumstances, except when an appeal is fairly determined to be frivolous.

Finally, in the final rules, GAO/DOJ have added a new Section 102.13(h) which prohibits assessment of interest and charges pending consideration of waiver under a so-called "mandatory" statute i.e., where the agency is required by law to consider the merits of every request for waiver or review. See 49 Fed. Reg. at 8894. What if the agency, by regulation, has bound itself to provide an opportunity for administrative review of requests for reconsideration of agency claims? 25/ Is there any reasonable basis for distinction between mandatory statutes and mandatory regulations?

IV. ADMINISTRATIVE OFFSET/INTEREST ISSUES

A. Exclusion of State and Local Governments From Administrative Offset and Interest Provisions

The single most controversial issue raised by the Debt Collection Act of 1982 is the exclusion of State and local government agencies from the definition of "persons" against whom (1) administrative offsets may be taken (Section 10) and (2) interest, penalties and costs may be charged (Section 11). Simultaneously upon passage, representatives of State and local governments were applauding the exclusion, while federal agencies were requesting the Comptroller General to confirm the government's "common law" right to effect offsets against State and local government agencies.

Recently, GAO and DOJ attempted to put an official gloss on the federal agency position by incorporating it in their final rules;26/ however, the Senator who sponsored the exclusion remains adamant that Congress meant what it said in the Act, i.e., State and local government agencies may not be the subject of administrative offset, interest or penalty charges. The respective positions of GAO and the federal agencies and State and local governments are discussed below.

1. GAO/Federal Agency Position

In addition to a summary statement in the preamble to GAO/DOJ's rules (49 Fed. Reg. 8891), the federal government's position has been expressed in no less than four separate Comptroller General opinions and letters. These opinions date from December 17, 1982 (only 2 months after the Act was signed into law) to January 4, 1984.27/ Essentially, the Comptroller General takes the position that the major purpose of the Debt Collection Act is to facilitate improved government collection procedures. To construe the exclusion of State and local governments from Sections 10 (administrative offset) and 11 (interest, penalties, costs) as altogether prohibiting the use of these collection tools obviously (according to GAO) would undermine Congress' primary goal.

In order to avoid "serious erosion" of existing authority, the Comptroller General contends that the exclusions should be read narrowly; i.e., although Sections 10 and 11 of the Act are inapplicable, nothing in the statute or legislative history prohibits the use of administrative offset or assessment of interest and other charges against State and local governments when federal agencies are acting pursuant to some other authority, whether founded in statute28/ or in common law.

As an example of cases recognizing the federal government's common law right of setoff, the Comptroller General cites United States v. Munsey Trust Co., 332 U.S. 234, 239 (1947) ("The government has the same right 'which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him.'"). With respect to the government's common law right to charge interest, the Comptroller General cites Royal Indemnity Co. v. United States, 313 U.S. 289, 296 (1941) (in the absence of a federal statute, it is for the federal courts to determine the appropriate measure of damages, expressed in terms of interest, for nonpayment).29/

The Comptroller General then states his "presumption" that had the Congress intended to impose a comprehensive prohibition which impliedly repeals or abrogates common law principles concerning administrative offset and charges, it would have provided statutory language (or, at least, legislative history) clearly to express such a purpose or reasonably support such a construction.[30] Emphasizing that the legislative history of the Act is silent with respect to the intent behind the exclusions from the definition of "person,"[31] the Comptroller General concludes that Sections 10 and 11 do not abrogate the common law beyond the extent required by their terms.

If one follows the Comptroller General's analysis, an interesting result obtains -- all non-public debtors are, by virtue of the Act, entitled to various due process protections before offset may be effected, whereas public debtors, excluded from the Act, are not entitled to such safeguards. The Comptroller General seeks to buttress this position by pointing out that the Supreme Court has held that states are not "persons" for purposes of the Due Process Clause of the Fifth Amendment.[32]

2. Non-Federal Position

United States Senator Charles H. Percy, a prime mover of the Act's passage, was the sponsor of the exclusions of State and local governments from the "persons" against whom administrative offset under the Act could be effected and interest and other charges assessed. Concerned that the Act was not being interpreted as Congress intended, Senator Percy wrote to the Comptroller General on November 21, 1983. Excerpts from his remarks are reprinted below:

> As I have stated on a number of occasions, the purpose of the Debt Collection Act of 1982 was to rectify a situation which had given rise to appalling examples of waste and mismanagement of government funds. As the hearings and the House and Senate reports indicate, most of the concerns of the legislators revolved around student loan defaulters, especially those currently employed by the federal government, and delinquent debts arising from a variety of federal loan programs. The Debt Collection Act of 1982 was designed to give the federal government much-needed tools to correct these abuses.

> Prior to September 27, 1982, neither Senate bill 1249 nor House bill 4614 contained a provision exempting any entity from the Act. Several interest groups, however, presented the view that Sections 10 and 11 of the Act, except in cases where fraud was evident should not be applied to states or local governments because they constituted a different class of debtor than did private individuals and would suffer great harm if the federal government attempted to assess interest or apply administrative offsets against them.[33] These same concerns had been presented in hearings before the House Committee on the Judiciary during the House's consideration of the Debt Collection Act of 1981, H.R. 4614.
>
> In response to these concerns, on September 27, 1982, I proposed an amendment to S. 1249. This amendment, UP amendment 1299, amended provisions in Sections 10 and 11 of the Act, stating that "the term 'person' does not include any agency of the United States, or any State or local government." *This provision effectively took federal agencies, state and local governments out of the Act, but retained sufficient flexibility to permit Congress to legislatively pick and choose according to circumstances, those situations in which the government might assess interest against those entities exempted by the Act.* As enacted, the Debt Collection Act of 1982 appears clear on this point. *It was not anticipated that federal agencies would attempt to invoke common law authority, which if it exists* with respect to interest assessment and administrative offset against states and local governments *was abrogated by sections 10(e)(2) and 11(e)(8) of the Act*. (Emphasis added.)

Summarized briefly, the Act's sponsor views the plain language of Sections 10 and 11 as forbidding the use of administrative offset or assessment of interest and charges against State and local governments unless otherwise explicitly provided for by another statute.

In addition, the non-federal camp takes issue with the Comptroller General's underlying assumption that the federal government enjoys any common law right to effect administrative offsets against, and charge interest on, State and local government debts. For example, Mr. James Frech, Associate Director of the State of Illinois Commission on Intergovernmental Cooperation, commented:

> State and local governments do not, when they enter into agreements with the federal government, act in a common law manner. In any case of agreement with the federal government, the offer-acceptance and willing yielding of the state's law and rights must be supported by a legislative authorization and arguably protected by 10th Amendment and Article IV, Section four protections. The rules should specifically direct the federal agencies to consider the limits of their authorities before proceeding to take offset against state and local governments since the "common law" does not exist in these situations.

Frech Comments on Proposed Rules at 17-18 (Aug. 23, 1983). Significantly, only one of the cases cited by the Comptroller General in support of the federal government's "common law" rights involved a State or local government and that case did not uphold the federal government's claim. Thus, it appears that no court has dealt with the special constitutional problems which may be posed.

It appeared that such a case had presented itself to the Supreme Court in Bell v. New Jersey, _____ U.S. _____, 76 L.Ed.2d 312 (1983), wherein the Department of Education sought to recoup misspent grant funds from the States of New Jersey and Pennsylvania. The States argued that the Department lacked recoupment authority under the applicable statute. The government responded that: (1) it did have statutory recoupment authority; and (2) in any event, it enjoyed a common law recoupment right. Since the Supreme Court agreed that the government was authorized by statute to recover the funds, it did not reach the common law issue. See 76 L.Ed.2d at 321, n.7 (and cases cited therein).

Whether the Debt Collection Act abrogates the government's common law right (if any) to charge interest on debts owed by State and local governments is an issue currently being litigated in State of South Carolina CETA Consortium and Gloucester County, N.J. v. Donovan, Civil Action No. 83-1518 (D.D.C.). The Comptroller General has stated that, while the lawsuit deals solely with interest (not administrative offset), the result will "presumably" be equally applicable to both Sections 10 and 11; accordingly:

> In view of this pending litigation, we think it would be inappropriate for us to formally reconsider our position at this time.

B. "Claim" Versus "Debt"

Several commenters criticized the GAO/DOJ rules for failing to distinguish between a "claim" and a "debt." These critics contend that the government can "claim" anything it wants; but the government has no right to initiate collection or assess interest and penalties, until the claim is reduced to a "debt" by virtue of an adjudication rendering the claim certain and valid as a factual and legal matter.

The rules provide that, "[f]or purposes of these standards, the terms 'claim' and 'debt' are deemed synonymous and interchangeable," 4 C.F.R. §101.2(a), because of DOJ/GAO's conclusion that "[i]n the final analysis, following the substance of the regulations is more important than specific nomenclature." 49 Fed. Reg. at 8889. However, GAO/DOJ's explanation does not address the real concerns of the commenters, i.e., that it is fundamentally unfair for agencies to initiate collection efforts (including administrative offset) and assess interest (and, 90 days later, penalties) before the agency has allowed the potential debtor to exhaust administrative remedies, resulting in a final agency decision as to whether a debt is due and owing, and if so, precisely how much is owed.34/

The unfairness of allowing the agencies to initiate collection actions and assess charges before an alleged debtor has a chance to present his case is perhaps best illustrated in the grants context, where claims usually take the form of audit disallowances issued by agency grant officers. In large grant programs, it is not uncommon to see: (1) auditors' findings questioning hundreds of thousands or even millions of dollars of expenditures; (2) an Inspector General's (IG) final report which mirrors the auditors' findings; and (3) a grant officer's decision incorporating by reference the IG report. Normally, the grant officer advises the grantee that the disallowance will be considered final and a debt owing the United States unless the grantee requests review of the disallowance, *e.g.*, by the agency's grant appeal board or an administrative law judge or other agency review mechanism.

The rationale for assessing interest at the grant officer decision stage is the apparent belief of GAO that this discourages groundless appeals and hastens the audit collection process. *See* "Federal Agencies Negligent in Collecting Debts Arising From Audits," *supra* at 21-23. However, the fact is that review by the grant appeals board or administrative law judge is typically the grantee's first chance to obtain impartial consideration.35/ Indeed, as documented in our 1982 report to the Conference, such reviews have resulted in the reversal or withdrawal of tens of millions of dollars of disallowances. Moreover, agency reviews take an average of 18 months or longer to complete -- usually because of agencies' limited resources rather than conscious delay.36/

It is difficult to imagine, under most circumstances, how an agency could justify offsets or starting the clock on interest and charges *before* its final decision. It seems unfair that grantees should be penalized when agencies are slow to resolve disputes. Significantly, in disallowance proceedings, the governmental units or other grantees typically are not holding unexpended federal funds and collecting interest on them. Rather, the funds have been spent, usually on legitimate programs, but the auditors allege technical violations, such as failure to get prior written approval. Whatever the cause, grantees, as a rule, have few, if any uncommitted resources, hindering their ability to bear the added burden of interest charges accrued during a lengthy appeal.

There are alternatives to such a policy which would seem to be more consistent with Congress' apparent desire to balance improved debt collection with due process. For example, if an agency fairly determines an appeal to be frivolous, perhaps it could charge interest and penalties retroactively.

CONCLUSION

The foregoing report presents a number of issues which have surfaced with respect to the Debt Collection Act of 1982 and rules implementing the Act. Possible solutions are as varied as the problems themselves.

In our view, the Administrative Conference should recommend that Congress clarify its intent with respect to the following issues:

(1) The exclusion of various types of "routine administrative pay adjustments" from the purview of the salary offset procedural protections (Section 5); and

(2) Exemptions of State and local government agencies from administrative offset and assessment of interest and penalty charges (Sections 10 and 11).

In order to alleviate partially the regulatory burden facing individual agencies (and ensure interagency consistency), additional uniform guidance and standards should be solicited from GAO, DOJ and OPM with respect to:

(1) The form and content of offset hearings and reviews;

(2) Interagency offset procedures;

(3) Permissible administrative charges; and

(4) Waiver of assessment of interest and charges.

Finally, the Administrative Conference should recommend that GAO and DOJ reconsider their position and revise the rules with respect to:

(1) Deviations from the ordinary demand cycle;

(2) Offsets prior to completion of procedural safeguards;

(3) Inflexible 6 percent penalty rate;

(4) Charging interest on penalties and charges; and

(5) Effecting offsets and charging interest and penalties before administrative remedies have been exhausted.

FOOTNOTES

1/ See, e.g., "More Effective Action is Needed on Auditors' Findings -- Millions Can be Collected or Saved" (FGMSD-79-3, October 25, 1978); "Disappointing Progress in Improving Systems for Resolving Billions in Audit Findings" (AFMD-81-27, Jan. 23, 1981); "Federal Agencies Negligent in Collecting Debts Arising From Audits" (AFMD-82-32, January 22, 1982).

2/ See Sen. Rep. No. 97-378 [to accompany S. 1249], 97th Cong. 2d Sess. 2 (May 3, 1982) (Governmental Affairs Committee), reprinted in 1982 U.S. Code Cong. & Ad. News at 3378.

3/ As will be discussed infra in Section IV, the agencies believe that they always have possessed this authority via common law. It should be noted that the offset and interest/penalty provisions of the Act do not apply to claims or debts or amounts payable under the Internal Revenue Code, the Social Security Act or tariff laws of the United States. See 31 U.S.C. §3701(d) as amended by Section 8(e) of the Debt Collection Act.

4/ In addition, the Act empowered the agencies to enlist outside help, i.e. to contract with private organizations to collect debts, and to disclose otherwise private information concerning individual debtors to facilitate collection. This Report does not address issues raised by these additional collection tools, although it should be noted that there are major enforcement problems, occasioned by requirements that private organizations comply with the Privacy Act.

5/ See, e.g., Sen. Rep. No. 97-378, supra 12, reprinted in 1982 U.S. Code Cong. & Ad. News 3388 ("The Committee feels that it is imperative, however, that federal employees be provided their full due process rights in any setoff procedure....")

6/ See Section 8(1) of Executive Order, 11609, "Delegating Certain Functions Vested in the President to Other Officers of the Government," redesignated by Executive Order 12107, "Relating to the Civil Service Commission and Labor-Management in the Federal Service," which delegated to OPM the authority to approve agency regulations regarding such offsets.

7/ Prior to the amendment, the set-off procedure could be used only to collect: (1) erroneous payments to the individual, typically overpayments for salary or other benefits; or

(2) unused advances for travel and transportation expenses. In addition, if a federal employee terminated employment, any general debt, such as an outstanding loan, could be collected from final salary payments, from payments for accrued annual leave, or from annuity payments. The federal government could not, however, employ an involuntary salary set-off mechanism to recoup general debts owed by federal employees, because the Comptroller General had ruled that there was no justification for such set-offs, absent specific statutory authorization. Accordingly, set-offs against current salaries were permitted only with the employees' consent. See Sen. Rep. No. 97-378, supra at 10-11, reprinted in 1982 U.S. Code Cong. & Ad. News at 3386-3387.

8/ See Sen. Rep. No. 97-378, supra at 12, reprinted in 1982 U.S. Code Cong. & Ad. News at 3388.

9/ See comments of the Department of Treasury, Office of Personnel Management (OPM), Department of Defense and the Department of Housing and Urban Development on GAO/DOJ's proposed amendments to 4 C.F.R. Parts 102-105 (48 Fed. Reg. 23249, May 24, 1983) (hereafter referred to as "proposed GAO/DOJ rules").

10/ See Comment of the Department of Air Force on proposed GAO/DOJ rules (July 19, 1983). However, OPM specifically did not request an exemption for erroneous pay adjustments, presumably believing that procedural protections were due in such situations (given that a dispute could arise as to whether or not there actually had been an error, and the extent thereof).

11/ Such an exclusion would not extend to processing errors which result in under-withholding. See n.10 supra. Further, OPM proposed that if a processing period is unduly lengthy, e.g. in excess of four pay periods, the exemption would not apply.

12/ See April 8, 1983 draft from GAO to DOJ, quoted at length in the Department of Air Force's comment on the proposed GAO/DOJ rules.

13/ Telephone interview with John Salter, Office of General Counsel, OPM, March 27, 1983.

14/ For example, the agencies are directed to prescribe in their regulations the action to be taken on requests for hearings after the deadline has expired, stating that ordinarily such requests should be accepted if the employee shows that the delay was beyond his control. See proposed 5 C.F.R. §550.1104(g).

15/ A separate issue -- the lack of distinction between the terms "claim" and "debt" -- is addressed in Section IV, *infra*.

16/ Thus, 31 U.S.C. §3716(a) provides:

> *After* trying to collect a claim from a person under section 3711(a) of this title, the head of an executive or legislative agency may collect the claim by administrative offset. (Emphasis added.)

Section 3711(a), in turn, provides that:

> The head of an executive or legislative agency --
>
> (1) shall try to collect a claim of the United States Government for money or property . . .
>
> (2) may compromise a claim of the Government of not more than $20,000 [under certain conditions]...
>
> (3) may suspend or end collection action...

17/ The courts have been sharply divided on the issue of whether potential debtors are constitutionally entitled to *pre*-offset hearings. These cases are discussed at length in *Atwater* v. *Roudebush*, 452 F. Supp. 622, 627-631 (E.D.Ill. 1976), a case in which a setoff by the Veterans Administration, preceded only by an informal "fait accompli" oral conference, was held violative of due process. Applying the balancing test enunciated in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), the court ruled:

> At a bare minimum, the recipient (1) should be given access to information relied upon by the agency as the reasons for its decision, and to a summary of the evidence upon which the decision is based, (2) should be given an opportunity to submit additional evidence or arguments in written form challenging the agency action *prior to a final decision*, and thereafter (3) should be informed of his right to administrative review.

452 F. Supp. at 630-631. With respect to the government's interest in protecting the treasury by prompt recovery of past debts, the court found such interest outweighed by "the slight incremental cost of providing at least the limited form of hearing..." Id. It should be noted that the Eighth Circuit recently found that a pre-setoff hearing was not required, as a constitutional matter, in a case in which the alleged debtor did not dispute the existence or amount of the debt. Wisdom v. Dept. of Housing and Urban Development, 713 F.2d 422, 425 (8th Cir. 1983).

18/ See Administrative Conference Recommendation 82-2, "Resolving Disputes Under Federal Grant Programs" (adopted June 17, 1982); "Federal Grant Dispute Resolution: A Report for the Administrative Conference of the U.S.," Boasberg, Klores, Feldesman and Tucker, Mezines, Stein and Gruff Administrative Law (1983).

19/ In this regard, section 102.3(d) provides:

> Appropriate use should be made of the cooperative efforts of other agencies in effecting collection by administrative offset, including use of the Army Holdup List. Generally, agencies should not refuse to comply with requests from other agencies to initiate administrative offset to collect debts owed to the United States, unless the requesting agency has not complied with the applicable provisions of these standards or the offset would be otherwise contrary to law.

20/ Section 102.3(c) is very detailed with respect to oral versus paper hearings. Essentially, this regulation provides that an oral hearing must be provided with respect to determinations of indebtedness or waiver involving issues of credibility or veracity. However, the oral hearing need not be a "formal evidentiary-type hearing." When an oral hearing is not required, the agency must accord a paper hearing, i.e. review based on the written record. See Califano v. Yamasaki, 442 U.S. 682 (1979).

21/ The Senate Governmental Affairs Committee noted that this was in spite of joint GAO/DOJ regulations issued in the Claims Collection Standards in April 1979 and subsequent Treasury regulations, requiring agencies to charge debtors interest on overdue payments. The Committee report underlying Section 11 thus stated:

> In the absence of interest charges for delinquent payments, debtors have little or no incentive to make timely payments. Also, debtors are likely to pay their private sector debts first and their government debts last. The Committee has concluded that this factor is a major contributor to the growing amount of delinquent debt owed the government.

Sen. Rep. No. 97-378, supra at 17, reprinted in 1982 U.S. Code Cong. & Ad. News at 3393.

22/ Thus, section 102.13(c) provides in pertinent part:

> Interest should not be assessed on interest, penalties or administrative costs required by this section. However, if the debtor defaults on a previous repayment agreement, charges which accrued but were not collected under the defaulted agreement shall be added to the principal to be paid under a new repayment agreement.

23/ The preamble advises the agencies that 4 C.F.R. 91.5(c) may be useful in defining "equity and good conscience." Under that provision, "equity and good conscience" is satisfied where the debt resulted from administrative error and there is no indication of fraud, misrepresentation, fault or lack of good faith on the debtor's part. If the debtor reasonably should have known something was wrong and should have inquired further, waiver should be denied. 49 Fed. Reg. at 8893.

24/ The preamble states that this would include requests to GAO for advice or decision, but does not otherwise illustrate what a permissive statute is. See 49 Fed. Reg. at 8893. Is a silent statute permissive? See 4 C.F.R. 104.2(c)(2).

25/ For example, several agencies provide appeal rights to grantees facing cost disallowances. See, e.g., HHS regulations, 45 C.F.R. Part 16.

26/ Thus, 4 C.F.R. §102.3(b)(4) provides in pertinent part:

> [U]nless otherwise provided by contract or law, debts or payments which are not subject to administrative offset under 31 U.S.C. 3716 [as amended by the Debt Collection Act] may be collected by administrative offset under the common law or other applicable statutory authority.

27/ See Letter to J. Paul McGrath re: Bell v. New Jersey and Pennsylvania, Sup. Ct. No. 81-2125, B-209669 (Dec. 17, 1982); Comp. Gen. Dec. B-210086, July 28, 1983; Comp. Gen. Dec. B-212222, August 23, 1983; Letter to Senator Charles H. Percy (Jan. 4, 1984).

28/ Indeed, Sections 10 and 11 expressly provide that they are inapplicable if another statute specifically provides for or prohibits the use of administrative offsets or assessment of interest. Thus, argues the Comptroller General, Congress did not intend, in enacting sections 10 and 11, to repeal by implication any other pre-existing statutes which authorize administrative offset and assessment of charges.

29/ Other cases cited with respect to the Government's common law offset authority include: Pearlman v. Reliance Insurance Co., 371 U.S. 132, 140 (1962); Barry v. United States, 229 U.S. 47 (1913); McKnight v. United States, 98 U.S. 179 (1878), affirming 13 Ct. Cl. 292 (1877); Gratiot v. United States, 40 U.S. (15 Pet) 336 (1841). With respect to charging interest, the Government cites Billings v. United States, 232 U.S. 261 (1914) and Board of Commissioners v. United States, 308 U.S. 343 (1939). Of all the cases cited above, only the last one involved a State or local government -- the rest involved private parties, mostly government contractors. The Board of Commissioners case involved a suit for recovery of interest by the government on behalf of an Indian against whom Jackson County, Kansas had improperly levied property taxes. The Court held that the equitable considerations which warranted interest charges in cases involving private litigants did not control in intergovernmental litigation. Given the facts that Congress had not provided for interest recovery in legislation implementing Indians' tax immunity, and that nothing seems "more appropriate than due regard for local institutions and local interests," the Court held that it would be inequitable to exact interest from the county.

30/ Here, the Comptroller General relies on Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952), where the Supreme Court stated:

> Statutes which invade the common law ... are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.

31/ See Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 266-67 (1979) (legislative silence while contemplating important and controversial changes in the law is unlikely); United States v. Bellard, 674 F.2d 330, 335 (5th Cir. 1982) (federally insured student loan program statute granting U.S. right to succeed to lender's claim upon satisfaction of defaulting borrower's obligation does not deny Government right of direct recovery against borrower).

32/ See South Carolina v. Katzenbach, 383 U.S. 301, 323-24 (1966).

33/ For example, Cleta Deatherage, on behalf of the National Conference of State Legislatures, testified:

> The Federal Government maintains a $90 billion industry of service programs through state and local governments. State and local governments are not folding up quietly and stealing away in the middle of the night. Our debts are not serious collection problems. We are as responsible to our citizens as the federal government, and we will be around for as long as the federal government. Clearly, it is a serious matter to hold up payments that are due under Federal grant obligations with State and local governments. Many State laws and budgets contain limits on expenditures, limits on revenue increases, dedicated funds which cannot be transferred, and constitutional provisions regarding transferring funds from one account or budget line to another. Federally-initiated administrative offset, on federal "claims" alone, can result in a serious interruption of service, jeopardizing the very programs the government is trying to improve.

Testimony of Cleta Deatherage on H.R. 4614, at 6-7 (July 15, 1982). At these hearings, Congressman Sam Hall of Texas expressed surprise that the Act could be construed to include audit claims against other governments. Subsequently, the exemption was added.

34/ Most of the critics have labelled their concerns in terms of the "claim"/"debt" distinction, however, as GAO/DOJ suggest in the preamble, the nomenclature is not the key. The crucial theme in "claim/debt" comments is that agencies should not be allowed unilaterally to effect a remedy as drastic as offset along with interest and penalty charges, before the potential debtor has had an opportunity to present his or her case.

35/ One witness, an attorney from the present consultant's law firm who specializes in representing State and local governments, public interest groups, and other grantees on disallowance matters, testified that Department of Labor officials had admitted that, in order to meet deadlines for issuance of grant officer decisions, they sometimes cut their review short and issued disallowances which they believed would be reversed upon further review. Testimony of Ann Steinberg on H.R. 4614, at 5 (July 15, 1982).

36/ According to Ms. Steinberg's testimony, in those cases where delays have been caused by grantees, the agencies have shown that they can speed things up "by imposing strict deadlines, limiting discovery, defining the nature of written submissions and oral presentations, and, if necessary, dismissing an appeal by a grantee for want of timely action." *Id.* at 7. *See* also, "Federal Grant Dispute Resolution: A Report for the Administrative Conference of the U.S.," *supra*.

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CONTEXTS AND CONTENTS OF "FOR GOOD CAUSE" AS CRITERION FOR REMOVAL OF ADMINISTRATIVE LAW JUDGES: LEGAL AND POLICY FACTORS

VICTOR G. ROSENBLUM*

I. INTRODUCTION

Push has been coming to shove recently in sectors of relationships between administrative law judges and employing agencies, with conflicts at the Social Security Administration in the visible forefront. The lure and trauma of battle over the power of agencies to prescribe and sanction methodologies and outputs for administrative law judges have left in limbo implementation of earlier consensus-oriented proposals for incremental improvements in selection and monitoring of the judges[1] and have, instead, placed priorities on

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* Professor of Law and Political Science, Northwestern University School of Law; A.B., Columbia University, 1945; LL.B., Columbia University School of Law, 1948; Ph.D., University of California at Berkeley, 1953; D.H.L. (Honorary) Hebrew Union College, 1970. Chairman, Administrative Law Section of the American Bar Association, 1977-78. Member, Executive Committee of the American Judicature Society; Association of American Law Schools.

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[1] Two fine studies bearing on selection of administrative law judges were conducted by Amiel T. Sharon for the Examination Services Branch of the U.S. Office of Personnel Management's Personnel Research and Development Center and published by OPM in 1980 without commentary or implementation. Sharon, *An Investigation of Reference Ratings for Applicants for Administrative Law Judge* (PRR 80-6) (1980); Sharon, *Validation of the Administrative Law Judge Examination* (PRR 80-15) (1980) (available from Office of Personnel Management, Wash., D.C.).

The LaMacchia Committee's study a decade ago of opinions and beliefs concerning the efficacy and adequacy of administrative law judge adjudication was the most thorough and detailed undertaken to date. Chaired by the Civil Service Commission's then Deputy Counsel, the LaMacchia Committee sought the views of administrative law judges and sampled the opinions of federal agency officials, private practitioners, and Bar Association representatives about the quality and quantity of administrative law judge work products, relationships between judges and their agencies, standards of review of administrative law judge decisions, and criteria for recruitment of administrative legal jousts before the Merit Systems Protection Board (MSPB) and the federal courts.

Because the core of the sanctioning power over administrative law judges is found in 5 U.S.C. § 7521(a)'s provision for removal "for good cause,"[2] this article shall focus on legislative history, policy issues and precedents that provide its contexts, limit its contours and suggest its contents. Adoption by Congress, in 1946, of the "good cause" standard for removal of hearing examiners as part of

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law judges. See UNITED STATES CIVIL SERVICE COMM'N, REPORT OF THE COMMITTEE ON THE STUDY OF THE UTILIZATION OF ADMINISTRATIVE LAW JUDGES (LAMACCHIA COMM. REPORT) (1974). The findings of the LaMacchia Study were summarized in the author's 1975 Report to the Administrative Conference, SUBCOMM. ON SOCIAL SECURITY OF THE COMM. ON WAYS AND MEANS, 94TH CONG., 1ST SESS., RECENT STUDIES RELEVANT TO THE DISABILITY HEARINGS AND APPEALS CRISIS 171-245 (Comm. Print 1975).

An Advisory Committee on Administrative Law Judges was established by the then Civil Service Commission in 1976 to make recommendations to the Commission for improvements in managerial effectiveness and utilization of administrative law judges. Prior to being disbanded by the Carter administration as a consequence of the administration's hostility as a matter of principle to advisory committees, the Advisory Committee on Administrative Law Judges made four explicit recommendations and called for "thorough study" of other key issues not ripe for resolution by consensus. The four recommendations were 1) that the Civil Service Commission take appropriate steps to remove administrative law judges from the coverage of the Veteran's Preference Act; 2) that the practice of selective certification be abandoned upon removal of administrative law judges from the coverage of the Veteran's Preference Act; 3) that the Civil Service Commission reduce the list of types of occupations that do not count towards qualifying experience for administrative law judge positions; and 4) that the Civil Service Commission modify its requirement of recency of qualifying experience for appointment as an administrative law judge.

On the issue of tenure of administrative law judges, the Final Report of the Advisory Committee stated:

> There was some concern expressed that the [administrative law judge] system, with only two removals in the past 30 years, was not designed to eliminate the marginal performer. While recognizing that [administrative law judges] were protected against annual performance evaluation, consideration was given to the thought that [administrative law judge] performance could be assessed at the end of a given term appointment, e.g., five years, with the suggestion that only the satisfactory performer be offered reappointment. On the other hand, it was pointed out that term appointments would be less likely to attract private practitioners who would hesitate to change careers for brief periods of time. In the end, the Committee felt that the [administrative law judge] tenure issue required thorough study before APA amendment could be entertained.

ADVISORY COMM. ON ADMINISTRATIVE LAW JUDGES, FINAL REPORT TO THE UNITED STATES CIVIL SERVICE COMM'N (Feb. 14, 1978).

[2] 5 U.S.C. § 7521(a) (1982). Section 7521(a) provides:

> An action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.

the Administrative Procedure Act[3] (APA) is the starting point. The Supreme Court's approaches to and decision in *Ramspeck v. Federal Trial Examiners Conference*[4] in 1953 will then be analyzed as the paramount case involving agency powers over administrative law judges. Subsequently, Attorney Generals' opinions and Supreme Court observations regarding the roles and functions of administrative law judges are considered contextually as preludes to an analysis of current conflicts before the MSPB and the federal courts. The author seeks at the conclusion to distill guidelines that can govern implementation of the "good cause" standard so as to accord maximum protection to decisional independence and integrity of administrative law judges, while at the same time assuring agencies and the public of conscientiousness, competence and professionality in judging.

II. LEGISLATIVE HISTORY AND "GOOD CAUSE"

If the contents of "for good cause" were clear to a certainty, its contexts would be superfluous and irrelevant. But reasonable doubt existed and continues to exist over precisely the extent of independence Congress intended to confer on hearing examiners through incorporation of that standard into section 11 of the original APA.[5] Similarly, reasonable doubt existed over the weight to be accorded hearing examiners' opinions in a judicial application of the substantial evidence standard of review. Justice Frankfurter delivered the Supreme Court's decision in *Universal Camera Corp. v. NLRB*,[6] a landmark recognition of the purpose and salience of a hearing examiner's decisional independence.[7] This reversed Chief Judge Learned Hand's painfully derived hypothesis that reviewing judges were bound to uphold agency decisions, regardless of a hearing examiner's findings and opinions, as long as substantial evidence could be found in the record to support the agency's conclusions.[8] But just as Justice Jackson had to avow in *Wong Yang Sung v. McGrath*[9] the year before, that the APA contains "many compromises and generalities and, no doubt, some ambiguities"[10] and that its "legislative history is more conflicting than the text is ambiguous,"[11] Justice Frankfurter needed to point out that Congress adopted the APA as a whole "with unquestioning—we might even say uncritical—unanimity"[12] and with a palpable lack of that "clarity of purpose which Congress supposedly furnishes courts in order to enable them to enforce its true will."[13]

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[3] Section 11 of the Administrative Procedure Act of 1946 provided:

> Subject to the civil service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to Sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 7 of said Act, as amended, and the provisions of section 9 of said Act, as amended, shall not be applicable. Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected by the Commission from and with the consent of other agencies. For the purposes of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports, including an annual report to the Congress, promulgate rules, appoint such advisory committees as may be deemed necessary, recommend legislation, subpoena witnesses or records and pay witness fees as established for the United States courts.

Ch. 324, § 11, 60 Stat. 237, 244 (1944) (codified as amended at 5 U.S.C. § 7521(a) (1982)).

The sections of the Classification Act of 1923 held inapplicable to hearing examiners by section 11 of the APA concerned criteria for setting rates of compensation and their relationships to efficiency ratings of personnel by agency officials. Ch. 346, 55 Stat. 613, 614 (1941).

[4] 345 U.S. 128 (1953).

Compromise heightens capacity for consensus but does so at the cost of concomitant ballooning of ambiguity. As Professor Nathanson noted, with his typical understatement at the time the APA was adopted, "the compromise worked out in the drafting of the Act between advocates of uniformity in administrative procedure and the defenders of diversity and flexibility did not always result in a product that is crystal clear."[14] Small wonder then, that computer-like precision in delineating the contents of "for good cause" is available only in dreams. Nonetheless, notwithstanding the avowed uncertainties of legislative intent behind key provisions of the APA, points of specific adoption and rejection by Congress established sufficient contextual meaning to induce Justice Jackson to write of the APA's ascertainable "formula,"[15] and Justice Frankfurter to conclude that the APA established a "mood" that "must be respected even though it can only serve as a standard for judgment and not as a body of rigid rules assuring sameness of application."[16]

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[5] Ch. 324, 60 Stat. 237, 244 (1946) (current version at 5 U.S.C. § 7521(a) (1982)).

[6] 340 U.S. 474 (1951).

[7] *Id.* at 475.

[8] NLRB v. Universal Camera Corp., 179 F.2d 749, 753 (1950), *vacated*, 340 U.S. 474 (1951).

[9] 339 U.S. 33 (1950).

[10] *Id.* at 40-41.

[11] *Id.* at 49.

[12] *Universal Camera*, 340 U.S. at 482.

[13] *Id.* at 483.

[14] Nathanson, *Some Comments on the Administrative Procedure Act*, 41 ILL. L. REV. 368, 419 (1946).

Insofar as the standard for removal of hearing examiners was concerned, the context especially worth analyzing was the contrast of section 11's language with the proposal of the Attorney General's Committee on Administrative Procedure.[17] Congress's rejection of the tenure proposal for hearing examiners made by the Attorney General's Committee, and the comments about the choice by leading members of the Senate and House Judiciary Committees, throw significant light upon the legislature's objective in utilizing the terminology of "for good cause."

Accompanying the Attorney General's Committee's Report was "A Bill" putting in the form of proposed legislation, the principal recommendations for improvements in the administrative process that it believed susceptible of legislative treatment. Section 302 of Title III focused on appointment and removal of "hearing commissioners." Nomination was to be by "each agency entrusted with the duty of deciding cases", but the power of appointment was to be vested in an independent Office of Federal Administrative Procedure which must find appointees "qualified by training, experience and character to discharge the responsibilities of the position."[18] No political test or qualification was to be permitted; all nominations and appointments were to be "made on the basis of merit and efficiency alone."[19]

Section 302(5) of the Attorney General's Committee's Bill dealt explicitly with "term of office" for the "hearing commissioners":

> Each commissioner shall be appointed for the term of seven years and shall be removable, within that period, only:
> a) Upon charges, first submitted to him by the agency that he has been guilty of malfeasance in office or has been neglectful or inefficient in the performance of duty; or
> b) Upon charges of like effect, first submitted to him, by the Attorney General of the United States, which the Attorney Gen-

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[15] *Wong Yang Sung*, 339 U.S. at 40.

[16] *Universal Camera*, 340 U.S. at 487.

[17] ATT'Y GENERAL'S COMM. ON ADMIN. PROCEDURE, ADMIN. PROCEDURE IN GOV'T AGENCIES, S. DOC. NO. 8, 77TH CONG., 1ST SESS. (1941).

[18] *Id.* at 196.

[19] *Id.*

> eral is authorized to make in his discretion after investigation of any complaint against a hearing commissioner made to him by a person other than the agency; or
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> C) Upon certification by the Director, after application by the agency, that lack of official business or insufficiency of appropriation renders necessary the termination of the hearing commissioner's appointment.[20]

Although the Attorney General's Committee was aware and supportive of the need for hearing officials to be free of any undue influence, they deemed seven year tenure sufficient to provide the necessary insulation from political invasion. Congress, in passing the APA, rejected the Committee's conception of tenure for a specific term (as well as its "commissioner" title for hearing officers, preferring "examiner") and chose instead the "for good cause" standard as the only mode of removal. Thus, section 11 of the APA, as adopted in 1946, specified that there shall be appointed by and for each agency "as many qualified and competent examiners as may be necessary" for proceedings pursuant to the statute:

> who shall be assigned to cases in rotation as far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission after opportunity for hearing and upon the record thereof.[21]

Explaining the policy behind this language of section 11, the Senate Judiciary Committee stated:

> That examiners be "qualified and competent" requires the Civil Service Commission to fix appropriate qualifications and the agencies to seek fit persons. In view of the tenure and compensation requirements of the section, designed to make examiners largely independent, self-interest and due concern for the proper performance of public functions will inevitably move agencies to secure the highest type of examiners.
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> The purpose of this section is to render examiners independent and secure in their tenure and compensation. The section thus takes a different ground than the present situation, in which examiners are mere employees of an agency, and other proposals for a completely separate "examiners' pool" from which agencies might draw for hearing officers. Recognizing that the entire tradition of

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[20] *Id.*

[21] Ch. 324, § 11, 60 Stat. 237, 244 (1946).

> the Civil Service Commission is directed toward security of tenure, it seems wise to put that tradition to use in the present case. However, additional powers are conferred upon the commission. It must afford any examiner an opportunity for a hearing before acceding to an agency request for removal, and even then its action would be subject to judicial review. The hearing and decision would be made under sections 7 and 8 of this bill. The requirement of assignment of examiners "in rotation" prevents an agency from disfavoring an examiner by rendering him inactive.
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> In the matter of examiners' compensation the section adds greatly to the Commission's powers and function. It must prescribe and adjust examiners' salaries, independently of agency ratings and recommendations. The stated inapplicability of specified sections of the Classification Act carries into effect that authority. The Commission would exercise its powers by classifying examiners' positions and, upon customary examination through its agents, shift examiners to superior classifications or higher grades as their experience and duties may require. The Commission might consult the agency, as it now does in setting up positions or reclassifying positions, but it would act upon its own responsibility and with the objects of the bill in mind.[22]

The House Judiciary Committee repeated most of the Senate Committee's observations about section 11.[23]

Congressman Walter, in the House of Representatives' discussion of the APA, supported further tie-in of examiner "independence" with utilization of Civil Service Commission machinery in removal cases:

> One of the most controversial proposals in the field of administrative law relates to the status and independence of examiners who hear cases where agencies themselves or members of boards cannot do so. . . .
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> It is often proposed that examiners should be entirely independent of agencies, even to the extent of being separately appointed, housed, and supervised. At the other extreme there is a demand that examiners be selected from agency employees and function merely as clerks. In framing this bill we have rejected the latter view, as the Attorney General's Committee on Administrative Procedure throughout the greater part of its final report rejected it, and have made somewhat different provision for

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[22] S. Doc. No. 248, 79th Cong., 2d Sess. (1937), *reprinted in* Legislative History of the Administrative Procedure Act of 1946, at 215 (1946) [hereinafter Legislative History].

[23] *Id.* at 280-81.

> independence. Section 11 recognizes that agencies have a proper part to play in the selection of examiners in order to secure personnel of the requisite qualifications. However, once selected, under this bill the examiners are made independent in tenure and compensation by utilizing and strengthening the existing machinery of the Civil Service Commission.
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> Accordingly, section 11 requires agencies to appoint the necessary examiners under the civil service and other laws not inconsistent with the bill. But they are removable only for good cause determined by the Civil Service Commission after a hearing, upon the record thereof, and subject to judicial review. Moreover, their compensation is to be prescribed and adjusted only by the Civil Service Commission acting upon its independent judgment. The Commission is given the necessary powers to operate under this section, and it may authorize agencies to borrow examiners from one another.
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> If there be any criticism of the operation of the civil-service system, it is that the tenure security of civil-service personnel is exaggerated. However, it is precisely that full and complete tenure security which is widely sought for subordinate administrative hearing and deciding officers. Section 11 thus makes use of past experience and existing machinery for the purpose.[24]

In his *Foreword* to the brief volume, *Legislative History of the Administrative Procedure Act*,[25] Senator McCarran, the Judiciary Committee Chairman, maintained that the Act, "Although it is brief, . . . is a comprehensive charter of private liberty and a solemn undertaking of official fairness."[26] He may have conveyed more than he intended when he noted that this statute has been through "a sieve of consideration by the Congress."[27]

Professor Morgan Thomas of the University of Michigan maintained, soon after adoption of the APA, that:

> [T]he main change [made by the APA] lay in the new independence which hearing examiners were to have. To that end they were explicitly made free of supervision by the investigatory, prosecuting and administrative staffs of their agencies. . . . Within each agency, cases were generally to be rotated so that agency in-

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[24] *Id*. at 371.

[25] LEGISLATIVE HISTORY, *supra* note 22.

[26] *Id*. at III.

[27] *Id*. Senator McCarran added that the statute "upholds law and yet lightens the burden of those on whom the law may impinge. It enunciates and emphasizes the tripartite form of our democracy and brings into relief the ever essential declaration that this is a government of law rather than of men." *Id*.

> fluence could not be made effective through assignment of cases. Moreover the Civil Service Commission was entrusted with the broad powers which the agencies themselves had previously exercised over their trial examiners. Thus the Commission was given authority to prescribe examiners' grades and salaries and to pass on promotions independently of agency ratings or recommendations. And an examiner could be removed only if "good cause" were established at a Civil Service Commission hearing.[28]

The guarantee of security of tenure for hearing examiners by the Civil Service Commission was, according to Professor Thomas, "the appropriate way to ensure that the examiners would be free from subservience to their agencies."[29] But he probed the scope and dimensions of hearing examiners' freedom from subservience to their agencies no more deeply than had Senate and House spokesmen in discussing "for good cause." Did freedom from subservience require or countenance freedom from accountability? Did it prohibit all agency sanctions and discipline against hearing examiners? Or only those that could prescribe, control or otherwise influence improperly hearing examiners' decisions? Can a line be drawn and feasibly enforced between sanctions that do and do not intrude upon decisional independence?

III. APPLICATION OF THE STANDARD

A. *Incumbent Trial Examiners at the Enactment of the APA*

The great expectation that the Civil Service Commission would be a paragon of fairness and equity, if not wisdom, in administering the standards and processes for removal of examiners, was materially corroded at the program's outset when the issue of retention of incumbent examiners serving at the time the APA took effect had to be faced. The APA legislative history's pervasive silence extended to whether those who were trial examiners when the legislation took effect would have to requalify. Some argued that the lack of criticism of existing examiners in the legislative history meant that they were automatically protected by section 11. On the other hand, others maintained that the APA in effect abolished all the old trial examiner positions and created a whole new set of jobs for competition on equal terms by all applicants.[30]

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[28] Thomas, *The Selection of Federal Hearing Examiners: Pressure Groups and the Administrative Process*, 59 YALE L.J. 431, 431-32 (1950) (footnote omitted).

[29] *Id*. at 473-74.

The Civil Service Commission coped with the dispute by appointing an advisory committee to assist in drafting rules for implementation of its APA roles. That not all members of Congress thought incumbent examiners to be role models was made clear by Senate Judiciary Committee Chairman Alexander Wiley in a note to Civil Service Commissioner Arthur Flemming in which he insists that the Commission demonstrate that the hearing examiners "will not be men of leftist thinking, men who don't have complete loyalty to our constitutional system of checks and balances, men who are not devoted to our system of private enterprise. . . ."[31] The Senator sought "substantial proof" that the Commission would fill these posts with "men of the highest unimpeachable calibre" rather than with men who simply have occupied similar positions in the Federal Government today, who largely are of one party, and who may lack the approach of private enterprise in their work."[32]

The Commission deferred definitive action on the status of incumbents until after June 11, 1947, the date the APA provisions were to take effect. It authorized "conditional reappointment" of incumbents pending final action and, in January 1948, appointed a Board of Examiners with the authority to determine which incumbent examiners were "eminently qualified" and therefore appointable without competitive examination.[33] The Board of Examiners consisted of two State Supreme Court Judges, one employee of the Civil Service Commission, and three practicing attorneys who had held high American Bar Association positions.[34] Professors Morgan Thomas and Ralph Fuchs, the two major scholars studying hearing examiner issues at the time, were in agreement that not much was known about the details of the Board of Examiners' procedures and practices in individual cases. Fuchs declared that, "It is not possible on the basis of available data to evaluate accurately the quality of the examinations that were given. . . ."[35] It was known that investigation of incumbents was conducted by Commission staff under the direction of the Examiners, and oral interviews were conducted by the Examiners in panels of two or more.[36] But, as Thomas noted regarding the investigators' work: "How widely they consulted the references (listed by the incumbents) and other persons who at that time or in the past had supervised the incumbents is not known."[37]

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[30] *Id.* at 433. Thomas told "The Story of the Qualifying Process" in objective detail, *see id.* at 433-58, and subjected it to incisive critique, *id.* at 458-75.

[31] *The 350 Hearing Examiners: Chairman Wiley Asks Open Choices for Fitness*, 33 A.B.A. J. 421, 422 (1947) [hereinafter referred to as *The 350 Hearing Examiners*]. In the same vein, *see generally "The Hearing Examiners: Undecided Questions as to Their Selection*," 33 A.B.A.J. 688 (1947).

[32] *The 350 Hearing Examiners*, *supra* note 31, at 422.

[33] Details of the Commission's procedures and practices were described both by Thomas, *supra* note 28 at 433-58, and by Professor Ralph Fuchs of Indiana University, who had been a member of the Attorney General's Committee on Administrative Procedure. *See* Fuchs, *The Hearing Examiner Fiasco Under the Administrative Procedure Act*, 63 HARV. L. REV. 737 (1950).

[34] Fuchs, *supra* note 33, at 747.

The Board of Examiners' decisions, which were accepted and translated into the Commission's own official action, were announced in a Commission press release on March 11, 1949.[38] Of 212 incumbents rated by the Board of Examiners, 54 or 25.5% were disqualified. They included 3 out of 5 at the United States Maritime Commission, 3 out of 5 at the Department of Agriculture, 14 out of 41 at the National Labor Relations Board (NLRB), 10 out of 30 at the Civil Aeronautics Board (CAB) and 12 out of 48 at the Interstate Commerce Commission (ICC).[39] The only reasons assigned for the disqualifications were "overall characteristics" or "lack of sufficient specialized experience."[40]

Objections and protests followed. Every affected agency appealed on behalf of its examiners. For example, the NLRB complained that: "The action has eviscerated the hearing examiner staff at a time when its caseload is singularly great . . . . The Board will be unable efficiently to pursue its regular operations without the services of these trained men, many of whom have been with the Board for over a decade."[41]

The ICC Practitioners Association called upon Congress to investigate the Civil Service Commission's "violence to one's sense of justice and fair play" in the rating of incumbent examiners.[42] On their own behalf, examiners complained that it was impossible for them to appeal effectively since the Board of Examiners had failed to identify in what respects each hearing examiner had been found wanting.[43]

Responding to the criticism, the Commission's staff subsequently prepared a "Basis of Findings" item for each instance of disqualification and listed criticisms such as "lack of fairness," "arbitrariness," "immaturity," or "biased in certain respects" in place of the previous "overall characteristics." Where disqualification was due to lack of sufficient specialized experience, the Commission then specified the experience not credited as being "specialized."[44] Attacks on the work of the Board of Examiners did not abate, however. Indeed, charges escalated, ranging from lack of legitimate authority to economic and religious bias.[45] The charges, countercharges, and evidence introduced in ensuing proceedings indicate that "serious misstatements and omisisons" were contained in the 1948 investigations of incumbents.[46] Where second investigations were undertaken, there were "marked discrepancies" with the reports of the first investigations.[47]

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[35] *See id.* at 751.

[36] *Id.* at 752 & n.62.

[37] Thomas, *supra* note 28, at 440.

[38] *Id.* at 441-42.

[39] *Id.* at 442-43.

[40] *Id.* at 442.

[41] Quoted by Thomas, *supra* note 28, at 444.

[42] *Id.* at 455 (quoting 16 I.C.C. Prac. J. 706, 710 (1949)).

[43] *Id.* at 445.

These events, not surprisingly, led to the resignation of the Board of Examiners and to further changes in the Civil Service Commission's register of eligible hearing examiners.[48] On December 13, 1949, the Commission rescinded its firing of the incumbent examiners found less than eminently qualified by the Board of Examiners, "herald[ing] the end of one of the bitterest behind-the-scenes fights Washington has seen in recent years."[49] Professor Thomas praised the Commission's action as a necessary corrective rather than a capitulation to the "temptation to contrive petty ways of muddling through and saving face."[50] Professor Fuchs cautioned that the hearing examiner program would remain a fiasco "if the Civil Service Commission continues to permit itself to be pushed first in one direction and then in another by outside pressures."[51] It is "particularly depressing," he added, "that an agency of government that traditionally embodies the highest rectitude should appear in such a role."[52]

The federal government's only experience prior to recent MSPB proceedings with evaluation and removal of incumbent hearing officers turned out to be a model of how *not* to proceed. From the establishment of the Board of Examiners to the final effectual

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[44] *Id.*

[45] *Id.* at 445-54.

[46] *Id.* at 452.

[47] *Id.* at 453.

[48] *Id.* at 456.

[49] *Id.* at 431.

[50] *Id.* at 475.

[51] Fuchs, *supra* note 33, at 767.

[52] *Id.*

"grandfathering" of the incumbents into APA status, the experience was marked by dissonance, ambiguity, vacillation and pressure. The problem was not primarily that the "for good cause" standard of removal was not deemed applicable by the ill-fated Board of Examiners; it was that both Board and Civil Service Commission eschewed consistent adherence to any rational standard for deciding which hearing examiners would be retained and which would leave as the APA era dawned. Instead, Board and Commission fell "victim to the winds of the moment."[53]

B. *Case Law*

Hearing examiners and the District of Columbia Federal District Court made the contents of "for good cause" a central legal issue when the Civil Service Commission adopted rules in 1951[54] for promotion, compensation and reductions in force of hearing examiners. Ultimately, the Supreme Court's decision in *Ramspeck* rejected the construction of "for good cause" put forth by the examiners and accepted by District Judge Bolitha Laws when, instead of the narrow "personal disqualification" connotation emphasized in the district court, the Supreme Court majority adopted a concept of "for good cause" in accordance with the findings and reasons of the Commission.[55]

Ruling on motions for summary judgment filed by both plaintiffs and defendants in the action, Judge Laws had granted the examiners' motion and denied the Commission's without any doubt as to the meaning of the APA's section 11. Separation of hearing examiners by reductions in force was contrary to the Act because, in part, the statute's language, stating that examiners may be removed "*only* for good cause," had to be construed in light of the "significant" finding that "reduction in force provisions in earlier drafts of legislation governing administrative procedure were omitted from the Administrative Procedure Act as passed. . . ."[56] Judge Laws maintained that "the importance of security of tenure to independence of judgment needs no argument and was clearly recognized by the Attorney General's Committee on Administrative

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[53] *Id.* at 768.

[54] 5 C.F.R. § 34.15 (Supp. 1951).

[55] 345 U.S. at 143.

[56] Federal Trial Examiners' Conference v. Ramspeck, 104 F. Supp. 734, 740-41 (emphasis added by court), *aff'd*, 202 F.2d 312 (D.C. Cir. 1952), *rev'd*, 345 U.S. 128 (1953).

Procedure. . . ."[57]

Whether or not Judge Laws was correct in viewing the Attorney General's Committee proposal for a seven year term for hearing examiners as recognition of security tenure's importance, the court of appeals' majority, consisting of Judges Miller and Proctor, routinely agreed with him in a two-paragraph, seventy word opinion.[58] Judge Bazelon dissented at some length, repudiating in particular the notion that "for good cause" was confined to "a *personal* shortcoming—malfeasance, incompetence or some kindred disqualification."[59] Quoting from Senate Report 752 in the APA's Legislative History, Bazelon maintained that Congress "put 'the entire tradition of the Civil Service Commission . . . to use' when it prescribed a new system of tenure for hearing examiners in section 11."[60] Criteria for reductions in force "are now a firmly embedded implementation of that 'tradition.' "[61]

In two particularly salient paragraphs, Judge Bazelon contended that the examiners' view of section 11,

> which is adopted by the [district] court, goes much farther along the road toward complete examiner independence than Congress itself was willing to travel. In enacting [section] 11, Congress sought to strike a balance between the need for administrative efficiency and expertise and the need for freeing hearing examiners from dictation or intimidation by the agencies. Accordingly, Congress did not adopt any of the extreme proposals to isolate hearing examiners from the agencies or insulate them completely from expressions of the agencies' views. . . . Instead Congress adopted the less extreme proposal of removing from the agencies and giving to the Commission wide powers over the selection, compensation and removal of hearing examiners. This was the means adopted to end "the present situation in which examiners are mere employees of an agency."[62]

Judge Bazelon's concluding paragraph enlarged upon the administrative discretion dimension of this analysis. Proceeding from the premise that much of the attack on the Commission's regulations has been "leveled at the possibility they offer for frustrating the purpose of the Administrative Procedure Act to free hearing examiners from agency domination and coercion," Judge Bazelon admitted "that the possibility exists cannot be denied."[63] But, he insisted, that possibility

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[57] *Id.* at 741.

[58] Ramspeck v. Federal Trial Examiners' Conference, 202 F.2d 312 (D.C. Cir. 1952), *rev'd*, 345 U.S. 128 (1953).

[59] *Id.* at 313 (Bazelon, J., dissenting) (quoting Brief for Appellees at 36) (emphasis added).

[60] *Id.*

[61] *Id.*

[62] *Id.* at 314-15.

> is not so gross as to make the regulations invalid. . . . Congress has a right to rely upon the administrators to keep faith with the spirit of the statute. The record in this case does not reveal that that confidence was misplaced. If individual instances of abuses should arise in the future which threaten to thwart the spirit of the statute, the means are available to put the matter right.[64]

Without mentioning Judge Bazelon's dissent directly, the Supreme Court majority accepted his view of section 11 although its reasoning was neither as overt or precise. What is abundantly clear from the record of the case, notwithstanding any imprecision of reasoning, is that the justices rejected the views of Judge Laws and the court of appeals' majority and largely ignored additional arguments presented in the examiners' brief by Charles Rhyne, Eugene Bradley, Eugene Mullin and Brice Rhyne.[65]

Counsel for the examiners stressed, for example, the difference in meaning between statutory provision for removal of personnel for "such cause as will promote the efficiency of the service" and removal "only for good cause." The former clearly authorized a reduction in force because such reductions, undertaken when work and funds were no longer available, could be said to promote the service's efficiency. But "only for good cause" required "something more than normal civil service tenure."[66]

Rhyne further argued that, in section 11, Congress chose deliberately to use phraseology different from standard traditional Civil Service tenure language; it rejected efficiency of the service as the criterion for removal of hearing examiners and chose to provide examiners with "extraordinary protection" consonant with the uniqueness of their functions within the administrative process, as compared with agency employees in general.[67] Congress did not provide simply that examiners shall be removable for good cause or that they shall be removable for good cause only after hearing but that they shall be removable "only for good cause," language which is "manifestly different and which clearly excludes removal for any reason other than good cause."[68] Because good cause "connotes a personal disqualification," an employee removed by reduction in force procedures has not been removed "for good cause."[69]

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[63] *Id.* at 316.

[64] *Id.*

[65] 345 U.S. at 129-43.

[66] Rhyne brief for Federal Trial Examiners' Conference at 74; *Ramspeck*.

[67] *Id.* at 81.

To cope with the argument by counsel for the Commission that the examiners were claiming "lifetime jobs during 'good behavior' irrespective of the workload of their agencies or the availability of funds with which to pay them," Rhyne maintained that respondents

> never contended that a hearing examiner has an inalienable right to retain his salary when there is no work for him to do. . . . Section 11 does not purport to state all the reasons for which examiners may be removed. It does state all the reasons for which they may be removed "by the agency in which they are employed". . . . There . . . is no doubt as to the power of Congress to remove examiners, or to abolish their positions.[70]

Furthermore, the APA's authorization of interagency borrowing of examiners and of assignment of them to duties compatible with their responsibilities as examiners were the statute's designated ways for dealing with workload changes.[71]

Counsel for the examiners sought to reinforce their argument that removals by reductions in force are prohibited by section 11 with a detailed discussion of the requirements for and prohibitions of efficiency ratings. Statutes and regulations governing reductions in force traditionally required that efficiency ratings be taken into account.

> When Congress forbade efficiency ratings for examiners, it knew that efficiency ratings were utilized by the agencies in reduction in force to determine not only the relative standing of an employee within his competitive level but also the very competitive level in which he was to be placed. Congress' action in prohibiting efficiency ratings for examiners is utterly inconsistent with an intent that examiners be subject to removal by reduction in force.[72]

Without discussing at all the similarities and differences between the "efficiency of the service" standard and "for good cause" standard for removal of personnel, the Supreme Court majority simply punctured the examiners' and lower courts' positions by pro-claiming that "[a] reduction in force for the reasons heretofore provided by the Civil Service Commission and removal of an examiner in accordance therewith is 'good cause' within the meaning of [section] 11."[73] Echoing Judge Bazelon's faith in the corrective and preventive roles of the Commission, the justices maintained that "[i]t must be assumed that the Commission will prevent any devious practice by an agency which would abuse this Rule. The Rule provides for examiner appeal to the Commission, so there is opportunity to bring abuses to the Commission's attention."[74]

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[68] *Id*. at 75.

[69] *Id*. at 71.

[70] *Id*. at 80.

[71] *Id*. at 81.

[72] *Id*. at 76.

At the core of the reversal by the Supreme Court majority of the lower courts' rulings, was the justices' rejection of the proposition that the APA was designed to make trial examiners "very nearly the equivalent of judges even though operating within the Federal system of administrative justice."[75] Justice Minton, who wrote the majority's opinion, regarded this statement in a letter from Senator McCarran, then Chairman of the Senate Judiciary Committee, to Chairman Ramspeck of the Civil Service Commission as "taken out of context" because of its having been "written over five years after the [APA] was enacted."[76] Thus he refused to consider it illustrative of the intent of Congress at the time it passed the Act. Whereas the dissenters stressed, as a prime APA objective, giving examiners "a new status of freedom from agency control,"[77] the majority saw prevention of agency abuses of examiners' integrity and impartiality as the key objectives of the Act rather than the achievement of total independence. The thrust of the APA, according to Minton, was that hearing officers "were not to be paid, promoted or discharged at the whim or caprice of the agency or for political reasons."[78] In other respects, traditional personnel practices of the Civil Service Commission were to be retained, including "reduction in force for lack of funds, personnel ceilings, reorganizations, decrease of work, and similar reasons."[79]

Although the Supreme Court's decision in *Ramspeck* denied APA hearing officers the total independence they sought, it emphasized at the same time the obligation of the Civil Service Commission to "prevent any devious practice by an agency" that would abuse examiners' integrity or impartiality or subject them to political controls.[80] The APA did not reduce the responsibility of an agency to assure that it had a sufficient number of competent examiners to handle its business properly, but it clearly put the responsibility in the Commission's hands to insure that examiners would be free from the influences of politics, whim or caprice.

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[73] *Ramspeck*, 345 U.S. at 143.

[74] *Id*. at 142.

[75] *Id*. at 144 (Black, J., dissenting) (quoting S. Doc. No. 82, 82d Cong., 1st Sess. 9).

[76] *Id*. at 143 n.9.

[77] *Id*. at 144.

[78] *Id*. at 142.

[79] *Id*. (citation omitted).

The Supreme Court has not, since the *Ramspeck* decision, considered directly the scope and contours of "for good cause." Nonetheless, its decision 25 years after *Ramspeck*, in *Butz v. Economou*,[81] can be cited as an extension of the justices' concern with the independence of administrative law judges beyond the majority's position in 1953. Whereas the majority in *Ramspeck* rejected the proposition that trial examiners were "very nearly the equivalent of judges even though operating within the Federal system of administrative justice,"[82] Justice White pointed out in *Butz* that "adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages."[83]

While Justice White's extended observations regarding administrative law judges in the *Butz* case could be dismissed as pure dictum, it is more likely that they constituted both an affirmation of judicial respect for these hearing officials whose role is "functionally comparable to that of a judge," and a hint that the courts might have to reassess their present approach to judicial review of agency decision making if the independence of administrative law judges were reduced:

> More importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency. Prior to the Administrative Procedure Act, there was considerable concern that persons hearing administrative cases at the trial level could not exercise independent judgment because they were required to perform prosecutorial and investigative functions as well as their judicial work . . . and because they were often subordinate to executive officials within the agency. . . . The Administrative Procedure Act contains a number of provisions designed to guarantee

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[80] *Id.*

[81] 438 U.S. 478 (1978).

[82] *Ramspeck*, 345 U.S. at 143 n.9.

[83] 438 U.S. at 512-13.

> the independence of hearing examiners. They may not perform duties inconsistent with their duties as hearing examiners . . . . When conducting a hearing under [section] 5 of the APA . . . a hearing examiner is not responsible to, or subject to the supervision or direction of, employees or agents engaged in the performance of investigative or prosecution functions for the agency. . . . Nor may a hearing examiner consult any person or party, including other agency officials, concerning a fact at issue in the hearing, unless on notice and opportunity for all parties to participate. . . . Hearing examiners must be assigned to cases in rotation so far as is practicable. . . . They may be removed only for good cause established and determined by the Civil Service Commission after a hearing on the record. . . . Their pay is also controlled by the Civil Service Commission.
>
> In light of these safeguards, we think that the risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women.[84]

If these "safeguards" are removed and the "independent judgment" of administrative law judges is jeopardized, it would be only natural to expect a revision of present comity and perhaps a reversion by the courts to the adversarial if not hostile dimensions of judicial review of agency action of yesteryear.

The 1980 decision by the Court of Appeals for the Second Circuit in *Nash v. Califano*[85] provided an additional supportive footnote to the Supreme Court's emphasis on the independence of administrative law judges in *Butz*. The underlying issue in the *Nash* case was whether an administrative law judge had standing to sue when an agency allegedly interfered with his or her decisional independence.[86] The district court judge had ruled that Simon Nash, a judge with twenty-two years experience in the Social Security Administration's Bureau of Hearings and Appeals,[87] had not suffered the injury-in-fact required by the doctrine of standing when Nash was subjected to the Bureau's program of monitoring and reviewing the decisions of its administrative law judges.[88] Among other contentions, Judge Nash complained that arbitrary monthly production quotas had been established by the Agency and that what the Agency designated as a "quality assurance program" was in reality an attempt to direct the number of decisions awarding or denying Social Security benefits. Administrative law judges who deviated from the "average" 50 percent reversal rate for all decisions were allegedly counseled and admonished to bring their rates in line with the national average on pain of sanctions.[89]

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[84] *Id.* at 513-14 (citations omitted).

[85] 613 F.2d 10 (2d Cir. 1980).

[86] *See id.* at 11-14.

[87] *Id.* at 12.

[88] *Id.* at 13.

While carefully noting that his ruling dealt in no way with the merits of Judge Nash's contentions, Judge Kaufman first quoted from Justice White in *Butz* on the current structuring of agency adjudication so as to assure administrative law judges "independent judgment."[90] He continued by ruling that "express prohibitions of performance evaluation and substantive review [by the administrative law judge's agency] contained in 5 U.S.C. § 4301, and appellant's position description promulgated by the Bureau of Hearings and Appeals, give his injury the required direct impact upon statutorily created rights."[91] Judge Kaufman closed the panel's unanimous opinion that Judge Nash had standing to sue with the admonition that "good administration must not encroach upon adjudicative independence [for] the principal goal of judicial and quasi-judicial administration [which is] reduction of delay without compromise to the demands of due process [requires for its fulfillment] judicial independence [as] one important part."[92]

C. *Attorney General Opinions and the Horsky-Mahin Study*

The dimensions and nuances of administrative law judge independence received specific attention from attorneys general in three opinions between 1951 and 1977.[93] These, together with a comprehensive study in 1960 of hearing examiner roles in the decisional machinery of the Social Security Administration by Charles Horsky[94] suggest a distinction between administrative law judges' independence of judgment and independence of personal behavior and work habits. Attorney General Levi's 1977 ruling on the power of an agency official to reprimand a judge drew the distinction explicitly;[95] and the Horsky Report did so implicitly.[96] Attorney General Ford's 1951 opinion[97] and Attorney General Katzenbach's 1964 opinion,[98] on aspects of promotion of hearing examiners, were compatible with the Levi-Horsky distinction.

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[89] *Id.* at 15 (quoting *Butz*, 438 U.S. at 513).

[90] *Id.*

[91] *Id.* at 17.

[92] *Id.* at 17-18. In a Seventh Circuit case decided in February, 1983, the court ruled that Social Security Administration administrative law judges do not have standing to seek an injunction against an instruction SSA issued to its judges concerning a "new policy" for dealing with retroactive cessation of disabilities. According to Judge Posner of the Seventh Circuit, "The instruction . . . did truncate the administrative law judges' adjudicative discretion," D'Amico v. Schweiker, 698 F.2d 903, 905 (7th Cir. 1983); but "[t]he withdrawal, as in this case, of one issue from the factfinding power of the administrative law judges does not significantly impair 'decisional independence.' " *Id.* at 907. Judge Posner construed Judge Kaufman's decision upholding standing in *Nash* as stemming from impairment of the administrative law judges "qualified right of decisional independence" and concluded that no significant impairment of such independence was wrought here by withdrawal of adjudicative discretion over retroactive cessation of disabilities. *Id.* at 907. Whereas standing may be appropriate to "housekeeping" cases involving judges, it is not appropriate, according to Judge Posner, to cases involving "substantive directives" that put the judicial officers suing to enjoin them "in the position of taking sides in controversies" they are supposed to adjudicate impartially. *Id.* at 907.

Faced with the question of whether, as a general rule, employing agencies may promote hearing examiners, or whether the Civil Service Commission was charged with the responsibility of the selection of hearing examiners for promotion, Peyton Ford ruled that the APA's requirement in section 11 that examiners "shall receive compensation prescribed by the Commission independently of agency recommendations or ratings,"[99] plainly meant that salaries and promotions of examiners should be kept separate from any agency control. Ford stressed that "the hope of promotion may motivate men as strongly as the fear of loss of their jobs. If salaries and promotions are subject to agency control, there is always danger that a subtle influence will be exerted upon the examiners to decide in accordance with agency wishes."[100] The employing agency is not forbidden to make suggestions or recommendations to the Civil Service Commission, but the Commission must assume "the full responsibility for the selection of those to be promoted" and must arrive at its decisions "through the independent exercise of its own judgment."[101]

Attorney General Katzenbach's 1964 opinion focused on a narrow facet of the promotion issue: "When an agency proposes to fill a Chief Hearing Examiner's position by the promotion of one of its hearing examiners, must the Civil Service Commission select the hearing examiner who is to be promoted?"[102] Katzenbach ruled that, because the designation of the chief hearing examiner "quite clearly involves something more than a mere increase in compensation," and because even the increase in compensation rests on the individual's "substantial administrative and managerial responsibilities" rather than on his or her quasi-judicial responsibilities, the agencies have the power to appoint an incumbent hearing examiner to chief hearing examiner, and the Civil Service Commission does not have that power.[103]

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[93] *See* 41 Op. Att'y Gen. 74 (1951); 42 Op. Att'y Gen. 289 (1974); 43 Op. Att'y Gen. 1 (1977).

[94] Horsky & Mahin, The Operation of the Social Security Administration Hearing and Decisional Machinery (1960) (mimeo).

[95] 43 Op. Att'y Gen. 1 (1977); *see infra* text accompanying notes 104-09.

[96] *See infra* text accompanying notes 110-20.

[97] 41 Op. Att'y Gen. 74 (1951).

[98] 42 Op. Att'y Gen. 289 (1964).

[99] 5 U.S.C. § 7521(a) (1982).

[100] 41 Op. Att'y Gen. 74, 78 (1951).

[101] *Id.* at 79.

It is of course possible, Katzenbach recognized,

> that the carrot of an appointment to a Chief Hearing Examiner position could be used to exert a subtle influence on the examiner to decide as the agency wishes. However, the same possibilities already exist with regard to appointments to membership in the agency or to other highly paid positions in the Federal Government. Congress recognized that such possibilities can never be wholly eliminated; it sought merely to minimize them.[104]

If a fine line could be maintained between promotion for managerial functions and promotion for performance of quasi-judicial roles, could a parallel distinction be drawn regarding reprimands? Attorney General Levi explicated such a distinction in responding to the question: "May the head of an agency of the Federal Government issue a reprimand to an [a]dministrative [l]aw [j]udge employed in his agency without initiation of proceedings before the Civil Service Commission?"[105]

Recognizing at the outset that the question presented posed "in a new context the recurrent issue of the intended scope of the independence of administrative law judges from the control of their parent agencies, " Levi stated that the APA provided administrative law judges "a certain degree of independence of status but not complete independence from administrative control."[106] Reprimands for failure to report to work on time or to put in a full day did not have to await the adjudication of charges by the Civil Service Commission. On the other hand, independence of action in the conduct of formal APA proceedings was clearly established by the APA for hearing officers. Such functions as regulating the course of the hearing, holding conferences for settlement or simplification of issues, disposing of procedural requests, and making or recommending decisions, as set out in section 556(c),[107] were typical of roles requiring unencumbered independence of judgment. Thus, while not ruling out reprimands for purely administrative infractions, "the clear legislative prescription for independence of adjudicatory action clearly does prevent the use of the reprimand as a means of affecting, controlling or sanctioning an administrative law judge's decision in a formal APA proceeding."[108]

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[102] 42 Op. Att'y Gen. 289 (1964).

[103] *Id*. at 297-300.

[104] *Id*. at 299.

[105] 43 Op. Att'y Gen. 1 (1977).

[106] *Id*. at 3.

In the particular instance, the administrative law judge had been reprimanded for issuing a decision in violation of a commitment that had been made by the Interior Department to a federal district court judge to withhold administrative action in the case. Levi unequivocally construed the issuance of a decision by an administrative law judge as constituting an exercise of his APA adjudicatory responsibilities:

> The action to be taken was not ministerial; nor do the facts as presented involve any formal judicial injunction against issuance. Judgment, then, had to be exercised—and a sort of judgment which, in the context, was essentially judicial, and was to be made by the administrative law judge according to his own understanding and conscience. In my view, therefore, an agency reprimand with respect to that decision was improper.[109]

Reprimands for administrative infractions could be administered by agencies but were not entrusted solely to agency discretion. According to Attorney General Levi, the dangers of abuse through using such reprimands as instruments of punishment for "displeasing adjudicatory activity" required subjecting the judges to the supervision and correctives of the Civil Service Commission.[110] In sum, then, reprimands by employing agencies for judgment-related action by administrative law judges were forbidden; reprimands for administrative infractions were permissible, subject to the Commission's responsibility to protect against abuse. Levi's opinion made explicit an analysis of the contours of the independence of administrative law judges that was implicit in a study done by Charles Horsky for the Social Security Administration seventeen years earlier.[111]

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[107] 5 U.S.C. § 556(c) (1982).

[108] 43 Op. Att'y Gen. 1, 6.

[109] *Id.* at 7.

[110] *Id.* at 5.

Charles Horsky and Amy Mahin of the Washington firm of Covington and Burling, having undertaken the assignment from the Social Security Administration "to recommend measures that would facilitate and expedite the disposition of cases, " determined, by the time they filed their report in December, 1960, that "we could be of greater service by attempting to insure that overemphasis on speed would not be the occasion for underemphasis on fair procedures."[112] As a component of relationships between speed and fairness, they examined the extent to which agency hearing examiners had been accorded the "independence" to which they were entitled by the APA.

Interestingly, the authors ascribed to the Court the position of the minority in *Ramspeck* and then proceeded to inquire: "What is meant by or included within the term 'independence,' or 'freedom from agency control' to use the language of the Supreme Court?"[113] Their complex answer endeavored to draw a fine line between freedom from control in fact-finding and freedom from control in determining policy.

Horsky and Mahin began their analysis with the proposition that, taken as a whole, section 11 of the APA "indeed represents a significant 'bill of rights' for Federal hearing examiners."[114] But it did not establish an unlimited sphere of entitlement to non-interference. It did not make an examiner the equivalent of a federal district court judge, for example, nor did it confine the agency relationship with an examiner to one similar to a court of appeals judge and district court judge. They preferred viewing the examiner "as a member of a regulatory team—independent of the agency to be sure, in the section 11 sense, but nonetheless subordinate in the sense that his work must mesh with and adapt and conform itself to the role and responsibility of the agency."[115]

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[111] Horsky & Mahin, *supra* note 94.

[112] *Id*. at 462. Horsky and Mahin were requested by the Social Security Administration to make a study of:

> (1) Operations under the existing organizational structure of the Office of Hearings and Appeals; (2) Practices, procedures and instructions affecting the relationship between the Office of Hearings and Appeals, its hearing examiners and appellants; (3) The effect of (1) and (2) upon the independence of hearing examiners in deciding cases under Title II of the Social Security Act and upon the fairness of hearings.

Id. at 2. Based upon that study, Horsky and Mahin were to make recommendations "for such changes as may be necessary or appropriate which would (1) assure the independence of hearing examiners and the impartiality of the hearing and review process; and (2) facilitate the disposition of cases by hearing examiners and the Appeals Council." *Id*.

[113] *Id*. at 375-76.

[114] *Id*. at 377.

The examiner must be "free from outside interference from any source" in making determinations as to the facts in each case. "To conclude from that, however, that the examiner must therefore be free to make his determination as to the decision in every case free from similar interference is to ignore the basic distinction between facts, on the one hand, and law and policy of the agency, on the other."[116] Implementation of basic policy set by Congress is the province of the agency through rule making or through a course of decisions. The only time an examiner is justified in making policy decisions is "when the policy of the agency has not yet been defined in the circumstances with which he must deal."[117]

The examiner's independence, and the safeguards to that independence contained in section 11 relate not to matters of law or policy but "to his judgments in connection with the facts. No matter how unpleasant or unwelcome or embarrassing the facts may be to an agency, the examiner must be free from any pressures which would color or distort his report of them."[118] Thus, a request to an examiner to submit his decision to the agency for comment before releasing it is clearly "unwise and improper."[119] But efforts to improve the quality and "reasonable productivity" of examiners can be undertaken through "post-reviews."

Although Horsky & Mahin believed that the agency had the power and responsibility to improve the performance of deficient examiners, including increasing their disposition rate, they were opposed to "norms which are set across the board for hearing examiners generally and norms derived from fixed quotas set in advance."[120] They suggested, without drawing any conclusion regarding its relationship to removal, that a distinction be drawn

> between the examiner who is producing to the limit of his capacity and producing far less than the average examiner and the examiner who is likewise producing far less but for reasons of inattention to his work, poor work habits, inefficient use of his clerical assistants, unwillingness to seek advice or help on problems where

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[115] *Id*. at 379.
[116] *Id*. at 381.
[117] *Id*. at 382.
[118] *Id*. at 383.
[119] *Id*. at 390.
[120] *Id*. at 398.

advice and help are available and useful, and the like.[121]

The Attorney Generals' opinions and the Horsky-Mahin study contributed authoritative analysis and contextual substance to the contours of the "independence" of administrative law judges but they failed to come to grips with what constitutes "for good cause" when proceedings for suspension or removal of administrative law judges are commenced.

D. *Merit Systems Protection Board*

The first determination by the Civil Service Commission of whether particular deficiencies in performance by a hearing officer met the "for good cause" standard of removal was undertaken in 1978. While that case was pending, the adjudicatory authority of the Civil Service Commission was transferred to the new Merit Systems Protection Board (MSPB). Action against an administrative law judge was initiated by the Director of the Office of Hearings and Appeals of the Social Security Administration (SSA) on grounds that the judge had conducted an unauthorized hearing after the Bureau's Appeals Council had removed that case from his jurisdiction. Further, the judge had refused to deliver case files after official requests to do so, and presided over cases with acute partiality and lack of judicial temperament. After a hearing before the MSPB's administrative law judge, a comprehensive "recommended decision" was issued against the SSA judge in December 1978, finding that "good cause has been established for the removal."[122]

The SSA judge relied upon the Supreme Court's decision in *Butz* for the contention that an administrative law judge was not answerable in any respect for conduct involving the performance of duties in officially assigned cases. The MSPB's judge rejected this defense, stating that "the respondent confuses judicial independence with judicial immunity." Although it is "almost a universal rule" that a judge cannot be removed because of errors or mistakes in judgment, nothing in the APA or in the *Butz* opinion "can be construed as precluding removal of an administrative law judge for misconduct, incompetence or other failings in the performance of adjudicatory duties."[123]

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[121] *Id.* at 397.

[122] *In re* Chocallo, 2 M.S.P.B. 23, 70 (1980) (McCarthey, J., recommended decision) (memorandum opinion and order of the Merit Systems Protection Board, 2 M.S.P.B. 20 (1980)).

[123] *Id.* at 27.

Citing the American Bar Association's Code of Judicial Conduct as professional recognition of the propriety of disciplinary action for judicial misconduct,[124] the MSPB's judge concluded that conducting a hearing and issuing a decision after jurisdiction legally had been taken away and refusal to comply with orders to deliver case files became "the antithesis of law and order which the judge personifies. . . ."[125] In addition, the MSPB's judge found that the SSA judge had displayed, in another specific case, a "truly startling example of intemperate judicial conduct" in refusing to accord reasonable opportunity for the designated attorney to be heard and to represent the interests of his client. Furthermore, respondent "misused the hearing process" by conducting a unilateral inquiry into privileged communications between attorney and client. Other manifestations of "flagrant and uncontrolled bias" by the SSA judge were found in the use of sarcastic and scathing language to denounce the attorney's veracity, intelligence, and emotional soundness.[126]

Each of the foregoing actions was found to constitute "good cause" for removal. The MSPB's judge was careful to note nonetheless, that removal proceedings based upon events in the hearing room should be reserved for serious improprieties, flagrant abuses, or repeated breaches of acceptable standards of judicial behavior: "The Commission is not constituted to serve as a performance evaluation board . . . to decide whether isolated remarks or rulings made by an administrative law judge in the course of a hearing measure up to some undefined ideal expected of those who conduct proceedings under the Administrative Procedure Act."[127]

The MSPB commended its judge for a "meticulous well-conceived and correct interpretation and application of the facts and law."[128] Consonant with its understanding of the major underlying purpose of the APA, the Board insisted that "a careful balance must be created between judicial independence and judicial accountability."[129] The Board closed its opinion with the assurance that agencies considering similar actions against administrative law judges "will be very carefully scrutinized for adequate bases in meeting the 'good cause' standard. Imposition of this degree of review in such instances is essential to ensure the necessary balance between the interests to be considered and the Board will not neglect its duty in fulfilling that goal."[130]

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[124] *See generally* CODE OF JUDICIAL CONDUCT (1972).

[125] *Id*. at 36.

[126] *Id*. at 62.

[127] *Id*. at 43, 62-65.

[128] *Id*.; *In re* Chocallo, 2 M.S.P.B. 20, 21 (1980) (memorandum opinion and order).

[129] *Id*. at 22.

In a subsequent case involving alleged personal misconduct by an SSA judge for hostile acts toward fellow employees (including closing and holding down the vinyl lid of a copying machine on the fellow employee's hand while that employee was seeking to retrieve her original memorandum that complained about remarks the judge had made), the Board sustained findings by the MSPB judge in his "Recommended Decision" that there was "good cause" for a 30 day suspension of the SSA judge.[131] The MSPB judge ruled that "such aggressive, disrespectful behavior toward a fellow employee must be disapproved;"[132] and the Board agreed.[133]

IV. LOW PRODUCTIVITY AS "GOOD CAUSE" FOR REMOVAL

As chronicled in the preceding section of this article, after a lengthy prelude of authoritative contextual, declaratory and admonitory opinions by courts, attorneys general and researchers construing the APA's constraints on agency powers vis a vis administrative law judges, overt invocation and application of "for good cause" began in 1978 in actual removal and disciplinary proceedings instituted by agencies before the Merit Systems Protection Board. It has since been gathering steam. The steam is currently being generated at full throttle as, for the first time since adoption of the APA, the professional fate of some administrative law judges hinged on whether "for good cause" is held to be satisfied by proving that they consistently produced fewer decisions per month than the average produced by their peers in the agency and failed, after notice and alleged opportunity to do so, to improve their yield of decided cases.

The proceedings instituted in *SSA v. Goodman*[134] by the Department of Health and Human Services (HHS) against SSA Judge Robert W. Goodman is a prototype that warrants explication. The charge against Judge Goodman by the Office of Hearings and Appeals of the Social Security Administration, filed on April 23, 1982, was that:

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[130] *Id.*

[131] *In re* Glover, 2 M.S.P.B. 73 (1980) (recommended decision) (memorandum opinion and order, 2 M.S.P.B. 71 (1980)).

[132] *Id.* at 80.

[133] *Id.*; *In re* Glover, 2 M.S.P.B. 71, 72 (1980) (memorandum opinion and order).

[134] No. HQ75218210015 (MSPB Apr. 6, 1983) (recommended decision), *rev'd*, No. HQ75218210015 (MSPB Feb. 6, 1984).

> Goodman's productivity level is, and has been for some time, unacceptably low. This inefficiency in the conduct of his official duties, resulting from his failure to increase his output to a minimally acceptable level of productivity, has contributed to undue delays experienced by claimants awaiting a hearing decision under section 205(b) of the Social Security Act and is detrimental to the efficiency of the service.[135]

The charge equated "inefficiency" with "unacceptably low" productivity, and "for good cause" with "inefficiency" in the conduct of official duties and detriment to "efficiency of the service." His productivity was deemed "unacceptably low" because his 1980 average of 15.6 dispositions per month was far below the average of 30 dispositions per month maintained by all the SSA judges who were on duty during the fiscal year. For fiscal year 1981 Goodman's average was 15.8 dispositions per month compared with an average of 32 for all SSA judges. In addition to his "unacceptably low" disposition rate, Goodman was alleged also to have "failed to carry a minimally acceptable workload." His annual average monthly "pending" for 1981 was 64 compared with 178 for all SSA judges. This placed an "unfair, unwarranted burden on the other administrative law judges and delays the processing of all social security claims within the hearing office."[136]

Goodman maintained that the complaint should be dismissed on three primary grounds: the action subjected him to a "performance rating" contrary to APA's section 4301(2)(D);[137] it violated the Act's "for good cause" standard codified in section 7521;[138] and it violated the 1978 settlement agreement executed by SSA after the challenge by administrative law judges to establishment of workload goals in *Bono v. United States Social Security Administration*.[139] Even if standards could legally be established to measure the performance of administrative law judges, the complaint was defective, according to Goodman, because no standard had ever been submitted for approval to the Office of Personnel Management or has ever been made known to him.[140]

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[135] *Id.* at A-1 app. ("Details of the Charge Against Judge Goodman") (Reidy, J., recommended decision).

[136] *Id.* at A-2 app.

[137] 5 U.S.C. § 4301(2)(D) (1982).

[138] *Id.* § 7521.

[139] Civ. No. 77-0819-CV-W-4 (W.D. Mo. 1979). Judge Bono filed the Brief of the Association of Administrative Law Judges and Request for Opportunity to Participate in Oral Hearing in support of Judge Goodman, August 25, 1983. Not surprisingly, he contended, inter alia, that the SSA's acts leading to and culminating in the filing of the charges against Judge Goodman were "in violation of specific provisions of the APA, the Federal OPM Personnel Regulations pertaining to [administrative law judges], and the agency's acknowledged policy of prohibiting announcements of quotas or goals of production to [administrative law judges] in its employ, and its agreement entered into in July 1979 to refrain from establishing quotas and goals in numbers." Brief at 14, *Bono*.

A hearing on the charges was held before MSPB Administrative Law Judge Edward J. Reidy over five days in September and October 1982, and Judge Reidy issued his "recommended decision" on April 6, 1983.[141] Reidy rejected Goodman's contentions as to the legitimacy and validity of the action against him. The MSPB judge proceeded by recommending that Goodman be removed from service as an administrative law judge because his persistent inefficiency as manifested by a production record far below average and by his failure to improve it or to offer a satisfactory explanation for it, constituted "good cause" for removal. Judge Reidy suggested at the same time that Goodman be retained as an HHS employee but that he be transferred to a position better suited to his skills. Although he couched his conclusions in the "belief that respondent's position is one of distinction and authority, not of subservience and that, if anything, his obligations are greater, not lesser, on account of his status,"[142] Judge Reidy rejected quickly Judge Goodman's arguments that APA's sections 4301(2)(D) and 7521 were violated by proceeding against him based upon performance-related grounds rather than conduct-related grounds. Admitting that Judge Goodman was "industrious," "conscientious," "articulate" and "conducts his hearings in a professional manner,"[143] Reidy found, nonetheless, that striking the necessary balance between judicial independence and judicial accountability, consistent with the Supreme Court's ruling in *Ramspeck*, required rejection of the "attenuated interpretation" of "for good cause" pressed by Goodman. "Good cause is not analogous to good behavior."[144] Nothing in section 7521 prevents action against an administrative law judge "merely because the action is performance based."[145] Given the language of section 4301(2)(D), Judge Goodman's performance "cannot be measured against any standards or critical elements that are performance standards which form the basis for determining unacceptable performance under Chapter 43;" but "his performance may properly be considered to ascertain whether he had been so inefficient that good cause for his removal has been manifested under [section] 7521."[146]

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[140] *Goodman*, No. HQ75218210015, slip op. at 6 (recommended decision).

[141] *Id*.

[142] *Id*. at 20 n.9.

[143] *Id*. at 20.

[144] *Id*. at 22.

[145] *Id*. at 32.

In concluding that performance-related removals pursuant to chapter 75, as distinguished from Chapter 43, have been upheld, Judge Reidy cited two 1982 Court of Appeals decisions, *Drew v. Department of the Navy*[147] and *Darby v. IRS*[148] without further discussion. "What this complaint involves, I conclude, is a performance-related charge filed consistent with the 'only for good cause' provisions of [section] 7521"; the complaint "is not rooted in a performance evaluation or rating tied to specified criteria established in an agency performance appraisal system within the contemplation of Chapter 43 actions."[149]

With regard to the *Bono* settlement, Judge Reidy first questioned whether the MSPB was "the forum wherein the power to enforce that settlement resides";[150] but then, assuming arguendo that it was, he found "no desecration of that agreement." The key paragraph in the settlement provided that SSA's Office of Hearings and Appeals (OHA) "will not issue directives or memoranda setting any specific number of dispositions by [administrative law judges] as quotas or goals."[151] Reidy found that the complaint against Goodman was not for failure to make a specific number of dispositions as quotas or goals, but for failure to improve his yield, given ample time and encouragement.[152] Goodman's persistently low productivity, not his failure to meet a particular level of dispositions per month, was what had placed him "in a category of [administrative law judges] whose work habits and production shortcomings warranted exploration" and, after sustained failure to improve or to offer an adequate explanation for not improving, made him one of four SSA judges against whom charges were brought.[153]

Having determined that performance-related charges could constitute good cause for removal under section 7521, Judge Reidy focused on the standard of proof necessary to establish good cause. He construed the MSPB's ruling in *In re Chocallo*,[154] albeit a conduct case on its facts, to signal and approve of removal actions grounded on charges of inefficiency and to require the showing by a preponderance of the evidence that any judge proceeded against was not "merely sub-par or imperfect," but manifested "substantial and identifiable deficiencies."[155] Applied to Goodman,

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[146] *Id.*

[147] 672 F.2d 197 (D.C. Cir. 1982).

[148] 672 F.2d 192 (D.C. Cir. 1982).

[149] *Goodman*, No. HQ75218210015, slip op. at 33 (recommended decision).

[150] *Id.* at 27.

[151] *Id.* (quoting the 1978 settlement agreement, see *supra* notes 136-38 and accompanying text).

[152] *Id.* at 29.

[153] *Id.* at 29-30.

[154] 2 M.S.P.B. 23 (1980); *see supra* text accompanying notes 122-30.

> it must be established that his productivity is so unacceptly low such that the Board is entirely satisfied that the showing made warrants removal in the interest of promoting the efficiency of the service. Anything less than a serious deficiency or a compelling showing as a grounds for dismissal would not only fall shy of good cause but smack of an impermissible intrusion into the independence of [administrative law judges].[156]

Judge Reidy reviewed low productivity, lack of adequate justification and failure to improve even slightly through counseling and offers of assistance, and noted that Goodman's "supervisors have lost confidence in his ability to perform adequately the duties of his position."[157] Taking notice that Goodman's answers at the hearing were "in more detail than the questions required and more wordy than the interrogator desired,"[158] Judge Reidy concluded that, given its swollen workload, Goodman's inability to meet the growing demands of the job was a burden the agency could not efficiently endure. While he encouraged HHS "to ascertain if there might be another assignment whereby the skills and diligence of Judge Goodman might be utilized,"[159] he still urged the MSPB to

> enter an order finding that the preponderant evidence forcefully shows that respondent's productivity level has been unacceptably low revealing inefficiency in the conduct of his official duties so as to warrant the removal of Robert W. Goodman from employment with the federal government, and that such removal will promote the efficiency of the service.[160]

The MSPB set oral argument for September 22, 1983 for its hearing in the Goodman case.[161] The agency's Notice of Hearing instructed participants that briefs submitted should be limited to four issues, two of which focused on the Board's authority and discretion to specify the sanction to be applied when "good cause" had been found under section 7521. The two key issues bearing on the content and application of "for good cause" were:

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[155] *Goodman*, No. HQ75218210015, slip op. at 34 (recommended decision).

[156] *Id*.

[157] *Id*. at 42.

[158] *Id*. at 36 n.17.

[159] *Id*. at 42.

[160] *Id*. at 44.

[161] 48 Fed. Reg. 33,946-47 (July 26, 1983).

> What is the relationship, if any, of the "good cause" standard of [section] 7521(a) to the "efficiency of the service" standard of [section] 7513 and/or to the "good behavior" standard of Article III of the [United States] Constitution? If low productivity may constitute good cause for removal of an administrative law judge, what evidence must the employing agency introduce in order to meet its burden of proof?[162]

Counsel for Judge Goodman—John Bodner, Albert Cornelison and Lewis Barr of Howrey and Simon—repeated the earlier arguments that the charges were disguised performance ratings of administrative law judges and thus forbidden by law; that they violated the *Bono* settlement; and that, even assuming "inefficiency" could be "good cause," the conclusion that Goodman was inefficient was unsupported by any preponderance of the evidence. In addition, counsel contended that Goodman was denied due process in the hearing before Judge Reidy by virtue of being precluded from litigating fully the issue of inefficiency. They also urged that dismissal was much too severe a penalty, in any event, because Goodman "served with distinction for more than a decade, . . . [had] never been criticized for the handling of a single case, [had] followed OHA's own guidelines for [administrative law judges] and [had] sought only to assure that claimants receive the full and fair hearings and the adequate written decisions required by law."[163] Finally, they cited this writer's testimony before the Senate Subcommittee on Governmental Affairs for the proposition that administrative law judges perform judicial functions that parallel within the administrative process the roles of our other federal judges within the broader governmental process and warrant similar protection against pressures and influences.[164]

On the issue of the evidence that must be introduced if low productivity legitimately could be deemed "good cause," counsel for Goodman insisted, citing Professor Mashaw's studies of *Social Security Hearings and Appeals*[165] and *Bureaucratic Justice*[166] as key authorities, that there must be some objective, pre-formulated standard against which to judge an administrative law judge's performance.[167] Counsel maintained that "OHA should have conducted a study, or compiled empirical support to show that Judge Goodman was indeed inefficient."[168] Goodman's actual case production rate was "unfairly compared with an abstract national average statistical rate,"[169] which was "skewed" against Judge Goodman because it was "derived, in large measure, from the output of high-producing [administrative law judges] who [did] not properly fulfill their duties as [administrative law judges]."[170] In any event, Goodman's counsel urged, the agency must notify its judges regarding case production standards by which their productivity will be measured, and must be reasonably responsive to the requests and suggestions of the administrative law judge for assistance in raising his or her production rate. Goodman's request for a second hearing assistant, instead of a decision writer as most administrative law judges were given, was ignored, except for one brief interim period.[171]

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[162] *Id.* at 33,946.

[163] Respondent's Request to Participate in Oral Argument and Supporting Memorandum at 3, *Goodman*.

[164] *Id.* at 11 (citing Rosenblum testimony, *Social Security Disability Reviews: The Role of the Administrative Law Judge: Hearing Before the Subcommittee on Oversight Management of the Senate Committee on Governmental Affairs*, 98th Cong., 1st Sess. 91-92 (1983) [hereinafter Report]. The Subcommittee reached the conclusion that "The [administrative law judge] is the only impartial, independent adjudicator available to the claimant in the administrative process and the only person who stands between the claimant and the whim of agency bias and policy." *Report*, at 38.

The brief filed by the Office of Personnel Management (OPM) was especially interesting because, while it concurred in Judge Reidy's finding "that the complainant [had] instituted proper removal actions against respondent and that good cause was established to warrant respondent's removal from his position of administrative law judge pursuant to [section] 7521,"[172] it also asserted as "inappropriate" the removal of administrative law judges pursuant to an "efficiency of the service standard."[173] Decisions like *Ramspeck* "clearly differentiate subordinate and semi-independent administrative law judges from life tenured federal judges." Similarly, the "good cause" and "efficiency of the service" standards were "developed independent of one another."[174] The OPM brief did not undertake to analyze the compatibility with these legal views of Judge Reidy's invocations of "efficiency of the service" concomitantly or exchangeably with "good cause."

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[165] J. Mashaw, SSA Hearings and Appeals (1978).

[166] J. Mashaw, Bureaucratic Justice (1983).

[167] Respondent's Request to Participate in Oral Argument and Supporting Memorandum, at 12-15, *Goodman*. Invoked in particular was Professor Mashaw's statement that: "If the quality of performance is to be judged, there obviously must be some standard against which to judge it. The more specific and objective the goals of the organization can be made, the easier it will be to determine whether or not performance meets expectations." *Id.* at 12 (quoting J. Mashaw, Bureaucratic Justice 149 (1983)).

[168] *Id.*

[169] *Id.* at 13.

[170] *Id.* To the same effect see *id.* at 13 n.3, 15 n.7.

[171] *Id.* at 15-16.

[172] Brief of Office of Personnel Management at 3, *Goodman*.

[173] *Id.* at 14.

The Merit Systems Protection Board issued a unanimous final decision in the *Goodman* case on February 6, 1984, ruling that the "record in this case does not reveal the existence of good cause."[175]

Although the Board determined that "there is no generic prohibition to the filing of this charge,"[176] and did not employ terms of endearment to evaluate "the unreasonably methodical manner in which the respondent handled his cases,"[177] it concluded that the agency's evidence "did not prove the agency's charge that respondent had failed to achieve a minimally acceptable level of productivity."[178] That Judge Goodman's case dispositions were shown to have been half the national average was not adequate proof of unacceptably low productivity "[i]n the absence of evidence demonstrating the validity of using its statistics to measure comparative productivity."[179] Especially in light of agency acknowledgement that its cases "did vary in difficulty" and "are not fungible,"[180] nation-wide case disposition averages could not be relied upon as guides for measuring reasonable productivity. "Where, as here the agency's entire case rests upon comparative statistics, proof of their validity is an essential element of the agency's case."[181]

Issues identical to those raised before the MSPB in the *Goodman* case have been raised in Federal court litigation,[182] and in another MSPB case against an SSA judge, *SSA v. Balaban*.[183]

Stanley M. Balaban, an SSA judge in the Long Beach, California office was, like Goodman, charged with an "unacceptably low level of productivity" in fiscal years 1980, 1981 and part of 1982, as compared with the average number of dispositions by all administrative law judges in the Social Security Administration.[184] In rejecting Balaban's motion to dismiss, which challenged the legitimacy of removal proceedings based on performance ratings under sections 4301(2)(D) and 5721 and contended the proceeding against him violated the *Bono* settlement[185] (as had Goodman),[186] MSPB Judge John J. McCarthy phrased the agency's burden of proof slightly differently than did Judge Reidy in his recommended decision in the Goodman case. Judge Reidy placed the burden on the agency to establish, by a "preponderance of the evidence," that the administrative law judge failed to increase his unacceptably low productivity after notice and opportunity.[187] Judge Reidy subsequently integrated the preponderance test with satisfaction by the MSPB "that the showing made warrants removal in the interest of promoting the efficiency of the service."[188] Judge McCarthy maintained that the "good cause" requirement for actions against administrative law judges was "similar" to the "efficiency of the service" standard applicable to other federal employees,[189] but he avoided classifying the standard of proof as a "preponderance of the evidence." Rather, he seemed to favor requiring, an "obvious and severe" test for performance failure that warranted a conclusion the administrative law judge was "grossly incompetent or inefficient."[190]

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[174] *Id.*

[175] SSA v. Goodman, No. HQ75210015, slip op. at 19 (MSPB Feb. 6, 1984).

[176] *Id.* at 15.

[177] *Id.* at 5.

[178] *Id.* at 16.

[179] *Id.* at 17.

[180] *Id.* at 18.

[181] *Id.* at 19.

[182] Nash v. Califano, 613 F.2d 10 (2d Cir. 1980), raised such issues but only the question of standing has been resolved thus far. Examples of pending cases are Nash v. Heckler, Civ. No. 78-281 (W.D.N.Y. filed May 30, 1978) and Association of Admin. Law Judges v. Heckler, No. 83-0124 (D.D.C. heard Mar. 5, 1984). *See also* Judge Simon Nash's observations on these issues in his Brief by Intervenor in Support of Respondent, *Goodman*.

[183] No. HQ752812100014 (MSPB Feb. 22, 1983), *cert. denied*, 103 S. Ct. 128 (1983).

In order to draw the requisite line between acceptable and unacceptable administrative law judge performance, the MSPB required "evidence of the nature and difficulty of the work and the conditions affecting the productivity of OHA judges," McCarthy maintained.[191] A "simplistic answer" to the question of when the level of performance should be considered unsatisfactory would be that

> removal of less efficient judges and retention of only the more pro-

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[184] His 1980 average was 18.2 cases per month, 15.3 in 1981, and 13.2 in the first five months in 1982. By comparison, the national monthly average was 30 cases in 1980 and 32 in 1981. *Id*. at 3.

[185] *Id*. at 16-17.

[186] *See supra* notes 137-39 and accompanying text.

[187] *Goodman*, No. HQ75218210015, slip op. at 17 (recommended decision).

[188] *Balaban*, No. HQ752812100014, slip op. at 34. Judge Reidy reiterated applicability of the preponderance requirement and relevance of the efficiency of the service standard at the end of his recommended decision. *Id*. at 43-44.

[189] *Id*. at 10.

[190] *Id*. at 15.

[191] *Id*.

> ductive judges would increase "the efficiency of the service" and satisfy the "good cause" requirement of section 7521. But such an approach to the issue would not take into account the concept of independence which all the interested parties acknowledge to be an important factor. A more valid approach, reasonable in fact and in law, might require a "strong" showing of inefficiency to justify the extreme sanction of removal. Arguably, the failure in performance, i.e., low productivity, should be so obvious and severe as to warrant the conclusion, absent some other explanation, that the administrative law judge is grossly incompetent or inefficient.[192]

In addition to the possible differences between MSPB Judges Reidy and McCarthy on burden of proof, their equality of certitude in dismissing the respective SSA judges' challenges to the legality of the proceedings against them was tempered by a difference between their interpretations of precedent for the actions. McCarthy's rejection of Balaban's claims that the APA and Civil Service Reform Act[193] barred performance-related actions to remove administrative law judges was based primarily on his acceptance as applicable precedent of the MSPB's language in the *Chocallo* "mis-behavior" removal case.[194] McCarthy then appended to his invocation of *Chocallo* the finding:

> While the principle of independence must be respected when performance-based reasons are advanced to justify removal or disciplinary action, the mere realization that an agency may propose to the Board that such an action be taken does not of itself constitute such a threat to independence as to warrant a general rule holding such a proposal to be contrary to law or otherwise barred.[195]

McCarthy nonetheless acknowledged that "research of cases arising under [section] 7521 discloses no case in which either the Board or a court has addressed the specific question of whether low productivity can justify the dismissal of an administrative law judge."[196]

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[192] *Id.*

[193] 5 U.S.C. § 1101 (1982).

[194] Construing *Chocallo*, Judge McCarthy maintained:

> While the case was essentially one involving misbehavior of an administrative law judge in performing adjudicatory functions, the Board recognized the tension that arises between the need to keep the judge free of improper agency influences and the responsibility of the employing agency to institute disciplinary or removal action before the Board for the good of the Government service. The Board stated that 'a careful balance must be created between judicial independence and judicial accountability' . . . . [T]he board ruled that the fact that duties are being carried out within a hearing room rather than an office 'does not provide an impenetrable shield from appraisal of performance.'

Id. at 11-12 (quoting *In re* Chocallo, 2 M.S.P.B. 20, 21 (1980)).

[195] *Id.* at 13.

Reidy also invoked the MSPB's language in the *Chocallo* case in the course of his recommended decision to justify removal for performance-based reasons. He added that the complaint against Goodman was "a performance-related charge filed consistent with the 'only for good cause' provisions of [section] 7521 and not prohibited by any law or regulation."[197] For support, he relied upon the court of appeals' 1982 decisions in *Drew v. United States Department of the Navy*[198] and *Darby v. IRS*[199] which upheld the "use of Chapter 75 procedures for performance based removals," as distinguished from chapter 43 procedures.[200]

The *Drew* and *Darby* decisions of the District of Columbia Circuit did indeed hold that removal proceedings under chapter 75 were separate and distinct from such proceedings under chapter 43; both cases having upheld removals of federal personnel pursuant to chapter 75 after termination of proceedings for "unacceptable performance" pursuant to chapter 43.[201] But citing these cases to support performance-based actions against administrative law judges requires an intermediate step that even OPM declined to take.[202] It requires equating the "good cause" standard with the "efficiency of the service" standard, because *Drew* and *Darby* involved proceedings, *not* under section 7521 which requires the "for good cause" standard, but under section 7513 which requires resort to the "efficiency of the service" standard. The court of appeals ruled 2-1 in both cases that the agency had shown by a preponderance of the evidence that removal of the employee "would promote the efficiency of the service."[203]

Given this explicit tie of the *Drew* and *Darby* rulings to the "efficiency of the service" standard, the only precedent for the proposition that performance-related charges can be found to constitute "good cause" in a removal proceeding under section 7521 prior to *Goodman*, is the language in the course of the *Chocallo* opinion by the MSPB, which avowedly was a "misbehavior" case.[204] While it certainly remains correct as a general rule that an agency's construction of the statute Congress has charged it to administer is entitled to deference, contemporaneity of the construction with adoption of the statute is a key justification for the deference. Whether a first-time construction by the agency, more than 30 years after adoption of the statute, qualifies for deference or invites disdain, is an open question.[205]

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[196] *Id.* at 11.

[197] *Goodman*, No. HQ75218210015, slip op. at 33 (recommended decision).

[198] 672 F.2d 197 (D.C. Cir. 1982).

[199] 672 F.2d 192 (D.C. Cir. 1982).

[200] *Id.* at 195-96. Under chapter 43, agencies are required to establish performance appraisal systems and are authorized to take action against employees for "unacceptable performance." 5 U.S.C. §§ 4302, 4303 (1982). Administrative law judges are excepted from chapter 43 by 5 U.S.C. § 4301(2)(E) (1982). The "for good cause" standard for administrative law judges of section 7521 is under chapter 75, 5 U.S.C. §§ 7501-7543 (1982).

[201] *Drew*, 672 F.2d at 200-01; *Darby*, 672 F.2d at 195-96.

[202] *See generally* Brief of U.S. Office of Personnel Management, *Goodman*.

[203] *Drew*, 672 F.2d at 201; *Darby*, 672 F.2d at 196.

The degree of deference that the MSPB's quoted language in *Chocallo* warrants should be dependent upon the relevance of that language to the facts and ruling in the case, the contemporaneity of the language with adoption of the statute, and the consistency of that language with positions, if any, previously taken by the agency on the point at issue. Regarding the last of these factors, issues of unsatisfactory productivity as "good cause" were before the MSPB for the first time in the *Goodman* and *Balaban* cases, and had not previously been argued before that agency or its predecessor, the Civil Service Commission. Nonetheless, there is at least a question whether the Civil Service Commission previously looked with favor on the position, a position compatible with Goodman's and Balaban's arguments, that "good cause" removals are confined to disciplinary infractions.

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[204] *See supra* note 194. On appeal of the MSPB's decision, the United States District Court for the District of Columbia maintained, in upholding the MSPB, that "an administrative law judge is not immune from review for procedural misconduct, incompetence or other failings in the performance of his or her duties." Chocallo v. Prokop, No. 80-1053, slip op. at 3 (D.D.C. Oct. 10, 1980), *aff'd, vacated, and remanded*, No. 80-2518 (D.C. Cir. Feb. 11, 1982) (unpublished). According to MSPB Judge McCarthy, the remand was for the district court to explain its dismissal of plaintiff's claims in constitutional tort. The district court dismissed those claims again by order dated May 3, 1982, accompanied by a memorandum opinion. Order denying Balaban motion to dismiss, *Balaban*, slip op. at 11 n.11 (MSPB Feb. 22, 1983).

[205] In Bob Jones Univ. v. United States, 103 S. Ct. 2017 (1983), Chief Justice Burger, in upholding IRS denial of tax exempt status to private schools that practice racial discrimination, noted of the IRS interpretation that hadn't been announced until 1970, "That it may be seen as belated does not undermine its soundness." *Id.* at 2030. Although this statement by the Court seems at odds with the author's position in the text, the Court justified the "belated" interpretation of I.R.C. § 501(C)(3)(1982) by the IRS on the ground that

> racial discrimination . . . is contrary to public policy. . . . Indeed, it would be anomalous for the Executive, Legislative and Judicial Branches to reach conclusions that add up to a firm public policy on racial discrimination, and at the same time have the IRS blissfully ignore what all three branches of the Federal Government had declared.

Id. at 2030-32. No similar "firm public policy" is evident to require an administrative interpretation that the performance related charges against Judge Goodman are "good cause" for administrative law judge removal under section 7521.

The Supreme Court's explanation for denying deference to the NLRB's belated construction beginning in 1970 that faculty members are "employees" entitled to the protection of the National Labor Relations Act seems more consonant with the situation under discussion. "[W]e accord great respect to the expertise of the Board," said Justice Powell, "when its conclusions are rationally based on articulated facts and consistent with the Act." NLRB v. Yeshiva Univ., 444 U.S. 672, 691 (1980).

In *Benton v. United States*,[206] a court of claims proceedings involving the question whether a hearing examiner who was involuntarily retired for disability was "removed" within the meaning of section 11 of the APA and hence subject to the APA's procedural protections, the Civil Service Commission argued that there was a clear distinction between a removal for good cause and a separation based on an involuntary retirement for disability. According to the court of claims' report of the case, the Commission, in implementing its argument for this distinction, maintained that removal for cause "denotes a disciplinary type of action, whereas involuntary retirement is viewed as a non-disciplinary type of action."[207] A judge could be involuntarily retired, the Commission maintained, without being accorded APA procedural protections. The court of claims rejected the Commission's dichotomy and ruled that disability could constitute good cause for removal of hearing examiners. Because involuntary retirement as a result of disability was "removal", the disability must be established through the procedures prescribed by the APA, which, for administrative law judges, was "wholly different from that applicable to 'mere employees of an agency'. . . ."[208] The court of claims concluded: "We cannot agree with defendant that the term 'removal for good cause' has become a term of art in legal parlance and that in every case and in every statute relating to civilian employees of the [g]overnment, it means a removal for disciplinary reasons."[209]

Given the peripheral status of the allegedly supportive language in *Chocallo* to the facts of the case, the uncertainty about consistency between the current position of the agency on the scope of "good cause" and the position of its predecessor agency a decade earlier, and the exposition of the agency's present construction three decades after formulation of the statute, there is little ground for deferring to the MSPB's interpretation. The core issue is not solely one of deference in any event, for a cluster of interrelated factors bear upon accepting and applying performance-related standards as good cause for removal: essentially statutory and judicial texts and contexts of the good cause standard in conjunction with an evaluation of how the standard's underlying objectives can most effectively be served.

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[206] 488 F.2d 1017 (Ct. Cl. 1973).

[207] *Id*. at 1024.

[208] *Id*. at 1025.

[209] *Id*.

V. GUIDELINES FOR DEFINING "GOOD CAUSE"

The foregoing examination of legislative history, professional commentary and arguments before, and opinions by, courts regarding the standard for removal of administrative law judges, indicates that the meaning of "for good cause" is plainer in terms of *relationships* to comparable standards along a spectrum of strictness than it is in terms of *descriptions* of formal contents. In prescribing the standard to govern removal of administrative law judges, Congress eschewed both the strict constitutional standard of "good behavior" required for removal of federal judges and the loose standard of "such cause as will promote the efficiency of the service"; the latter standard authorized traditionally for removal of non-judicial federal civil service personnel.[210] The obvious inference to be drawn from Congress' eliminating the "efficiency of the service" standard and adopting instead the noun "cause," as used in the traditional civil service standard, and combining it with the same adjective, "good," as used in the constitutional standard, is that more than mere "cause" that promotes the "efficiency of the service" was to be required for removal of administrative law judges. At the same time, less than noxious conduct falling afoul of "good behavior" was to be required. Removal of administrative law judges was not tied exclusively to their behavior. As the *Ramspeck* case made clear,[211] removal could be ordered legitimately as a consequence of economic traumas such as reductions in force. Presumably, other salient occurrences, whose impact on the administrative process exceeds "efficiency of the service" by a sufficient margin to be the equivalent of economic trauma, could also qualify as "good cause."

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[210] "The efficiency of the service" standard was adopted in 1912 as section 6 of the Lloyd-LaFollette Act, providing "[t]hat no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said service and for reasons given in writing. . ." 37 Stat. 539, 555 (1912). The Supreme Court upheld the standard against a claim of voidness for vagueness in Arnett v. Kennedy, 416 U.S. 134, 158-64 (1974).

[211] *See supra* notes 54-81 and accompanying text.

The APA increased the protection of hearing examiners from what it had been previously, as the Senate Report made plain, in an attempt to render them "independent and secure in their tenure and compensation," thus taking "a different ground than the present situation, in which examiners are mere employees of the agency. . . ."[212]

The "different ground than the present situation" necessary to establish "good cause" for hearing examiner removals had to be stricter than that necessary to establish "such cause as will promote the efficiency of the service"; "mere employees" already were entitled to that level of protection in "the present situation." No verbal alchemy can transmute the "good cause" standard into the stricter "good behavior" standard; the prohibition is equally compelling upon replacement of legal with prestidigitory techniques to pummel "good cause" into the looser "such cause as will promote the efficiency of the service."

How can the good cause standard be interpreted and applied in practice without confining it to purely behavioral delicts that would make it the equivalent, in effect, of the good behavior standard and without expanding it to encompass every inadequacy in performance that warrants removal to promote the efficiency of the service? Some matters not yet discussed, including the Administrative Conference's 1978 resolution on SSA-administrative law judge interactions,[213] Judge Merritt Ruhlen's Manual[214] for administrative law judges, the Supreme Court's 1983 decision in *Campbell v. Heckler*[215] and recent research by the Center for Judicial Conduct Organizations,[216] considered in conjunction with the earlier analyses of cases, commentaries and contexts can assist in establishing guidelines and monitoring borders.

Resolution 78-2 adopted by the Administrative Conference in 1978 limned three avenues to improvement of agency-judge relationships in the realm of social security disability claims. Terming its recommendations "interstitial and conservative," the Administrative Conference endeavored to "prescribe improvements while reinforcing sound practice."[217] Relevant to the particular concerns of this paper were:

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[212] LEGISLATIVE HISTORY, *supra* note 22, at 215.

[213] Administrative Conference of the U.S., Res. 78-2, 1 C.F.R. § 305.78-2 (1982).

[214] M. RUHLEN, MANUAL FOR ADMINISTRATIVE LAW JUDGES (rev. ed. 1982).

[215] 103 S. Ct. 1952 (1983).

[216] Letter to the author from Center for Judicial Conduct Organizations, American Judicature Society (Sept. 9, 1983).

[217] 1 C.F.R. § 305.78-2, at 99.

> Recommendations 78-2A2: The Bureau of Hearings and Appeals (BHA) possesses and should exercise the authority, consistent with the administrative law judge's decisional independence, to prescribe procedures and techniques for the accurate and expeditious disposition of Social Security Administration claims. After consultation with its administrative law judge corps, the Civil Service Commission and other affected interests, BHA should establish by regulation the agency's expectations concerning the administrative law judges' performance. Maintaining the administrative law judges' decisional independence does not preclude the articulation of appropriate productivity norms or efforts to secure adherence to previously enunciated standards and policies, underlying the Social Security Administration's fulfillment of statutory duties.
>
> 78-2B4: The Bureau of Hearings and Appeals should make better use [of] claimants as sources of information by: (a) providing them with available State agency reasons for denial; (b) providing notice of the critical issues to be canvassed at the hearing; and (c) engaging in careful and detailed questioning of the claimant at the hearing.
>
> 78-2C2: The Social Security Administration should devote more attention to the development and dissemination of precedent materials. These actions include (a) regulatory codification of settled or established policies (b) reasoned acquiescence or nonacquiescence in judicial decisions (c) publication of fact-based precedent decisions (d) periodic conferences of administrative law judges for discussion of new legal developments or recurrent problems.[218]

Thus, the Conference looked with favor on the articulation of appropriate productivity norms, provided that such norms should be established "by regulation" and posited on consultations with administrative law judges and other affected interests. There is no evidence in any of the proceedings against SSA judges that appropriate productivity norms have ever been articulated, let alone "by regulation" or "after consultation" with administrative law judges. The other integrative and practicable recommendations for codification of precedents and use of claimants for information in a manner that could systematize and simplify many disability cases have encountered recurrent neglect as well. SSA has responded, on the whole, with insularity and opacity to the Administrative Conference's proposal for a consultative, cooperative endeavor.

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[218] *Id.* at 99-100.

Judge Merritt Ruhlen's *Manual for Administrative Law Judges*, published by the Administrative Conference, treated administrative law judges' obligations to apply agency policy determinations as entirely compatible with maintaining their decisional independence. He noted that "[i]t is the [j]udge's duty to decide all cases in accordance with agency policy."[219] Nonetheless, if evidence or arguments not previously considered by the agency are introduced "or if there are facts or circumstances indicating that reconsideration of established agency policy may be necessary, the [j]udge has not only a right but a duty to consider such matters and rule accordingly."[220] Ruhlen described administrative law judge appointments as "absolute" in order to insure independence, though he also recognized that the judge is "an employee of the agency, charged with the interpretation and enforcement of its policies and the achievement of its distinct mission. . . ."[221] He stressed that the administrative law judge has a "strong affirmative duty" both "to try a case fairly and to write a sound decision" and "to insure that an accurate and complete record is developed."[222]

The latter obligation extends, when necessary, to directing counsel to research questions of law or policy and directing the parties "to discuss in oral argument, in brief, or in special memoranda during the hearing any issues or points he thinks germane. . . ."[223] He may even "have to call his own witness upon essential matters not covered adequately by the parties."[224] In writing opinions, administrative law judges must be aware that "the only way to write any document is to assemble the relevant material and the dictionary, thesaurus, style-book and guide to citation, and to write, rewrite, rewrite and rewrite."[225]

The clear intimation from Ruhlen's observations is that the administrative law judge who reworks and rewrites decisions to improve them is performing his obligations properly and is not by so doing, furnishing "good cause" for dismissal. Nothing in the record of the proceedings to remove the SSA judges indicates that their performance was appraised with regard to insuring that "an accurate and complete record is developed."[226]

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[219] M. Ruhlen, *supra* note 214, at 79.

[220] *Id.*

[221] *Id.* at 1.

[222] *Id.* at 3.

[223] *Id.*

[224] *Id.*

[225] *Id.* at 95.

Ruhlen's views of the responsibilities of administrative law judges were reinforced by the views of the Supreme Court in *Campbell v. Heckler*[227] in 1983. In reversing the court of appeals' conclusion that a finding by the Secretary of HHS that the claimant was "not disabled" was not supported by substantial evidence unless the Secretary showed "suitable available alternative jobs" for the claimant,[228] the Supreme Court maintained that the court of appeals relied upon a principle of administrative law that was "inapplicable" when the agency, as here, had promulgated valid regulations.[229] When an agency takes administrative or official notice of facts, a litigant must ordinarily be given an adequate opportunity to respond.[230] "But when the accuracy of those facts already has been tested fairly during rulemaking, the rulemaking proceeding itself provides sufficient procedural protection."[231] Reasons why the Secretary could choose to rely upon guidelines developed through rulemaking rather than to present testimony of a vocational expert in each case were that the regulations provide that "the rules will be applied only when they describe a claimant's abilities and limitations accurately" and that the regulations require the administrative law judge to " 'loo[k] fully into the issues.' "[232] The Secretary conceded that the regulations require conscientious inquiry by the administrative law judge but argued that the inquiry undertaken by the judge here "satisfied any regulatory duty."[233]

Concurring in the judgment, Justice Brennan commented that claimant's hearing before the administrative law judge "reflects poorly" on the judge's "duty of inquiry" and noted that the Secretary acknowledged this duty. He did not support the court of appeals decision in the case, however, because "the obligation that the [c]ourt of [a]ppeals would have placed on [a]dministrative [l]aw [j]udges was a poor substitute for good faith performance of the 'duty of inquiry' they already have."[234] Justice Marshall, the lone dissenter, disagreed with the other justices' conclusion that the court of appeals did not question the adequacy of the administrative law judge's inquiry at the hearing.[235]

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[226] *Id.* at 3.

[227] 103 S. Ct. 1952 (1983).

[228] Campbell v. Secretary, 665 F.2d 48, 54 (2d Cir. 1981), *rev'd sub nom.* Campbell v. Heckler, 103 S. Ct. 1952 (1983).

[229] 103 S. Ct. at 1959.

[230] *Id.* at 1958.

[231] *Id.* at 1959.

[232] *Id.* (invoking 20 C.F.R. § 404 (1982), especially §§ 404.1563(a), 404.944, 404 subpart P, app. 2 § 200.00(a)).

[233] 103 S. Ct. at 1958 n.12.

[234] *Id.* at 1960 (Brennan, J., concurring).

The Justices were unanimous in their perception of administrative law judges' responsibilities for inquiry and judgment. The Secretary could promulgate medical-vocational guidelines through rulemaking in order to improve both the uniformity and efficiency of determinations regarding the existence of suitable jobs in the national economy. The Justices, in a footnote, recognized additional support for the Secretary's guidelines that "[m]ore than a quarter of a million of these claims require a hearing before an [a]dministrative [l]aw [j]udge. . . . [t]he need for efficiency is self evident."[236] Efficiency was equated with avoiding previously inconsistent treatment of similarly situated claimants that resulted from disparities in the testimony of vocational experts. The use of rulemaking to formulate guidelines in order to heighten uniformity in determining the avilability of work that claimants could perform was applauded by the Court. By no stretch of the imagination could one find in the Court's decision in *Campbell*, however, a scintilla of support for the proposition that agencies can prescribe decisional minima to which administrative law judges must adhere or face removal. The Justices stressed thoroughness and fairness, not quantity, in reiterating the obligation of administrative law judges to look conscientiously and fully into the relevant issues and to refuse to apply the rules contained in the Secretary's guidelines upon finding that "they fail to describe a claimant's particular limitations."[237] Conscientiousness and thoroughness in probing and weighing issues were seen by the justices as positive components of administrative law judge performance. To switch them into criteria for proving "good cause" for removal of administrative law judges would require that the semantic standards of Big Brother in Orwell's *1984*[238] be substituted for traditional evaluative norms.

Does the foregoing analysis suggest that judges can legitimately mask indolence through talismanic allegations of conscientiousness and thoroughness? Certainly not; for probes of the empirical reality or falsity of such allegations are necessary and proper instruments in assessing whether removal of judges is warranted. Studies of judicial discipline by the American Judicature Society demonstrate that the time is past—if it ever existed—when judges could claim total immunity from accountability for their conduct and conscientiousness.[239] Research by the Society's Center for Judicial Conduct Organizations evidences consistent rulings of removability and orders of removal against judges shown to be delinquent in the performance of duties.

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[235] *Id.* at 1961 (Marshall, J., concurring and dissenting).

[236] *Id.* at 1954 n.2.

[237] *Id.* at 1958 n.11.

[238] G. ORWELL, 1984 (reprint 1982).

In a letter to this author on September 9, 1983 in response to a request for "cases concerning judges who have been disciplined for deciding too few cases or for delay in disposing of cases," American Judicature Society Staff Attorney Terrence Brooks listed 25 such cases, omitting from his compilation "cases where judges have been accused of delay together with other, more serious misconduct."[240] Perusal of the reports of the respective judicial conduct organizations in each of these cases revealed that the judge subjected to discipline failed in some respect beyond the charges leveled at Administrative Law Judges Goodman and Balaban—a factor in addition to low decisional productivity was always present.

A case closest to the allegations against Goodman and Balaban involved an Alabama circuit court judge who was found to be "mentally unable to perform his duties," after "failing to promptly dispose of cases submitted to him and failing to report cases pending decision before him for more than six months."[241] Typical of the charges against the judge was the claim that he exacerbated delays by losing decrees from time to time. For example, after hearing an automobile condemnation case in January 1978, he requested and received a proposed decree from an attorney in May 1978. He signed that decree in August 1978 but then lost it in his office for four months. It was found in December 1978 and finally filed eleven months after the hearing.[242] In other cases before that judge, attorneys "repeatedly wrote letters and made phone calls" urging the judge to decide submitted matters "but to no avail."[243]

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[239] See I. TESSITOR, JUDICIAL CONDUCT ORGANIZATIONS (1978). The American Judicature Society's Center for Judicial Conduct Organizations publishes, *The Judicial Conduct Reporter*, a quarterly newsletter, and *The Judicial Discipline and Disability Digest*, a multivolume work cataloging every reported case on judicial discipline since 1960. The November 1979 issue of *Judicature* was devoted to preserving confidence in the Commissions, 63 JUDICATURE 203 (1979). With regard to application of the constitutional "good behavior" standard to federal judges, see R. WHEELER & A. LEVIN, JUDICIAL DISCIPLINE AND REMOVAL IN THE U.S. (1979) (study of the Federal Judicial Center).

[240] *See supra* note 216.

[241] *In re* Powers, slip op. at 1 (Ala. Ct. of the Judiciary July 11, 1981) (unreported judgment) (mimeo).

[242] *Id*. at 5.

While falling short of malicious, immoral, or venal behavior, the performance of the Alabama judge, and of others removed or disciplined in similar cases, included elements of negligence or indifference, such as losing or mislaying case materials, keeping inaccurate records and unwillingness or inability to discharge administrative duties as presiding officer, in addition to a failure to make timely adjudications.[244]

Although the cases of judicial discipline contained some factor of negligence or indifference in addition to low decisional productivity on the part of the judge, reasonable persons journeying along the slipperly slopes of legal argumentation would have to acknowledge that decisional productivity can be so low as, without more, to constitute good cause for removal. It is submitted that an administrative law judge who presides admirably over hearings and elicits every relevant nuance of testimony and data, but who fails over a period of time to produce any decisions, negates the title of judge and furnishes good cause for removal. Except perhaps, in Gilbert and Sullivan operettas, one who cannot adjudicate cannot be a judge.

On the other hand, an administrative law judge who adjudicates at a pace similar to that at which rabbits multiply could also furnish good cause for removal if high quantity was achieved at the cost of violating the duty of inquiry and failing to look fully into the issues. Analysts of judicial performance should question rather than cheer high disposition rates that exceed, over a period of time, likely compatibility with full inquiry and deliberation. How should maximum and minimum figures be determined for each agency so that a presumption of good cause may appropriately be imposed for disciplinary proceedings against administrative law judges whose disposition rates fall above or below those figures? If it can be done equitably at all, it must be the product of representative, expert judgment. Compatible with the Administrative Conference's Resolution 78-2, reliance upon consultations with representative judges, judicial organizations and other experts from the profession are far more likely to produce fair and feasible criteria than are decrees by agencies acting alone in sovereign isolation. It would be a mockery of the vaunted methodology of administrative law to exclude from authoritative participation representatives of the individuals and professional groups most directly affected.

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[243] *Id.* at 7.

[244] *See, e.g.*, *In re* Heideman, 387 Mich. 630, 198 N.W.2d 291 (1972); *In re* MacDowell, 303 N.Y.S.2d 748 (N.Y. App. Div. 1977); and *In re* Judges of Municipal Court, 256 Iowa 1135, 130 N.W.2d 553 (1964) cited by the Alabama court in the *Powers* case. Typical of the other cases noted in the American Judicature Society Center for Judicial Conduct Organizations' letter of September 9, 1983 were *In re* Zedlar, (Pa. Mar. 1981) (unreported order) (mimeo) removing a District Justice of Cumberland County for such conduct as refusing to conduct hearings on Mondays and after 11:00 A.M. on Tuesdays through Fridays and for refusing to come to his office on a number of work days; and *In re* Stafford, (N.Y. Judicial Conduct Comm'n Nov. 12 1982) (unreported judgment) (mimeo) removing a justice of Newfield Town Court for having "failed to carry out virtually all her judicial duties", including failure to preside over arraignments, trials and other proceedings.

The setting, through consultations with representative experts, of decisional productivity standards deemed consistent with full elicitation and evaluation of testimony, data and arguments should be the beginning not the end of inquiries into whether good cause has been shown for dismissal of administrative law judges. The adequacy of support services available to meet particular judges' needs for assistance must be a factor of consideration. Reasonable efforts must be made by the agency to accommodate those needs in accordance with the judges' and not only the agency's perceptions. The professional quality of the written decisions by the judges against whom charges have been brought should also be appraised before any conclusion of "good cause" is reached. Panels of impartial experts selected from peer groups of administrative law judges, other distinguished members of the bench and bar and from law school faculties should be utilized to evaluate the quality of decisions by the charged judges. High quality could explain low productivity and would counsel against disciplinary action in those cases in which judges are charged with consistently falling below minimally acceptable decisional outputs. Any judicial system that prizes quality should have room for judges who, by observing the "write, rewrite, rewrite and rewrite" admonition of Ruhlen's manual,[245] achieve high levels of soundness and clarity. Such practices might play hob with caseload disposition if all the judges were perfectionists; but the same sense of reality that tells us that a judge who decides no cases should not be entitled "judge" also tells us that few judges are addicted to perfectionism. The few in service should be studied and treasured, not purged.[246]

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[245] M. RUHLEN, *supra* note 214, at 95.

[246] Although there may well be points of divergence between the Board's analysis of good cause in the *Goodman* case, *see supra* text accompanying notes 175-81, and that presented in this article, it is submitted that the Board's ruling and rationale overall are compatible with and conducive to implementation of what this article concludes is the task at hand.

VI. CONCLUSION

"Good Cause" for removal of administrative law judges is stricter than "efficiency of the service," the standard used for the removal of other classified civil service personnel, but not as strict as "good behavior," the constitutional standard governing removal of Article III judges. Improper conduct by a judge—soliciting or accepting bribes, for example—would justify removal under all three standards. Financial stringency leading to reductions in force would be a typical factor held to satisfy "good cause" and "efficiency of the service" but which would not comport with the constitutional standard of "good behavior." Failure to follow agency directives in decisionmaking provides justification for typical removals pursuant to the "efficiency of the service" standard but is prohibited from use as "good cause" for removal of administrative law judges.

Failure quantitatively to meet a minimum or to stay within a maximum average disposition rate could, arguably, provide a rebuttable presumption of good cause, if the rates have been determined for each agency through consultations with and recommendations by representative experts from the bench, bar and academia concerned with that agency's administrative adjudication, and if the agency has made reasonable effort to accommodate to particular judges' perceived and expressed needs for assistance. Resolution 78-2 of the Administrative Conference suggests the procedural *sine qua nons* for establishing quantitative norms. Ruhlen's Manual for administrative law judges suggests that thoroughness, clarity and recurrent rewritting of opinions are judicial assets. The Supreme Court's rulings in *Ramspeck*, *Butz*, and *Campbell* offer reminders, over a period of 30 years, of esteem for the role, performance and decisional independence of administrative law judges. The task at hand is to enhance, not jeopardize, the warrant for esteem through cooperative formulation of fair and feasible productivity goals, maximization of assistance to meet the needs of administrative law judges in attaining and maintaining them, and integration of the judges' findings and critiques into the agencies' machinery for making and evaluating policy.

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A STUDY OF IMMIGRATION PROCEDURES

Paul R. Verkuil*

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[*] Dean and Joseph M. Jones Professor, Tulane Law School. An earlier version of this Article was submitted to the Administrative Conference of the United States by the author as consultant. The publication of this Article is authorized by the Conference, but the author is solely responsible for its contents. Criticism of earlier drafts by Alex Aleinikoff, Jeff Lubbers, David Martin, Paul Schmidt, and Peter Schuck is gratefully acknowledged as is the research assistance of Chris Gobert, J.D. Tulane Law School, 1984.

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I. INTRODUCTION

Although immigration law in the United States long has been regarded as a specialized area, recent events have placed the field dramatically before the public, the courts, and Congress. Within the last three years, our immigration system has been shocked by the sudden arrival on our shores of Mariel Cubans and Haitian boat people, the marked increase in the numbers of Iranians, Afghans, Poles, and Central Americans seeking asylum, and the heightened pressure of Mexican nationals desiring entry at our southern border. Phenomena such as illegal immigration and mass asylum have raised important policy concerns. As a result, scholars are studying the field closely from a variety of perspectives.[1] This Article examines the process by which immigration matters are decided and seeks to relate immigration proceedings to established concerns of fairness and efficiency in the administrative setting.

A. *A Brief Overview*

Immigration is inseparable from the American experience. In 1783, President Washington proclaimed that the "bosom of America is open to receive not only the opulent and respectable stranger, but the oppressed and persecuted of all nations and religions, whom we shall welcome to a participation of all our rights and privileges."[2] For two hundred years we have been struggling with the meaning and implications of that bold challenge.

A detailed review of the history of immigration is beyond the scope of this Article. However, Peter Schuck suggests three periods in the evolution of our immigration law[3] that are useful to introduce the current inquiry. The first, from the beginning of the Republic until the 1880's, Schuck identifies with liberalism. During this time the law did not restrict the arrival of strangers to our shores. The second period, from the 1880's until the present, Schuck characterizes as one of "restrictive nationalism."[4] This movement introduced social, ethnic, and racial restrictions upon immigration and practiced a nativism that was often synonymous with xenophobia. Today Schuck perceives a new force at work, communitarianism, which embodies a commitment to those who have established ties with us, whether or not the ties were initially created by invitation.[5]

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[1] The recent legal literature on immigration law and policy is diverse and thoughtful. *See, e.g.*, *Symposium*, 36 U. MIAMI L. REV. 807 (1982); *Symposium—Strangers to the Constitution: Immigrants in American Law*, 44 U. PITT. L. REV. 163 (1983); *U.S. Immigration Policy*, 45 LAW & CONTEMP. PROBS., Spring 1982, at 1; Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984); *Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286 (1983) [hereinafter cited as *Developments Note*]. The congressional output is no less impressive. *See, e.g.*, JOINT COMMS. ON THE JUDICIARY, 97TH CONG., 1ST SESS., U.S. IMMIGRATION POLICY AND THE NAT'L INTEREST (Joint Comm. Print No. 8 1981) [hereinafter cited as NATIONAL INTEREST].

[2] *See* NATIONAL INTEREST, *supra* note 1, at 88.

[3] *See* Schuck, *supra* note 1, at 2–5.

[4] *Id.* at 2–3.

This broad outline of public values and attitudes toward immigration helps explain the changing importance of immigration law. Until recently law has been the handmaiden of immigration policy, a condition which brings to mind Grant Gilmore's postulate that law "reflects but in no sense determines the moral worth of a society."[6] During the nationalistic period classical immigration law was isolated from the American constitutional experience.[7] Today, with new public values, immigration law is returning to the mainstream. The communitarian values noted by Schuck are inherent in attempts to accept or "legalize" the undocumented workers in our midst, and in the recognition of the need to grant asylum to those in fear of persecution elsewhere.[8]

This emergence of moral values in immigration law has important procedural implications. Processes that once were accepted must be reconsidered. The need for reevaluation suggests that procedural developments in administrative law are relevant for immigration law analysis and that analogous procedures from other administrative schemes may also have relevance to the immigration setting.

B. *The Plan of This Article*

The view that immigration law is rejoining the mainstream of constitutional law[9] offers an obvious method of analysis—the role and content of procedural due process in the various immigration functions performed by the Immigration and Naturalization Service (INS) and the Department of Justice. The first goal of this Article, therefore, is to identify procedural weaknesses in immigration functions that rise to a constitutional dimension. A second, related goal is to go beyond the initial inquiry of constitutionality and determine how to organize decision resources to produce the best possible results.

The Article begins by examining the character of due process in the immigration setting. The Article develops the concept of flexible due process as it has evolved in the cases following *Goldberg v. Kelly*,[10] and discusses the relevance of that concept to the immigration setting.[11] Because due process analysis in the administrative area requires an assessment of individual and governmental interests, these interests are identified and evaluated.[12]

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[5] *Id.*; *see also* Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 173 (1982).

[6] G. GILMORE, THE AGES OF AMERICAN LAW 110 (1977).

[7] Schuck, *supra* note 1, at 3.

[8] *See* 8 U.S.C. §§ 1101(a)(42), 1158, 1253(h) (1982); S. 529, 98th Cong., 1st Sess. § 124 (1983) (Simpson-Mazzoli bill).

[9] *See* Schuck, *supra* note 1, at 4–5; *Developments Note*, *supra* note 1, at 1323–24.

[10] 397 U.S. 254 (1970); *see infra* notes 24–31 and accompanying text.

The Article then explores a set of immigration functions which have different procedural formalities: denaturalization, deportation, asylum, exclusion, parole/detention, and the three "discretionary" functions of adjustment of status, suspension of deportation, and extended voluntary departure. The procedural ingredients of each function are identified.[13] Following a methodology derived from the author's earlier work on informal adjudication procedures in other administrative contexts,[14] the procedures surrounding each immigration function are tested against the due process requirements of *Goldberg v. Kelly*.[15] The assumption is that *Goldberg*, by representing the high watermark of procedural due process in the administrative setting, offers an opportunity to confirm the procedural adequacy of other administrative functions. The functions whose procedures satisfy the *Goldberg* requirements should be vindicated readily. If the *Goldberg* test is not met, the functions must be measured against the flexible due process standards established after *Goldberg*, notably the three-factor test of procedural adequacy offered in *Mathews v. Eldridge*.[16] Therefore, each function is also evaluated in terms of the *Eldridge* criteria.

The result of this analysis is a "procedural audit" that determines which procedural ingredients are provided in each immigration function.[17] The purpose of this analysis is to measure the degree of informal process currently available, and to suggest appropriate directions for future development. Accordingly, the methodology is applied to the new immigration functions that the Simpson-Mazzoli bill proposes[18]—especially legalization, employer sanctions, and summary asylum[19]—and recommendations are made to improve procedures surrounding those functions.[20]

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[11] *See infra* notes 32–39 and accompanying text.

[12] *See infra* notes 40–72 and accompanying text.

[13] *See infra* notes 73–150 and accompanying text.

[14] Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739 (1976).

[15] 397 U.S. 254 (1970); *see infra* notes 151–263 and accompanying text.

[16] 424 U.S. 319 (1976).

[17] This information is presented in graphic form below. *See infra* notes 152–59 and accompanying text. The list of procedures was compiled from procedures contained in INS statutes and regulations. While the author observed some immigration hearings and discussed his findings with government and private attorneys, the research is in no sense empirical. It may for that reason fail to capture what is actually occurring in some hearing situations if such occurrences are not reflected in statutes or regulations. The premise is that the published procedures are those a party can expect to receive in the vast run of cases, not those that may occasionally result from informal practice.

[18] S. 529, 98th Cong., 1st Sess. (1983); H.R. 1510, 98th Cong., 1st Sess. (1983).

II. DUE PROCESS IN THE IMMIGRATION SETTING

Until recently immigration law has avoided the requirements that due process generally imposes upon the administrative state. While the Supreme Court long ago acknowledged a due process interest in the deportation of illegal aliens living within our borders,[21] those seeking entry have consistently been denied a comparable interest.[22] Congress, with the Court's acquiescence, has long distinguished between the process necessary in the typical administrative decision and that required of INS and the Department of Justice in immigration matters.[23] That distinction, however, is becoming increasingly difficult to justify.

A. *The Concept of Flexible Due Process*

Goldberg v. Kelly is credited with starting a due process revolution in 1970.[24] Since then the federal courts have decided thousands of due process cases that critiqued and often overturned federal and state administrative decisions. However, *Goldberg* did not prove adequate to the task of defining fair procedure in all administrative settings. Its procedural formula was found to be too rigid, and many decisions required that a balance be struck between its dictates and the need for an informal process. The concept of flexible due process, as articulated in a series of Supreme Court decisions,[25] was developed to balance the degree of private interest affected, the need for the procedural safeguard, and the burden on the government to provide it. This trend is illustrated by *Mathews v. Eldridge*, in which the Court applies the flexible due process concept in a public benefit context barely distinguishable from that in *Goldberg*.[26]

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[19] *See infra* notes 264–354 and accompanying text.

[20] *See infra* notes 355–68 and accompanying text.

[21] *See* The Japanese Immigrant Case, 189 U.S. 86 (1903).

[22] *See* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950); Jean v. Nelson, 727 F.2d 957, 968–69 (11th Cir. 1984) (en banc).

[23] In Wong Yang Sung v. McGrath, 339 U.S. 33, 45–47, *modified*, 339 U.S. 908 (1950), the Court assumed that the Administrative Procedure Act's independent decider requirements applied to INS immigration inspectors as a matter of due process. Congress reversed the Court on this point and the Court later acceded to the congressional will. *See* Marcello v. Bonds, 349 U.S. 302, 306–10 (1955). Some view this as a failure of the Court's will. *See, e.g.*, Schuck, *supra* note 1, at 33.

[24] 397 U.S. 254 (1970); *see* Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1268 (1975).

[25] *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 577–84 (1975) (suspension of students from public schools); Wolff v. McDonnell, 418 U.S. 539, 555–58 (1974) (prison disciplinary proceedings); Morrissey v. Brewer, 408 U.S. 471, 480–84 (1972) (revocation of parole).

The trend toward flexibility is evident in the very phrasing of the due process inquiry. The due process issue is frequently posed as one involving either fundamental fairness or the balancing of public interests, private interests, and the need for additional procedures.[27] Since the fundamental fairness approach does not determine whether an additional procedural ingredient need be added to an existing informal process, the balancing test now is employed uniformly to ascertain whether additional ingredients are necessary.

As might be expected, the Court is far from unified in its balancing approach. *Lassiter v. Department of Social Services*[28] illustrates the confusion. In *Lassiter* the issue was whether a mother convicted of second degree murder was entitled to the assistance of counsel in a civil custody proceeding. In a five to four decision, with the Chief Justice concurring in result only, the Court held that no such right existed. The majority opinion, by Justice Stewart, first concluded that fundamental fairness analysis requires the provision of counsel only when physical liberty is at stake. The majority therefore employed the *Eldridge* balancing test to measure the need for the incremental addition of counsel in this procedural setting. After undertaking the three-factor analysis, the majority struck the balance against that additional right.[29] *Lassiter*, one of the many cases that have applied the flexible due process concept since 1970, exemplifies both the relevance of the concept[30] and the difficulty inherent in its application.[31]

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[26] Mathews v. Eldridge, 424 U.S. 319 (1976). The *Eldridge* Court did distinguish the AFDC setting in *Goldberg* from the Social Security disability setting it confronted by stating that the deprivation in *Eldridge* (disability benefits) is likely to be less harsh than the deprivation in *Goldberg* (welfare benefits), and the procedural safeguard of written medical reports is likely to be more reliable than the determination of welfare entitlement. *See id.* at 340–41, 343–45. But the Court isolated *Goldberg* from the outset, declaring: "In only one case [*Goldberg* itself] has the Court held that a hearing closely approximating a judicial trial is necessary." *Id.* at 333.

[27] The former is the *Goldberg* test, the latter the *Eldridge* criteria.

[28] 452 U.S. 18 (1981).

[29] The balance was actually struck in favor of ad hoc provision of counsel rather than an automatic right to counsel. *Id.* at 31–32. The dissenters found that the three-factor analysis called for assistance of counsel. *Id.* at 35–48 (Blackmun, J., dissenting). A critical issue in the equation for both sides was the government's interest in an accurate custody decision, which is stronger than its usual interest in efficient (i.e., more summary) procedures.

[30] In fact, none of the Justices has eschewed it in the administrative setting.

[31] *See generally* Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

B. *The Relevance of Flexible Due Process to the Immigration Setting*

In a sense, the concept of flexibility entered immigration proceedings long before it became an articulable standard for due process review. In the *Japanese Immigrant Case*[32] the Court recognized a constitutional interest in an illegal alien's fighting deportation, and, because the procedures employed were far from formal, the case was in effect an early application of the concept of flexible due process.[33]

Flexible due process has more recently been applied to the exclusion hearing context. Historically, the Court found no due process rights in procedures deciding the status of excludable aliens, even when substantial individual interests were at stake. Its words were unequivocal: "Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[34] This view, however, may be changing. The Court's recent decision in *Landon v. Plasencia*[35] found due process relevant to the exclusion hearing context and remanded for a determination of what procedures were required.[36] If this case signals a reversal of earlier doctrine,[37] then the age of flexible due process has reached the entire immigration system. This conclusion has been reached by some lower federal courts, where due process rights are being expanded with a boldness that would impress even the *Goldberg* Court.[38] But it is not by any means a clear trend.[39]

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[32] 189 U.S. 86 (1903).

[33] Justice Harlan, for the majority, found that the illegal alien who had been ordered deported had received due process in a summary hearing before an immigration officer, even though she had argued that language difficulties made the hearing meaningless. *See id.* at 101–02. Justice Harlan emphasized that due process only requires that procedures "be appropriate to the nature of the case." *Id.* at 101.

[34] United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).

[35] 459 U.S. 21 (1982).

[36] *Id.* at 32–37. Justice Marshall, dissenting in part in *Plasencia*, would have held that due process standards had not been met where the plaintiff had to undertake an exclusion hearing within twenty-four hours of her detention, and without the assistance of counsel. *Id.* at 39–41 (Marshall, J., concurring and dissenting).

[37] Some say that it does. *See Developments Note*, *supra* note 1, at 1322–24; Note, *Constitutional Limits on the Power to Exclude Aliens*, 82 COLUM. L. REV. 957 (1982).

[38] *See, e.g.*, Jean v. Nelson, 711 F.2d 1455, 1483–85 (11th Cir. 1983) (detained excludable aliens entitled to challenge allegedly discriminatory exercise of parole power), *rev'd*, 727 F.2d 957 (11th Cir. 1984)(en banc); Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1397–90 (10th Cir. 1981) (detained aliens may raise due process challenge to indeterminate detention); Fernandez-Roque v. Smith, 567 F. Supp. 1115, 1138–39 (N.D. Ga. 1983) (granting detained Cubans procedural ingredients such as appointed counsel, exceeding those provided in *Goldberg*). The last case is currently on appeal to the Eleventh Circuit.

[39] The Eleventh Circuit, sitting en banc, recently reversed the panel decision in

Thus, immigration law is in a state of flux, formerly protected from many administrative due process demands, now possibly overtaken by them. In this uncertain environment, the contours of flexible due process are difficult to fix with confidence. However, one thing is clear: interest analysis—valuing procedures according to an individual's need for and entitlement to them—is relevant to the inquiry. Interest analysis therefore is our starting point.

III. Valuation of Individual and Governmental Interests in Immigration Decisions

Due process analysis suggests that the interests of persons subject to governmental action bear an important relationship to the kind of procedures that are required in such an action. The individual has a need for accurate or non-arbitrary decisionmaking. Conversely, the government, as surrogate for the public, has an interest in ensuring that the procedures surrounding a particular function are efficiently allocated to minimize fiscal and administrative burdens.[40]

A. *Valuation of Individual Interests*

The idea that some people have a greater interest than others in government actions, because of prior commitment, investment, or reliance, is familiar in the immigration field. Aliens seeking entry at our borders have traditionally been viewed as having no interests worthy of procedural protection. For them the privilege doctrine prevails.[41] However, in an era of illegal immigration and mass asylum claims the immigration setting has become more complicated. Valuing the interests of persons caught in these situations requires a rethinking of traditional responses. The meaning of individual choice and commitment in these settings is not easily discerned.

Henry Friendly's work suggests a method for approaching

Jean v. Nelson, 711 F.2d 1455 (11th Cir. 1983), which had earlier expanded due process rights of Haitians in detention. *See* Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984) (en banc). This court is likely to cut back on the rights granted Cuban detainees in Fernandez-Roque v. Smith, 567 F. Supp. 1115 (N.D. Ga. 1983).

[40] *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976). The third interest recognized in *Eldridge*, the importance of the particular procedure towards ensuring accurate decisionmaking, is explored below. *See infra* notes 160–63 and accompanying text.

[41] In Landon v. Plasencia, 459 U.S. 21, 32 (1982), the Court unequivocally reaffirmed this view: "This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." But Plasencia was a returning permanent resident alien who for that reason presented due process interests of greater moment.

these problems.[42] Judge Friendly proposes that individual interests in procedures be evaluated in order to establish a framework for a system of flexible due process.[43] He distinguishes between actions that change existing status and those that deny an initial benefit,[44] and he places procedural emphasis on the former group. Within that category he ranks highest those actions that deprive an individual of liberty, including deportation, parole revocation, and civil commitment; he ranks below these revocation of professional licenses, termination of public benefits, and reduction of public benefits.[45] Using this framework as a guide, a hierarchy of individual interests in immigration functions can be constructed.

One can assume that the foreigner seeking entry for the first time has a relatively low interest in the procedures that accompany government action on his or her application. The Court confirms this hypothesis when it applies the privilege doctrine to this situation.[46] But seldom are immigration matters so uncomplicated.[47]

At the high end of the interest spectrum stand denaturalization and deportation. An individual who has gone so far as to become a citizen has made a maximum commitment to participation in our society. Concerning denaturalization, the INS seeks to deprive such an individual of the status of citizen[48] and thereafter to deport him, a situation in which due process should demand the best procedural protection our society has to offer. Similarly, the deportation process threatens aliens within our borders with losses of liberty and property, jeopardizing substantial individual interests.[49]

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[42] *See, e.g.*, Friendly, *supra* note 24.

[43] Friendly, *supra* note 24, at 1295; *see* Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

[44] Friendly, *supra* note 24, at 1295. This is a traditional due process dichotomy. *See* B. SCHWARTZ, ADMINISTRATIVE LAW § 5.12 (2d ed. 1983).

[45] Friendly, *supra* note 24, at 1295–98.

[46] *See supra* note 41 and accompanying text.

[47] Even in initial entry situations, heightened interests are not difficult to postulate. Suppose, for example, the initial entrant is a close relative of someone already in the United States.

[48] *See* 8 U.S.C. § 1451 (1982).

[49] Judge Friendly included deportation in his highest category of interests, equating it with loss of liberty. *See* Friendly, *supra* note 24, at 1296–97. As a practical matter, this overstates the interest sought to be protected when a deported alien is only being sent to another country, which he may be able to choose. *See* 8 U.S.C. § 1253(a) (1982). However, that is often a cruel choice for someone committed to permanent residence in the United States. It is also quite possible that financial loss, separation of family, and difficulties in the next country will convert deportation into a loss of liberty or at least property. Although the deportation is a civil proceeding and is not considered punishment for a crime, *see* Carlson v. Landon, 342 U.S. 524, 537 (1952), the Supreme Court has described it as "a drastic measure and at times the equivalent of banishment or exile." Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).

The next function that must be placed on the interest scale is asylum. Refugees who come to our shores claiming a well-founded fear of persecution on account of race, religion, nationality, or membership in a particular social group or political organization may seek asylum.[50] Initial entrants, aliens already in the country who are subject to deportation proceedings, or aliens within the country on any temporary legal status can request asylum.[51] It is arguable that individual interests in asylum might vary among these groups. Certainly, those seeking initial entry are otherwise deemed to have low interests in procedural protections against arbitrary government action.[52] However, when the threat of persecution is added the initial entrant is seeking something beyond a new opportunity: she is seeking safety from oppression. Under these circumstances it is not simply a question of returning a person to the country which she left. If persecution exists, her only alternative if turned away from our country is to seek refugee status in a third country, status which may not be available. Thus, an initial entrant seeking asylum has higher interests than those presented by the typical applicant for admission.

But does that person have interests as high as those of persons already living here? Those aliens already here have strong interests both in remaining and in not being returned to countries where they may be persecuted. Since their interests are already recognized in the deportation context, asylum simply becomes an additional consideration. Moreover, it is difficult to justify treating initial entrants differently concerning asylum claims solely because they are not present in this country, when those here illegally are entitled to raise asylum claims in deportation proceedings.[53] Giving some credit in the asylum analysis to those who are within our borders illegally and withholding it from those who seek to enter legally appears to endorse the initial illegal action.[54] Unless one is willing to deprive illegal aliens of procedural protections because of their status, one must conclude that all persons seeking asylum have protectable individual interests, whatever their status or location at the time of application.

Moreover, the deportation determination is only the first step; if the deportation order cannot be executed within a reasonable time, the alien can be detained in this country if the public interest requires it. *See* 8 C.F.R. § 212.5(d)(2) (1984). This would clearly be a loss of liberty. The likelihood, therefore, is that deportation will raise substantial individual interests and, as a result, it should trigger corresponding procedural protections.

[50] 8 U.S.C. § 1101(a)(42) (1982).

[51] *See id.* § 1158.

[52] *See* Aleinikoff, *Aliens, Due Process and "Community Ties": A Response to Martin*, 44 U. PITT. L. REV. 237, 237–38 (1983).

[53] *See* 8 U.S.C. §§ 1225–1227, 1251–1253 (1982).

[54] *See* Martin, *supra* note 5, at 190–204.

Whether these interests are defined in constitutional terms or are drawn from the statutory provisions of the Refugee Act of 1980[55] is still a matter of debate.

The next function concerns those aliens detained while awaiting exclusion hearings. This situation also presents interests that distinguish these individuals from initial entry applicants. Although the aliens may have arrived on our shores uninvited, they have obvious interests in a speedy determination of their status and in some freedom of movement while awaiting decision. The Attorney General has the discretion to parole or detain people in this situation[56]—an interest in not being detained arbitrarily is worthy of some procedural protection, whether constitutionally or statutorily based.

Another category of detainees with liberty interests are those aliens who have been deemed excludable or deportable, but for whom no receiving country has been found.[57] Here, since exclusion has been decided on, the interest is lower than when a hearing is pending. However, detention is a further reduction of liberty that the post-exclusion process does not contemplate.[58] These individuals require adequate assurances that they are being treated fairly concerning the decision to parole pending deportation or exclusion.

The Attorney General makes other discretionary decisions which create less compelling individual interests. The Attorney General may suspend deportation, adjust the status of nonimmigrant aliens, and permit or delay the voluntary departure of deportable aliens.[59] These decisions have traditionally been discretionary and largely devoid of procedural protections. But recent attention to the exercise of discretion has raised the possibility that individual interests are at stake. For example, the Attorney General permits some aliens to leave voluntarily rather than be deported and permits others to remain in this country indefinitely even though their deportability is uncontested.[60] These discretionary processes may create interests that are worthy of some procedural recognition in others similarly situated. Comparable interests also emerge in the suspension of deportation. In the adjustment of status determination some aliens who have received asylum or other nonpermanent status may become permanent resident aliens. Here the individual interests are of lesser weight, since deportation does not result from a denial of adjustment.[61]

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[55] Pub. L. No. 96-212, 94 Stat. 102 (1980).

[56] 8 U.S.C. § 1252(a) (1982). While this policy has been primarily applied to excluded Haitians, it applies to others awaiting exclusion hearings, such as Iranians, Afghans, etc. Recently the Attorney General reversed prior policy and decided not to parole individuals pending an exclusion decision. *See* Jean v. Nelson, 711 F.2d 1455, 1469–72 (11th Cir. 1983), *rev'd*, 727 F.2d 957 (11th Cir. 1984) (en banc).

[57] Aliens can be excluded because of their prior criminal records. *See* 8 U.S.C. § 1182(a)(9)–(10) (1982). This was the case with the Mariel boat people from Cuba who were found to have criminal records.

[58] Concerning the Mariel Cubans who had been released from prisons in Cuba, however, one could argue that their interests in being released from detention are minimal, since their only "injury" is being transferred from Cuban to United States prisons—possibly not a deprivation at all. *See generally* Fernandez-Roque v. Smith, 567 F. Supp. 1115 (N.D. Ga. 1983).

[59] 8 U.S.C. § 1254 (1982).

These discretionary determinations suggest a descending order of individual interests. They seem to call for some check on potentially arbitrary government action, although not at the level one would expect for the weightier interests described in the other functions.

B. *Valuation of Governmental Interests*

The governmental interests in the processes surrounding immigration encompass complex concerns. In any mass justice situation there is an overriding interest in efficient and effective decisionmaking. As in the Social Security disability setting[62] this interest demands a process that meets minimum due process mandates without encouraging unnecessary delays or complications. Yet where the disability system values participant satisfaction as highly as efficiency and accuracy,[63] the immigration process seems more concerned with deterrence of illegal entrants than with satisfying those permitted to enter.

This difference in values acknowledges the tough-minded attitude we have continually taken toward those desiring to enter our country[64] and reflects the Court's repeated assertion that newcomers desiring entry are supplicants who seek privileges rather than claimants who exercise rights. As our immigration process adjusts to the increasing demands placed upon it, the deterrence value cannot be overlooked.

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[60] This practice has been challenged because the Attorney General appears to favor the applications of Poles over those of Salvadorans. *See* Wash. Post, June 16, 1983, at A1, col 5. However, the practice may be changing. *See* N.Y. Times, Sept. 22, 1983, at A3, col. 1.

[61] One answer to any claim for procedural checks on the exercise of discretion in these matters is that if deportation ensues, the protections of that process will be available. What this response fails to acknowledge, however, is that a favorable discretionary decision is a very valuable advantage, since it renders the deportation process unnecessary.

[62] *See generally* J. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983).

[63] *Id.* at 132–44 (defining a "dignitary interest").

[64] This does not mean we lack humanitarianism. The United States' record on immigration and asylum compares favorably with all other nations. *See* Teitelbaum, *Right versus Right: Immigration and Refugee Policy in the United States*, 59 FOREIGN AFF. 21, 24 (1980) (estimating that the U.S. accepts twice as many refugees and immigrants as the rest of the world combined).

At the same time, pressures toward leniency contained in congressional declarations like the Refugee Act of 1980[65] cannot be ignored. The humanitarian goals of that legislation must be reconciled with the strict legal limits of traditional immigration quotas. This clash of values—exemplified, as we have seen,[66] by the pressures caused by massive illegal immigration and requests for asylum—has a strong impact upon the procedural setting.[67]

However, this turmoil should not mask the government's valid interests in procedures that value both speed and accuracy, and that discourage a continued flow of uninvited opportunists.[68] Currently, over one million undocumented aliens are turned away at our borders annually,[69] and more than 170,000 asylum cases await decision.[70] Numbers of this magnitude can overwhelm the decision system. If unnecessary process or too few deciders and representatives further delay asylum decisions, the consequences will be a massive increase in asylum applicants awaiting parole or detention. The critical issue would become parole versus detention, and the result would be to render asylum decisions by default. If a strict policy of detention is followed, the need to decide cases more quickly—in order to minimize the hardships and system costs of detention—will itself add to the asylum decision burden. If parole becomes the rule, the putative asylum seeker may go underground within the United States.[71] This consequence would render the asylum decision irrelevant and send obvious signals to others seeking to enter our country under the guise of refugee status.

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[65] Pub. L. No. 96-212, 94 Stat. 102 (1980).

[66] The arrival of 125,000 Mariel Cubans in 1980 severely tested the new Refugee Act. *See* Martin, *supra* note 5, at 179–80; Martin, *The Refugee Act of 1980: Its Past and Future*, 1982 MICH. Y.B. INT'L LEGAL STUD. 91, 95.

[67] The treatment of the Haitians' asylum claims is a good example of this tension. *See generally* Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982).

[68] David Martin has emphasized the important government interest in not treating illegal entrants the same, procedurally, as legal immigrants. Martin, *supra* note 5, at 230–34.

[69] In the fiscal year ending September 30, 1983, the apprehension of illegal aliens at the United States-Mexico border for the first time exceeded one million. N.Y. Times, Apr. 8, 1984, at E2, col. 3.

[70] INS asylum adjudications pending before district directors totalled 171,402 as of May 31, 1983. Statistics provided to author by INS. *See also* CONGRESSIONAL RESEARCH SERV., ISSUE BRIEF NO. IB83119, at 8-9 (Aug. 17, 1983).

[71] If this occurs, the debate over procedures would become a meaningless exercise. Consider, for example, the situation in Landon v. Plasencia, 459 U.S. 21 (1982), in which the plaintiff, whose procedural rights to a deportation versus exclusion hearing were being carefully debated in the courts, presumably has long since vanished within the United States. Telephone interview with Paul Schmidt, Assistant General Counsel, INS (Oct. 1983).

Given these circumstances the governmental interest in efficient process is considerable. In the immigration setting the value of participant satisfaction, a crucial underpinning of our democratic state,[72] is thus counterbalanced by concern about controlling the entry of those not entitled to our society's benefits. Due process analysis must establish the minimum level of procedural protection necessary to satisfy this unique need for both government control and deterrence.

IV. Identification of Procedural Ingredients in Specific Immigration Functions

To isolate the minimum level of procedures that due process analysis requires, each immigration function must be reduced to its procedural components or "ingredients."[73] Subsequently, the importance of the individual ingredients themselves must be evaluated concerning the overall goal of fair process.[74] This approach will allow for the comparison of procedural ingredients in particular functions and permit us to determine three things: what ingredients are in fact available, what additional ingredients need be provided, or what ingredients can be taken away.

Some caveats are in order at the outset. The analysis isolates those ingredients provided by statute, regulation, or court order in the variety of immigration functions that most affect the work of the INS and the Department of Justice. This is not an empirical analysis. Situations undoubtedly exist where actual practice has yielded different results.[75] Moreover, there can be no confidence that supplying the ingredients listed will ensure justice in every case. This is a bloodless analysis; it does not ensure competent or experienced decisionmakers. A good decider, whether or not labeled "impartial," makes better decisions than a poor one; a good advocate can compensate for the loss of cross-examination; and so forth. Finally, this Article does not consider issues prior to hearing, such as motions to suppress evidence,[76] that can undoubtedly affect the outcome of immigration proceedings. The kind of analysis undertaken here is designed only to make a preliminary assessment of the appropriate demands of due process in the immigration setting.

Ten ingredients are chosen for study: timely and adequate notice; confrontation of adverse witnesses; oral presentation of arguments; oral presentation of evidence; cross-examination of adverse witnesses; disclosure to the claimant of opposing evidence; the right to retain an attorney; a determination on the record of the hearing; a statement of reasons for the determination and an indication of evidence relied on; and an impartial decisionmaker.[77] These ingredients were extracted from the Supreme Court's decision in *Goldberg v. Kelly*[78] and represent the maximum procedures that administrative due process mandates. *Goldberg*, like its later counterpart *Mathews v. Eldridge*,[79] required these procedural ingredients in an informal, mass justice setting similar to that of many immigration cases.

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[72] *See generally* J. Mashaw, *supra* note 62.

[73] *See* Verkuil, *supra* note 14, at 750–52.

[74] *See* Friendly, *supra* note 24, at 1279–95.

[75] It is possible that more ingredients may be employed in a particular case than is required by statute, regulation, or court order. *See supra* note 17.

[76] *See* INS v. Lopez-Mendoza, 104 S. Ct. 3479, 3490 (1984) (exclusionary rule does not apply to INS); INS v. Delgado, 104 S. Ct. 1758, 1764-65 (1984) (warrants not required in factory search).

The immigration functions selected for study have attracted attention and controversy.[80] These functions are evaluated, by examining their procedural ingredients, in descending order of the importance of individual interests as established above.[81] That order is as follows: denaturalization, deportation, asylum, exclusion, parole/detention, and the discretionary decisions of suspension of deportation, extended voluntary departure, and adjustment of status.

A. *Denaturalization*

Any naturalized citizen can be denaturalized[82] by direct procedural attack upon the decree of naturalization.[83] Thus denaturalization is a judicial process, in contrast to the administrative process applicable to the other functions. The INS and Department of Justice are involved only when they prosecute cases of fraud in the obtaining of naturalized citizenship. In recent years, the most important denaturalization proceedings have been brought against ex-Nazis under special statutory authority.[84]

The procedural ingredients that denaturalization cases provide reflect the highest standards of available process. The ingredients are those provided in a civil trial in the federal district court, but with two variations. First, since the process of attacking the original naturalization decree is an equitable one, no right to a jury is present.[85] Second, the burden of proof in denaturalization proceedings is heavier than in ordinary civil litigation. The government must establish its case by evidence which is clear, unequivocal, and convincing.[86]

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[77] These are the ten "*Goldberg* ingredients." *See* Goldberg v. Kelly, 397 U.S. 254, 267–71 (1970); K. DAVIS, ADMINISTRATIVE LAW § 10:6 (1979). Some commentators have consolidated these into fewer ingredients, *see, e.g.*, B. SCHWARTZ, *supra* note 44, at 203–04, but the assumption is made here that expanding the ingredients will refine the analysis.

[78] 397 U.S. 254 (1970).

[79] 424 U.S. 319 (1976).

[80] This Article does not explore the procedural issues that arise in connection with the usual process of legal entry.

[81] *See supra* notes 41–61 and accompanying text.

[82] Citizens by birth can be subject to expatriation, but that process will not be discussed here.

[83] 8 U.S.C. § 1451 (1982); *see, e.g.*, Knauer v. United States, 328 U.S. 654, 673–74 (1946) (upholding constitutionality of denaturalization proceedings).

[84] 8 U.S.C. § 1451(a) (1982); *see, e.g.*, United States v. Schellong, 717 F.2d 329, 331–34 (7th Cir. 1983) (affirming revocation of citizenship for willful misrepresentation by former concentration camp guard), *cert. denied*, 104 S. Ct. 1002 (1984).

Once a person is denaturalized he or she may be deported only after a separate administrative process. Thus, the denaturalization process provides considerable—if not excessive—procedural protections for those naturalized citizens the government seeks to deport.

B. *Deportation*

Deportation proceedings provide either seven or eight of the ten identified procedural ingredients, depending upon whether the ingredient of decider impartiality is satisfied by the institutionally controlled immigration judge.[87] The two ingredients missing are the right to confront adverse witnesses and the right to present oral argument.

Regulations that contemplate the use of depositions where testimony is "essential" and where the witness is not reasonably available effectively deny the right to confrontation.[88] Despite the denial of this right, the deposition process preserves cross-examination,[89] and recent cases have employed the cross-examination ingredient to forbid the use of adverse witness affidavits to contradict the alien's testimony if such a use would be fundamentally unfair.[90] The onerous effect of losing the confrontation right therefore is ameliorated.[91]

The other ingredient denied in deportation cases is the right to oral argument. The regulations provide[92] and the courts have held[93] that where no facts are at issue deportation cases can be decided on the merits without the benefit of oral argument. Since about eighty percent of deportation cases are so decided,[94] this rule amounts to abridging an ingredient traditionally available to civil litigants.[95] However, a potentially large savings in administrative time is also possible.

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[85] *See* U.S. CONST. amend. VII; FED. R. CIV. P. 38.

[86] *See* Schneiderman v. United States, 320 U.S. 118, 125 (1943).

[87] The issue of decider impartiality, which is common to each of the immigration functions under study, will be analyzed below. *See infra* notes 172–74 and accompanying text.

[88] 8 C.F.R. § 242.14(e) (1984).

[89] *See* Bhagat Singh v. McGrath, 104 F.2d 122, 123 (9th Cir.), *cert. dismissed sub nom.* Bhagat Singh v. Haff, 308 U.S. 629 (1940).

[90] *See, e.g.*, Baliza v. INS, 709 F.2d 1231, 1234 (9th Cir. 1983).

[91] The remaining issue is whether the policy of administrative efficiency allows immigration judges more flexibility in denying the opportunity for live witness confrontation, by use of depositions, than federal or state judges have in civil trials. *See* FED. R. EVID. 804; FED. R. CIV. P. 32.

[92] 8 C.F.R. § 242.16(b) (1984).

In addition, two of the other ingredients that deportation proceedings provide have limitations worth noting. First, the right to retain an attorney attaches only at the hearing itself, not during preliminary investigations.[96] Thus, it is possible for an alien to make damaging statements at an early stage in the proceedings, and these statements can be introduced against him at the deportation hearing.[97] Since *Miranda* warnings are not required,[98] the consequences of failing to advise the alien of his right to an attorney at the outset can be severe. Second, the right to a statement of the decider's reasons attaches only if the deportability issue is not decided on the pleadings.[99]

C. *Asylum*

Two methods exist for raising asylum claims. Under the Refugee Act of 1980, an alien seeking to enter the United States either at a consular office abroad or before a special inquiry officer at our border may claim asylum.[100] In addition, an alien can make an asylum claim after deportation or exclusion proceedings have commenced before an immigration judge.[101]

Neither process for obtaining asylum contains as many procedural ingredients as does deportation. That is, neither process offers either confrontation or oral argument, the two ingredients missing in deportation; both forms of asylum also pose further limits on other procedural ingredients. In fact, the only ingredients assured all applicants for asylum are notice and the right to retain an attorney.[102]

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[93] *See, e.g.*, Yap v. INS, 318 F.2d 839, 841 (7th Cir. 1963).

[94] *See* C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE § 5.7a (1984).

[95] Argument on motions is a practice that in the federal courts is probably on the decline.

[96] The regulations provide that an alien must be advised of his right to counsel upon personal delivery of an order to show cause. 8 C.F.R. § 242.1(c) (1984).

[97] *See* Nason v. INS, 370 F.2d 865, 868–69 (2d Cir. 1967).

[98] *See Developments Note*, *supra* note 1, at 1390–93. *But see* Orantes-Hernandez v. Smith, 541 F. Supp. 351, 381 (C.D. Cal. 1982) (requiring notice to Salvadoran refugees of right to counsel).

[99] 8 C.F.R. § 242.18(a)–(b) (1984). If about eighty percent of the cases are decided on the pleadings, *see supra* note 94 and accompanying text, this limits the INS's decision writing workload at some cost to those who have only legal claims to make. One can only expect that traditional standards of judicial review would call into question a decision made without adequate reasoning to accompany it. *See infra* notes 250–52 and accompanying text.

[100] 8 U.S.C. § 1158(a) (1982). An alien can proceed under this section to apply for asylum if "physically present in the United States or at a land border or port of entry, irrespective of such alien's status." *Id.*

[101] *Id.* § 1253(h).

The primary reason asylum cases are procedurally limited is that they rely heavily upon a State Department opinion as to whether the country applied from reasonably puts the applicant in fear of persecution for religious, political, or social reasons.[103] In making this determination the immigration judge interviews the applicant and receives a report on the application's merits from the State Department Bureau of Human Rights and Humanitarian Affairs (BHRHA). The applicant may see the report but there is no provision for confronting or cross-examining its authors.[104] The applicant is not guaranteed oral argument, although he may orally present evidence if his asylum claim is a part of a deportation or exclusion proceeding.[105] The applicant does have a limited right to disclosure of opposing evidence in that the BHRHA opinion is made a part of the record, but he does not have this right if the opinion is based on classified information.[106] Similarly, a decision on the record is given only insofar as the BHRHA opinion does not contain classified information. The statement of reasons ingredient is also limited to the unclassified aspects of the BHRHA report.

D. *Exclusion*

Exclusion proceedings can be conducted in a variety of settings. In effect, consular officers abroad exclude aliens when they deny visas.[107] The consul's decision is virtually final and without any effective procedural ingredients, save review by his superior.[108] Consular discretion in these circumstances is unchecked, either administratively or judicially.[109]

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[102] These ingredients are assured to Salvadorans only by judicial intervention. *See* Orantes-Hernandez v. Smith, 541 F. Supp. 351, 374–76 (C.D. Cal. 1982) (extending 8 C.F.R. § 208.1 (1984) to provide notice of right to apply for asylum under Refugee Act); Nunez v. Boldin, 537 F. Supp. 578, 585–86 (S.D. Tex.) (extending 8 C.F.R. § 242.17(c) (1984) to provide notice of right to apply for asylum to those in detention facilities), *appeal dismissed*, 692 F.2d 755 (5th Cir. 1982). The right to retain an attorney is not mentioned in the Refugee Act or regulations, but the courts have assumed that such a right exists. Orantes-Hernandez v Smith, 541 F. Supp. 351, 381 (C.D. Cal. 1982); *see also* Haitian Refugee Center v. Civiletti, 503 F. Supp. 442, 526 (S.D. Fla. 1980) (accelerated processing of asylum claims denies adequate representation), *aff'd as modified sub nom*. Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982). The right to retain counsel is provided by statute in deportation or exclusion proceedings. 8 U.S.C. § 1362 (1976). *See generally* Note, *Protecting Aliens from Persecution without Overloading the INS: Should Illegal Aliens Receive Notice of the Right to Apply for Asylum?*, 69 VA. L. REV. 901 (1983).

[103] 8 C.F.R. §§ 208.7, 208.8(d), 208.10(b) (1984). *See generally* Note, *The Right of Asylum Under United States Immigration Law*, 33 U. FLA. L. REV. 539 (1981).

[104] 8 C.F.R. §§ 208.8(d), 208.10(d) (1984).

[105] *See supra* text accompanying notes 92–95; *infra* text accompanying notes 112, 115–16.

[106] *See* 8 C.F.R. § 208.8(d) (1984).

Immigration officers at United States borders also conduct exclusion proceedings.[110] In this context, the right to procedures depends upon two important factors: whether the alien has made an entry into the United States, or whether the alien is seeking to reenter the United States.[111] If entry has occurred, then deportation procedures apply with all of the procedural ingredients described above.[112] If there has been no entry, the procedural ingredients are more limited. Notice is not required in any meaningful sense; rather, the applicant need only be informed of the issues confronting him at some point in the hearings and be given a reasonable opportunity to meet them.[113] The right to confrontation is not required, although depositions may be ordered if evidence is essential.[114] Oral argument is not provided for by statute or regulation.[115] Oral presentation of evidence is provided for,[116] as is a limited right of cross-examination[117] and disclosure of opposing evidence.[118] The right to retain counsel, to a determination on the record, and to a statement of reasons are protected, much as they are in deportation cases.[119]

If the alien is seeking to reenter the United States, the recent case of *Landon v. Plasencia*[120] suggests that due process might require adequate notice, the procedural ingredient usually missing in exclusion cases.[121] If notice were required, fewer features would distinguish exclusion procedures from those available in deportation.[122]

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[107] *See Developments Note, supra* note 1, at 1359–62.

[108] 22 C.F.R. §§ 41.130(b), 42.130(b) (1982).

[109] *See* Study, *Consular Discretion in the Immigrant Visa-Issuing Process*, 16 San Diego L. Rev. 87 (1978).

[110] *See* 8 U.S.C. § 1225 (1982).

[111] "Entry" itself is a much litigated concept. *See Developments Note*, *supra* note 1, at 1362–63.

[112] *See supra* notes 87–99 and accompanying text.

[113] *See In re* Salazar, 17 I & N (Dec.) 167, 169 (BIA 1979).

[114] 8 C.F.R. § 242.14(e) (1984).

[115] *See* 8 U.S.C. § 1226 (1982); 8 C.F.R. § 236.2(a) (1984).

[116] 8 C.F.R. § 236.3(2) (1984).

[117] *Id.* § 236.2(a).

[118] *See id.* § 236.2(a).

[119] *See id.* §§ 236.2(a), 236.5(a).

[120] 459 U.S. 21 (1982).

[121] The notice issue is to be decided on remand to the Ninth Circuit. *Id.* at 37. The court must determine whether thirteen-hour notice of an exclusion hearing is sufficient under the due process clause.

[122] The major distinguishing factor would be burden of proof, as discussed *infra*

E. *Parole/Detention*

Aliens who are awaiting exclusion hearings, or who are determined after hearing to be excludable from the United States, may be detained by the INS or may receive discretionary parole pending the final decision.[123] The policies and requirements governing parole recently have been changed. Following the arrival of the Haitians and Mariel Cubans, the INS, upon direction of the Attorney General, reconsidered its former policy of lenient parole pending final decision and decided to hold those aliens in detention camps. Since the policy to parole had been a matter of INS or Attorney General discretion, there were no procedural statutes or regulations dealing with parole.[124] To provide guidance in the processing of Cuban parole requests, the Attorney General, upon judicial insistence, formulated a Status Review Plan[125] which granted expedited hearings with some of the procedural ingredients identified earlier.[126]

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notes 204–13 and accompanying text. Of course the length of notice mandated by due process could well be shorter than the seven days available in deportation cases.

[123] On arrival in the United States the alien is subject to detention at the discretion of the examining immigration officer pending an exclusion determination. 8 U.S.C. § 1225(b) (1982); 8 C.F.R. § 235.3(b)–(c) (1984). In those instances where exclusion is determined adversely to the alien, he may again be detained if "the Attorney General, in an individual case, in his discretion, concludes that immediate deportation is not practicable or proper." 8 U.S.C. § 1227(a)(1) (1982); *see also* 8 C.F.R. § 237.1 (1984). The Attorney General may parole aliens detained under these sections. 8 U.S.C. § 1182(d)(5)(A) (1982). The statute is silent, however, on the procedure due to an alien in a detention hearing to determine eligibility for parole.

[124] The regulations discussed considerations relevant to the parole decision, *see* 8 C.F.R. § 212.5 (1984), but offered no procedural requirements. The only review of detention came in the form of a bond hearing before an immigration judge. *See id.* § 212.5(c). The district director set the undertaking in light of relevant factors (e.g., family and community ties) and his decision was reviewable by an immigration judge on those grounds.

[125] U.S. DEP'T OF JUSTICE, STATUS REVIEW PLAN AND PROCEDURES (1981), *discussed in* Fernandez-Roque v. Smith, 567 F. Supp. 1115, 1129–32 (N.D. Ga. 1983) [hereinafter cited as STATUS REVIEW PLAN].

[126] The procedural ingredients available under the Status Review Plan are as follows: the detainee initially has his file reviewed by a Panel (two Department of Justice employees) which makes a recommendation to the INS Commissioner. The file typically contains INS exclusion hearing documents, reports on the detainee's behavior while in detention, psychological reports of the Public Health Service, and any previous decisions regarding parole. If the Panel recommends against parole, the detainee is entitled to a personal interview before the Panel on seven days' notice; at that time he may bring a representative, have access to the documents initially reviewed by the Panel, and assert the right to submit information orally or in writing. The burden of proof is upon the alien to show continued nonviolent behavior. If the Panel rules against the alien it must provide him or her with a statement of reasons. Under the procedural ingredients identified herein, the Status Review Plan provides five ingredients—notice, oral argument, disclosure of opposing evidence, right to retain an attorney, and statement of reasons. STATUS REVIEW PLAN, *supra* note 125. The Plan has been held to comport with due process requirements in Palma v.

This Plan was held procedurally inadequate in *Fernandez-Roque v. Smith*.[127] The decision, currently stayed while on appeal to the Eleventh Circuit, mandates new procedural regulations under the due process clause for the INS in parole/detention situations. The district court's procedural ingredients reflect a level of due process protection not seen since *Goldberg v. Kelly*. Whatever the fate of the case on appeal,[128] it serves as a model for establishing the maximum process due in immigration cases.

Fernandez-Roque writes a notice requirement of fifteen days into the process.[129] Although silent on the right to oral argument, it assures the right to orally present evidence, including the right to compel attendance of witnesses.[130] Cross-examination is guaranteed,[131] as is disclosure of opposing evidence.[132] It secures the right to counsel by providing aliens with attorneys appointed at government expense.[133] It also provides decision on the record and statement of reasons.[134] Finally, concerning the impartial decisionmaker requirement, the court disqualified those hearing officers who as part of the Attorney General's Status Review Plan had prior access to the detainee's file.[135]

The decision reflects a commitment to procedure that not only exceeds that which the Supreme Court recently declared to be adequate in comparable settings,[136] but also that which had

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Verdeyen, 676 F.2d 100, 103–05 (4th Cir. 1982). *But see* Fernandez-Roque v. Smith, 567 F. Supp. 1115, 1129–32 (N.D. Ga. 1983).

[127] 567 F. Supp. 1115 (N.D. Ga. 1983).

[128] The Eleventh Circuit's en banc decision reversing the due process aspects of the panel decision in *Jean v. Nelson* leaves little doubt as to how it will rule on the *Fernandez-Roque* appeal. *See* Jean v. Nelson, 727 F.2d 957 (11th Cir. 1984) (en banc).

[129] 567 F. Supp. at 1135. The notice must contain "*all* information on which the government intends to rely to support a detention decision," along with "written notice of factual allegations and [a] summary of expert testimony." *Id*. (emphasis in original).

[130] *Id*. This right is subject to the qualifications of Wolff v. McDonnell, 418 U.S. 539, 566–67 (1974) concerning the "overriding needs of prison discipline." *Fernandez-Roque*, 567 F. Supp. at 1135.

[131] 567 F. Supp. at 1136. This is also subject to the *Wolff v. McDonnell* limitations discussed *supra* note 130.

[132] 567 F. Supp. at 1136.

[133] *Id*. at 1138.

[134] *Id*. at 1136. The court also shifts the burden of proof from the detainee, where it was placed under the Status Review Plan, *see supra* note 126, to the government, which must show by clear and convincing evidence that the detainee if released will abscond or pose a threat to national security or life and property. 567 F. Supp. at 1139–40.

[135] 567 F. Supp. at 1136.

[136] The Court analyzed Morrissey v. Brewer, 408 U.S. 471 (1972), largely to demonstrate why the procedures provided there on parole revocation hearings are inadequate in the detention process. Its reasoning turned primarily on the fact that

been required by *Goldberg* itself.[137] This level of commitment to procedural ingredients would seriously jeopardize much of the informal process currently employed in immigration cases.

F. *Discretionary Decisions*

In some situations the INS and the Attorney General can ameliorate the harsh effects of deportation or exclusion, even though no claim for asylum is asserted or established. These decisions are made with wide discretion and with few procedural ingredients provided by statute or regulation.[138]

The INS is authorized to suspend deportation of otherwise deportable aliens.[139] To receive this relief an alien must establish "exceptional and extremely unusual hardship" to herself or her immediate family[140] and ten years' continuous physical presence.[141] An alien may raise the suspension issue during the deportation proceeding, but she has no right to confrontation or to a determination on the record since confidential files can be used by the immigration judge.[142]

The INS also has authority to adjust the status of deportable aliens, nonimmigrant aliens, or aliens seeking asylum to that of permanent resident.[143] Adjustment of status determinations may be made initially by the district director, from whose decision no appeal lies, or by the immigration judge in the course of deportation proceedings.

A discretionary determination that has attracted much attention recently is the INS's power to extend the date of voluntary departure of otherwise deportable aliens.[144] The alien files a re-

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there is no underlying criminal trial in the detention setting to support unequivocally the initial propriety of incarceration. *Fernandez-Roque*, 567 F. Supp. at 1131–32.

[137] *Goldberg* did not require appointed counsel, and it limited notice of hearing to seven days, not fifteen. *See* Goldberg v. Kelly, 397 U.S. 254, 278–79 (1970) (Black, J., dissenting).

[138] *See generally* Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293 (1972).

[139] *See* 8 C.F.R. § 244 (1984).

[140] 8 U.S.C. § 1254(a)(2) (1982); *see* INS v. Wang, 450 U.S. 139, 145–46 (1981) (construction of statutory term "extreme hardship" within discretion of INS).

[141] 8 U.S.C. § 1254(a)(2) (1982); *see* INS v. Phinpathya, 104 S. Ct. 584, 590–91 (1984) (strictly construing the continuous presence requirement).

[142] *See* Jay v. Boyd, 351 U.S. 345, 352–56 (1956). Until INS v. Chadha, 103 S. Ct. 2764 (1983), Congress spoke the final word on suspension cases through exercise of a legislative veto over the Attorney General's grant of suspension. The Attorney General's *denial* of suspension is subject to limited procedural review. *See* McGrath v. Kristensen, 340 U.S. 162, 168–71 (1950).

[143] *See* 8 U.S.C. § 1254 (1982); 8 C.F.R. § 245 (1984). *See generally* Sofaer, *The Change-of-Status Adjudication: A Case Study of the Informal Agency Process*, 1 J. LEGAL STUD. 349 (1972).

[144] Aliens who are subject to deportation may be permitted to depart voluntarily. *See* 8 U.S.C. § 1254(e) (1982). In fact, this is an option chosen by over one million

quest for deferred action with the district director of INS.[145] The district director provides a written decision, which need not be on the record and from which no appeal is provided.[146] The courts generally have upheld these decisions as an exercise of unreviewable prosecutorial discretion,[147] but discrimination in exercising these determinations has recently raised anew the reviewability question.[148]

These discretionary determinations do not offer more than four or five of the procedural ingredients under consideration;[149] they are the least procedurally adequate of INS decisions. However, since they also may be the decisions with the least serious individual interests at stake, this paucity of procedural ingredients may be appropriate.[150]

V. Assessment of Procedural Ingredients in Immigration Functions

The immigration functions described above[151] present a wide variety of procedural ingredients, ranging from denaturalization, which contains the procedures regularly available in a federal civil trial, to discretionary proceedings with minimum procedures.

Mexican nationals who are apprehended at the border each year. Statistics provided to author by INS legal staff.

Aliens also may have their voluntary departure extended at the Attorney General's discretion for periods of up to one year when conditions in their countries are destabilized by civil war or invasion. These extensions are usually granted to all nationals of the country involved upon State Department recommendation. Of course, not all countries whose nationals desire such treatment are so recognized. *See* A. Liebowitz, Immigration Law and Refugee Policy § 5.05 (1983).

[145] 8 C.F.R. § 244.1 (1984).

[146] *Id.* § 244.2; *see* 1 INS Code, Operations Instructions, Regulations and Interpretations § 103.1(m) (1982) [hereinafter cited as INS Operations Instructions].

[147] *See* Nicholas v. INS, 590 F.2d 802, 807–08 (9th Cir. 1979); Soon Bok Yoon v. INS, 538 F.2d 1211, 1213 (5th Cir. 1976).

[148] Hotel & Restaurant Employees Union, Local 25 v. Smith, 563 F. Supp. 157, 163 (D.D.C. 1983) (refusal to extend departure of Salvadorans subject to review as denial of equal protection; motion to dismiss denied).

[149] Putting aside the question of decider impartiality, none of the discretionary determinations provide for notice or confrontation. Suspension decisions alone provide for oral argument, and suspension and adjustment of status provide for oral presentation of evidence. None of the three discretionary decisions provides for cross-examination; two of the three (suspension excepted) provide for disclosure of opposing evidence. All three provide for the right to retain an attorney, but only the extended voluntary departure decision provides for determination on the record. Finally, all three provide for a statement of reasons. *See generally* 8 C.F.R. §§ 242, 244–245 (1984).

[150] Of course, exercise of these discretionary powers in a controversial way easily could lead courts to force ingredients upon the agency by fiat, as has occurred in the parole/detention situation.

[151] *See supra* notes 73–150 and accompanying text.

This variation is summarized in the table below, "plus" indicating that an ingredient is present and "minus" that it is not.

TABLE

FUNCTIONS

INGREDIENTS	Denaturalization	Deportation	Asylum	Exclusion	Parole/ Detention[152]	Discretionary Decisions[153]
Notice	+	+	–[154]	–	+	+
Confrontation	+	–	–	–	–	–
Oral Argument	+	–	–	–	–	–
Oral Evidence	+	+	+[155]	+	–	–
Cross-Examination	+	+	–	+	–	–
Disclosure of Opposing Evidence	+	+	+	+	+	+
Retaining Attorney	+	+	+	+	+	+
Determination on Record	+	+	–	+	–	–
Statement of Reasons	+	+[156]	–	+	+	+
Impartial Decider	+[157]	+[158]	+[159]	+	+	+

A. *The Relationship Between Function and Procedures*

The next stage of the analysis is to evaluate the immigration functions and procedures previously described. Before doing so, some consideration should be given to the value of procedures in the immigration setting. It is a fair assumption that procedural ingredients are particularly valuable to the aliens who seek to invoke them. First, immigration determinations are inherently subjective and individualized—questions such as whether a person is of *good* character, in *fear* of persecution, *intending* to leave the country permanently. Second, possible language and cultural differences may make aliens less able to express themselves in writing and thus more in need of representation and oral proceedings.

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[152] Provided by the Status Review Plan for Cubans. *See supra* note 126.

[153] A combination of the three separate determinations discussed above. *See supra* notes 138–50 and accompanying text.

[154] Provided for in Orantes-Hernandez v. Smith, 541 F. Supp. 351 (C.D. Cal. 1982).

[155] Not provided for in proceedings under the Refugee Act, *see* 8 U.S.C. § 1158 (1982).

[156] If not decided on the pleadings.

[157] A federal district judge.

[158] *See infra* notes 172–74 and accompanying text.

[159] Not provided for in asylum applications made abroad. There, the consular office is the decisionmaker and no review is provided.

As the Supreme Court stated in *Mathews v. Eldridge*,[160] the probable value of additional procedural safeguards is an element of the due process balancing test.[161] Since the conditions present in *Eldridge* concerning written medical reports' reliability[162] are not found in immigration cases, the value of additional procedural ingredients in the immigration setting is likely to be significant.[163] Under *Eldridge* this probable value must be weighed with the other factors of individual and governmental interests to determine whether a particular ingredient is necessary for due process.

1. Denaturalization

Denaturalization offers the maximum process available—a civil trial in the federal district court. Since denaturalization deprives an individual of the fundamental right of citizenship and invites deprivation of a liberty interest through subsequent deportation, it is a function that in terms of administrative adjudication deserves to be placed "off the scale." In denaturalization, the individual and governmental interests in maximum process appear to coincide.[164] A federal district court trial, conducted by a judge of unquestioned impartiality who administers a heavy burden of proof against the government, may be a constitutional necessity.[165]

But once the denaturalization issue has been decided by the district court, and all appeals have been exhausted, a second hearing before an immigration judge on deportation may be a procedural luxury. Government attorneys prosecuting the denaturalization of Nazi war criminals have so argued,[166] proposing a more streamlined procedure. If in fact the issues heard in deportation proceedings are identical to those resolved in the denaturalization proceeding,[167] there seems little reason from a due process viewpoint to add the second hearing. Assuming that the federal district court provides the maximum process available, to review matters a second time in a procedurally less elaborate deportation hearing seems unnecessary. The government could request deportation in its prayer for relief after the court decides the denaturalization issue; appeals on both denaturalization and deportation could then be taken at once.

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[160] 424 U.S. 319 (1976).

[161] *Id.* at 335, 347–48.

[162] *Id.* at 343–44; *see also* Richardson v. Perales, 402 U.S. 389, 402–06 (1971).

[163] Two conditions must be fulfilled before the conditions present in *Eldridge* need be involved. First, factual issues must be presented. Approximately eighty percent of deportation cases apparently do not present factual issues, since they are decided on the pleadings. *See supra* note 94 and accompanying text. Second, the issues must not be susceptible to generic resolution outside the individual hearing context. Arguably, this is the case with State Department evaluations of human rights conditions in the countries from which aliens seek asylum. If generic issues do exist, however, their resolution might best be facilitated by the rulemaking process rather than by no process at all. *See infra* notes 192–200 and accompanying text.

[164] The individual interest in citizenship is obviously of the highest order, as is the governmental interest in sponsorship. Factors that render the governmental interest at variance with the individual interest, such as speed and deterrence, do not operate in the denaturalization context. These are occasional and inherently individualized proceedings. There is little need to qualify the government's interest in process with efficiency factors that are presented in the mass justice situations.

[165] Congress could place denaturalization proceedings within the administrative structure of INS, but if it did so and at the same time lightened the government's burden of proof, due process issues would surely arise. *See* Schneiderman v. United States, 320 U.S. 118, 124–25 (1943); *see also infra* notes 211–13 and accompanying text.

It may be, however, that a redundant process best expresses the governmental concern with the seriousness of the issues at stake, whether or not the due process clause strictly mandates such repetition. Moreover, basing a decision to collapse the process into one proceeding upon the Nazi cases could distort the outcome in other situations. There are few advocates of elaborate process for suspected Nazis, and although the potential universe of such cases is currently large enough to support an efficiency argument,[168] not all cases are so crucial. Any change in process presumably would apply to the less critical cases, in which the governmental and public interest in efficient process is less clear. The most that can be said is that an expedited one-decision process would facilitate decisionmaking and would not violate due process or other constitutional guarantees so long as it is evenly applied. But whether it is a desirable policy is a question inevitably larger than the context in which it arises.

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[166] Allan K. Ryan, Chief of the Justice Department's Office of Special Investigations, has argued for

> [s]ome way to combine the two separate legal proceedings we now have to pursue because we're essentially talking about the same issue. One has to go through federal court, one has to go through an administrative court. They're both on the same evidence. If there were some way to combine them into one fair trial with appeal rights, etc.[,] that would save a lot of time and taxpayer money, while still being fair.

Wash. Times, Aug. 30, 1983, at 3C, col. 1.

[167] The only new issue which might arise in deportation would be the question of suspension of deportation or asylum, neither of which is available to a former war criminal. *See* Artukovic v. INS, 693 F.2d 894, 897 (9th Cir. 1982) (upholding statute forbidding further stays of deportation for alleged Nazi war criminals over constitutional challenges based on bill of attainder and ex post facto clauses).

[168] The number of Nazis living in the United States has been estimated from 200 to a few thousand. *See* Wash. Times, Aug. 30, 1983, at 3C, col. 1. That is not an inconsiderable potential caseload for a small office to prosecute, but of course the passage of time will reduce that number dramatically.

2. Deportation

Decisions concerning deportation and the other functions discussed below, unlike denaturalization, are made initially in administrative proceedings. That fact alone is not, of course, determinative of the due process issue.[169] The critical *Goldberg/Eldridge* inquiry is whether the administrative hearing supplies adequate procedural ingredients to satisfy due process.

The deportation hearing encompasses all of the ingredients isolated above except confrontation of adverse witnesses, oral argument, and, possibly, decider impartiality. Confrontation of adverse witnesses is denied in the sense that depositions may be used freely to eliminate the need for live witnesses at trial. Since the depositions themselves usually provide for confrontation, and since federal and state courts often permit the use of depositions,[170] this denial would not seem to violate due process.

Oral argument, although lacking, is not a procedural ingredient that due process considerations require.[171] This is especially true when other aspects of oral presentation, such as cross-examination and presentation of witnesses, are present.

Neither is the impartiality issue of due process magnitude. *Goldberg* narrowed the impartiality inquiry to the decider's involvement in the particular case, therefore permitting officials at the same organizational level to act as both "prosecutor" and "judge."[172] Moreover, the Department of Justice recently enhanced the impartiality of immigration judges by separating them and the Bureau of Immigration Appeals from the direct control of the INS.[173] While further insulation might be desirable,[174] it is extremely unlikely that the Court would find the present relationship to violate procedures mandated by due process.

Consequently it appears that the procedural ingredients deportation cases provide, while not exactly tracking those called for in *Goldberg*, are substantial enough to satisfy the flexible due process analysis of *Eldridge* and subsequent cases. For the purpose of evaluating the ingredients provided by the remaining immigration functions under study, deportation ingredients may serve as a procedural base line. The question becomes whether satisfactory balancing reasons explain why the procedural ingredients in other functions do not meet those found in deportation.

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[169] We have long ago put to rest the proposition that only the judicial process is constitutionally satisfactory for resolving liberty or property interests. *See* Verkuil, *The Emerging Concept of Administrative Procedure*, 78 COLUM. L. REV. 258 (1978); *cf. supra* note 165.

[170] *See supra* notes 91, 95 and accompanying text.

[171] *See* K. DAVIS, *supra* note 77, § 10:9.

[172] *See* Goldberg v. Kelly, 397 U.S. 254, 271 (1970). This narrow view of decider impartiality has been applied by the Court in other contexts. *See* Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482, 489–94 (1976) (disciplinary hearings for striking teachers); Withrow v. Larkin, 421 U.S. 35, 46–55 (1975) (disciplinary hearing for physician); Arnett v. Kennedy, 416 U.S. 134, 170 n.5 (1974) (Powell, J., concurring) (discharge of government employee).

[173] *See Reorganization of INS,* INS REP., Spring 1983, at 13, 13–14.

[174] *See* H.R. 1510, 98th Cong., 1st Sess. § 122(a) (1983) (requiring ALJ's to decide immigration cases and making an independent United States Immigration Board within the Department of Justice); Levinson, *A Specialized Court for Immigration Hearings and Appeals*, 56 NOTRE DAME LAW. 644 (1981).

3. Asylum

The asylum process contains fewer procedural ingredients than deportation. This difference does not automatically render the asylum process deficient, however, since the individual and governmental interests in asylum differ from those in deportation cases. Individual interests at stake in asylum are arguably less strong; the governmental interest in efficiency and deterrence is heightened in an era of mass asylum applications. Nevertheless, the ingredients, both present and absent, bear close scrutiny.

One discrepancy is distinctive to asylum. The right to present oral evidence is limited to asylum issues raised in the context of deportation proceedings, and is therefore unavailable as a matter of right in Refugee Act proceedings commenced before consular officers overseas.[175] Congress is certainly free to make distinctions based upon the individual interests involved,[176] but it is not clear that it has done so in this situation. To argue that those fleeing persecution have less at stake than those already here who are trying to avoid return to a country where they may be persecuted,[177] ignores the humanitarian goals Congress aspired to in the Refugee Act.[178] On balance, procedural ingredients available to those seeking asylum ought to be the same whether or not the person is in deportation proceedings. This is especially true in consular offices abroad where the person denied asylum will not have the opportunity to test that decision in subsequent deportation or exclusion hearings.

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[175] In Refugee Act proceedings in the United States, an alien may present oral evidence but he must do so before INS district directors rather than before immigration judges. Therefore, those proceedings lack a different ingredient—impartiality.

[176] Congress has distinguished between aliens subject to exclusion and resident aliens by the length of detention: no limit for the former, six-month limit for the latter. 8 U.S.C. §§ 1227(a), 1252(c) (1982). This distinction has been upheld as having a rational basis. *See* Fernandez-Roque v. Smith, 567 F. Supp. 1115, 1124 (N.D. Ga. 1983) ("A deportable alien . . . will often have ties to the community in which he resides, in the form of family and/or property, that militate against the need for long term detention if immediate deportation is not possible."); *see also* Martin, *supra* note 5, at 230–34. Whether this kind of distinction ought to apply to the procedural ingredients available in asylum determinations is of course another matter.

[177] The person subject to deportation has already had his greater interest in procedures acknowledged by virtue of the deportation process itself. In many cases deportation also permits him to choose the country to which he seeks to be deported. There is no need to further protect his interests by giving him a greater number of procedural ingredients in the asylum aspects of his case.

[178] *See* H.R. Rep. No. 781, 96th Cong., 2d Sess. (1980); S. Rep. No. 256, 96th Cong., 1st Sess. (1979). In INS v. Stevic, 104 S. Ct. 2489, 2498 (1984), the Court

The other missing, or, more accurately, compromised ingredients are notice, confrontation, oral argument, cross-examination, determination on the record, statement of reasons, and to a limited extent, impartial decider. These ingredients are compromised for two reasons. Notice is compromised by the government's reluctance to advertise asylum broadly because it can be a fertile tool for delay.[179] The other ingredients are compromised principally because the issue upon which most asylum cases turn—the human rights situation in the country from which the person seeking asylum flees—is controlled by a State Department which does not submit freely to the administrative process.

The notice issue is not easily resolved. Some courts have ordered the INS to make aliens generally aware of the right to apply for asylum,[180] but others have resisted a broad application of this ingredient.[181] The tension here is between individual rights and effective administration. If automatic notice of asylum is provided, those aliens using it as a delay technique may frustrate the ability to be heard of those who truly fear persecution. One commentator has balanced the interests at stake and concludes that due process notice requirements can be satisfied by something short of generalized notice to aliens in all circumstances.[182] She finds adequate the congressional and administrative suggestion that notice of asylum be provided only to those aliens who, when interviewed, show some initial fear of return to the country from which they departed.[183] Her solution is to let the INS identify

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noted: "The principal motivation for the enactment of the Refugee Act of 1980 was a desire to revise and regularize the procedures governing the admission of refugees into the United States."

[179] The concern is that many aliens who now accept voluntary departure—over one million annually—will be encouraged, if automatically notified of asylum, to use that process in order to delay. *See* Note, *supra* note 102, at 903–04. As a result, those truly deserving asylum could get "lost in the crowd." *Id.* at 930.

[180] *See* Orantes-Hernandez v. Smith, 541 F. Supp. 351, 376–78 (C.D. Cal. 1982); Nunez v. Boldin, 537 F. Supp. 578, 583–84 (S.D. Tex.), *appeal dismissed*, 692 F.2d 755 (5th Cir. 1982).

[181] *See* Jean v. Nelson, 727 F.2d 957, 981–83 (11th Cir. 1984) (en banc) (majority rejects earlier panel decision assuring notice to asylees as a matter of due process). *See generally United States as a Country of Mass First Asylum: Hearing Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981).

[182] *See* Note, *supra* note 102, at 908–26, *cited with approval in* Jean v. Nelson, 727 F.2d 957, 983 (11th Cir. 1984) (en banc).

[183] Note, *supra* note 102, at 927.

those in fear of persecution, subject to a detached third party's review of the potential INS abuse of this subjective process.[184] This solution reconciles conflicting private and governmental interests, although the use of internal rather than external checks on INS arbitrariness may be the more realistic option.[185]

Concerning the other compromised ingredients, all but oral argument are denied in that asylum decisions may turn on the use of only State Department Bureau of Human Rights and Humanitarian Affairs (BHRHA) opinions. These opinions, while available for review and submitted in evidence, are not subjected to examination themselves.[186] Since many INS asylum decisions use these opinions,[187] denying the right to challenge them effectively compromises the procedural ingredients which ensure confrontation.[188] But so long as an alien seeking asylum is able to rebut the BHRHA opinion, he has received all the informal process that is currently available.[189]

The primary issue in these cases is whether those seeking asylum are doing so because of a well-grounded fear of persecution.[190] The issue's resolution turns on the human rights conditions in the country involved and upon the individual's particular circumstances in that country. The foreign policy implications of such determinations are obvious, but the State Department has been criticized for ignoring humanitarian factors, and suggestions have been made to limit its influence over the INS asylum process.[191]

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[184] Third-party review is to be conducted by the United Nations High Commissioner for Refugees (UNHCR), an office created after World War II to protect refugees. *See* Note, *supra* note 102, at 927–29. *See generally* Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9 (1981). Whether this proposed third-party reviewer is a practical solution is a matter for further study. However, an ombudsman at least could be established within the Department of Justice to ensure that the INS is not abusing its obligation to give notice of asylum procedure to those manifesting a fear of persecution.

[185] Quality control mechanisms can be created within the INS to evaluate the accuracy of district directors' performance. For example, undercover agents posing as seekers of asylum could be employed to check the evenhandedness of individual decisionmakers.

[186] *See* 8 C.F.R. § 208.8(d) (1984).

[187] Immigration officers are directed to seek advisory opinions from the State Department in all cases. *Id.* § 208.7; INS Operations Instructions, *supra* note 146, § 208.7.

[188] See Zamora v. INS, 534 F.2d 1055 (2d Cir. 1976), discussed *infra* notes 192–93 and accompanying text.

[189] *See* Haitian Refugee Center v. Smith, 676 F.2d 1023, 1040 (5th Cir. 1982). The case also requires that notice of the hearing not be so short as to prevent adequate preparation: "[W]hile justice delayed may be justice denied, prompt injustice is not the answer." *Id.* at 1040 n.43.

[190] That is certainly the dominant issue in the Haitian cases, for example. *See id.* at 1040.

Human rights conditions within a country raise issues susceptible to generic resolution. A regime's conduct towards its citizens can be documented from a variety of sources and should not vary much from individual to individual. Thus, one way to enhance individual participation while moderating State Department influence would be to use the rulemaking process to decide generic issues. Judge Friendly suggested as much in his opinion for the court in *Zamora v. INS*[192] when he referred to the proper use of State Department BHRHA opinions as providing legislative facts concerning a country's human rights record, not adjudicative facts concerning the individual asylum claimant's relationship to the conditions in that country. As Judge Friendly stated, "The attitude of the country of prospective deportation toward various types of former residents is a question of legislative fact, on which the safeguards of confrontation and cross-examination are not required and on which the [immigration judge] needs all the help he can get."[193] Since legislative facts are best resolved by rules,[194] this view leads to the possibility that the rulemaking process might play a role in their determination.

The State Department ordinarily operates outside of the procedural requirements of Administrative Procedure Act (APA) rulemaking,[195] but the INS does not.[196] Either the State Department or the INS could submit to a notice-and-comment rulemaking proceeding focusing on persecution in countries with substantial numbers of aliens seeking asylum. The advantage of this course of action is that it would resolve with public input many issues that are now clouded in bureaucratic secrecy.[197] A list of countries with clear good or bad human rights records could be prepared and updated, thereby reducing the amount of discretion available to the asylum decider.[198] No one expects that all of the difficult issues could be resolved by rulemaking, but any narrowing of discretion would produce more consistent decisionmaking.[199] Moreover, aliens seeking asylum, who now cannot cross-examine the State Department officials who issue BHRHA opinions, would have some assurance that others with comparable interests had been able, at the rulemaking stage, to help shape the institutional decision process. The rulemaking procedure also seems preferable, from an administrative efficiency standpoint, to the emerging alternative of class action resolution of the same issues.[200]

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[191] *See* CONGRESSIONAL RESEARCH SERV., ISSUE BRIEF NO. IB83119, at 5 (Aug. 17, 1983).

[192] 534 F.2d 1055 (2d Cir. 1976).

[193] *Id*. at 1062. In *Zamora* the court thought the State Department opinions did "both too little and too much" in that they did not give a general statement of conditions but did give an opinion about the specific claimant's right to asylum. *Id*. at 1062–63. The Department has not changed its approach.

[194] *See generally* K. DAVIS, *supra* note 77, § 12:4.

[195] Section 553 rulemaking procedures do not apply to foreign affairs functions, 5 U.S.C. § 553(a)(1) (1982), but there is nothing to stop an agency from voluntarily engaging in informal rulemaking.

[196] *See* Jean v. Nelson, 711 F.2d 1455, 1475 (11th Cir. 1983), *rev'd on other grounds*, 727 F.2d 957, 983 (11th Cir. 1984) (en banc).

[197] Of course, classified matters would still remain outside of the public rulemaking process. However, information from human rights organizations and similar sources that might not otherwise be available to the State Department could be placed in the public record.

4. Exclusion

Notice is the procedural ingredient missing in exclusion cases that is present in deportation proceedings.[201] In deportation at least seven days' notice is required before hearing. Excluded aliens, in contrast, often have a hearing on their eligibility to enter the country within twenty-four hours.[202] There seems little doubt but that this is an inadequate amount of time in which to prepare a case. Lack of notice renders meaningless the other procedural ingredients provided to aliens seeking entry.[203]

a. *Burden of proof as a procedural ingredient*. A second difference between deportation and exclusion proceedings, noted by the Court in *Landon v. Plasencia*,[204] is burden of proof.[205] Since the allocation of the burden of proof is a matter of substantive law,[206] it was not one of the procedural ingredients identified in this study. Nevertheless, the burden of proof can be a decisive factor in the hearing process and it significantly affects the value of the procedural ingredients available in immigration proceedings.

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[198] Moreover, a list of factors to be considered and weighed appropriately might be drawn up in advance to guide the decider in evaluating individual claims of persecution in questionable regimes.

Undoubtedly, concerns about sensitive international relations would make the Department of State reluctant to go on record in some cases. But it does so now, albeit with perhaps less publicity, when it submits BHRHA reports. Generic resolution of these recurring issues could still allow confidential submissions to be made.

[199] *See generally* Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983).

[200] *See, e.g.*, Orantes-Hernandez v. Smith, 541 F. Supp. 351 (C.D. Cal. 1982).

[201] Both deportation and exclusion proceedings deny confrontation and oral argument, but, as discussed in connection with deportation, *see supra* notes 170–71 and accompanying text, these ingredients are not mandated by current due process standards.

[202] *See* Landon v. Plasencia, 459 U.S. 21 (1982), in which the plaintiff was given an exclusion hearing at 11:00 a.m., some thirteen hours after being refused entry in the middle of the night. This was one of the issues that the Supreme Court recommended the Ninth Circuit evaluate in terms of due process dictates.

[203] It is possible to read the notice ingredient more generously for reentering aliens than for initial entrants. The Court in *Landon* was faced with whether to award a reentering resident alien deportation or exclusion procedures. While deciding the latter were appropriate, because the alien was deemed to have abandoned her residence, the Court may well have felt that she deserved more procedural consideration than a true initial entrant. By any measure, however, fair process must exceed twenty-four hours' notice. It is true that the alien can ask for a continuance, but this is the kind of decision that to be made intelligently requires the assistance of counsel or of another knowledgeable advisor.

Allocating the burden of proof to the government can be a constitutional necessity. This would be true of the presumption of innocence in a criminal case in which the government must prove the defendant's guilt beyond a reasonable doubt.[207] Even in civil proceedings the burden of proof issue has been raised to constitutional levels. In *Santosky v. Kramer*,[208] for example, the Court held insufficient under the due process clause a New York State statute requiring only a "fair preponderance of the evidence" before permitting termination of a natural parent's custody for child neglect. The Court required the state to "support its allegations by at least clear and convincing evidence."[209] Comparable rulings are not difficult to imagine in the immigration setting since the interests at stake, such as the right to prevent the state from removing family members, are similar.[210]

The use of a heavier burden against the government can do much to offset weaknesses in the process itself. For example, if the INS must prove its case by clear, unequivocal, and convincing evidence rather than by the usual preponderance of the evidence burden, the alien has a greater assurance that his or her position will prevail. Thus, in denaturalization and deportation proceedings the allocation and intensity of the burden of proof help to protect the individual.[211]

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[204] 459 U.S. 21, 35, 36–37 (1982).

[205] In deportation proceedings the burden by clear and convincing evidence is upon the INS; in exclusion proceedings it is upon the alien.

[206] The burden of proof often is articulated in statutes that establish the underlying substantive right. When it is, it becomes an integral part of that substantive right. *See generally* R. LEFLAR, AMERICAN CONFLICTS LAW 247–48 (1977).

[207] *See In re* Winship, 397 U.S. 358, 361–64 (1970); *see also* Addington v. Texas, 441 U.S. 418, 427–31 (1979) ("clear and convincing" standard is sufficient in civil commitment proceeding). *See generally* Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325 (1979).

[208] 455 U.S. 745 (1982).

[209] *Id.* at 768–80.

[210] The Supreme Court recently held that the Refugee Act of 1980 did not reduce the burden of proof upon the applicant for showing fear of persecution from "clear probability" to something less stringent. *See* INS v. Stevic, 104 S. Ct. 2489, 2901 (1984), *reversing* Stevic v. Sava, 678 F.2d 401, 408 (2d Cir. 1983).

[211] *See* Schneiderman v. United States, 320 U.S. 118, 125 (1943) (establishing clear, unequivocal, and convincing evidence burden upon government in denaturali-

Conversely, if Congress were to lighten the government's burden in denaturalization and deportation, the adequacy of the procedural ingredients currently provided would deserve reassessment.[212] In the balancing process *Eldridge* contemplated the need for procedures should be greater where the odds against prevailing are increased. If one is forced to overcome a burden of proof rather than to be the beneficiary of it, the procedural protections necessary to prove one's case could well involve greater formality and cost to the decision system.[213] Thus, when aliens seek to reenter the United States, the shift from deportation to exclusion procedures, with its change in burden of proof requirements, calls for closer scrutiny of the procedural ingredients provided and omitted. Adequacy of notice, of the right of confrontation, and of representation assume greater importance in exclusion and asylum cases.

5. Parole/Detention

No immigration function has been subjected to more judicial scrutiny than the INS determinations of whether to parole or detain excludable aliens. In terms of procedural ingredients, parole hearings for aliens detained pending resolution of their status have been shaped judicially to a much more formal degree than the process provided administratively or even by prior judicial precedent.

The procedural ingredients required by the *Fernandez-Roque v. Smith* court[214] exceed those provided by administrative practice in the Status Review Plan and even those required for deportation hearings.[215] This judicially designed detention process is difficult to justify in terms of either efficient administrative practice or due process.

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zation cases). The Court has affirmed this high standard of proof in denaturalization cases, *see* Fedorenko v. United States, 449 U.S. 490, 505–06 (1981), while at the same time overruling it with respect to expatriation cases, *see* Vance v. Terrazas, 444 U.S. 252, 266 (1980). *But see* Woodby v. INS, 385 U.S. 276, 282–86 (1966) (no deportation order may be entered unless proved by clear, unequivocal, and convincing evidence that grounds for deportation are true).

[212] Congress is considering a narrowed scope of review by circuit courts in deportation cases. *See infra* text accompanying note 353.

[213] In *Santosky*, Justice Blackmun, in arguing for the stricter standard of proof, pointed out that it was a lower cost method of protecting procedural interests than other alternatives: "Unlike a constitutional requirement of hearings, . . . or court-appointed counsel, a stricter standard of proof would reduce factual error without imposing substantial fiscal burdens upon the State." Santosky v. Kramer, 455 U.S. 745, 767 (1982).

[214] 567 F. Supp. 1115 (N.D. Ga. 1983).

[215] For example, the court ordered that counsel be appointed for detainees and notice of hearing be extended to fifteen days—ingredients that are not provided in deportation proceedings. *See supra* notes 127–37.

INS procedures are the starting point for evaluating detention. The Status Review Plan calls for a two-person Department of Justice team to initially review a detainee's file. If no favorable recommendation follows, the detainee receives a personal interview on seven days' notice, with the right to the assistance of counsel, the right of access to documents initially reviewed by the panel, and the right to submit information orally or in writing.[216]

This administrative hearing obviously lacks several of the procedural ingredients this Article has identified. However, whether the absence of these ingredients amounts to a constitutional inadequacy is not clear. There is nothing wrong with an initial determination based upon a file review; a similar clearinghouse function is employed in several mass justice administrative settings, notably the Social Security disability program.[217] The question of procedural adequacy arises at the second stage, during review of the initial unfavorable recommendation. This review lacks the essentials of adversary adjudication: cross-examination and confrontation. Therefore, the information in the detainee's file may not be challenged directly, and is offset only by the introduction of other information. Some method should exist to challenge the accuracy of information contained in the detainee's file—perhaps upon a preliminary showing of the likelihood of inaccuracy.[218]

The use of panel deciders is another potential problem with the present administrative structure. It is true that there is no constitutional prohibition against employees of an agency both prosecuting and deciding[219] so long as they do not do so in the same case, and the Department of Justice could use its own employees for this function. Moreover, there is evidence that the use of more than one decider improves the quality—that is, the rationality—of the resulting decision.[220] A problem arises, however, if the same panel both makes the original recommendation and conducts the oral interview. The human tendency to confirm one's mistakes, rather than to reevaluate an earlier decision, undercuts due process standards.[221] To cure this deficiency a different panel should conduct the oral interview.

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[216] *See supra* note 126.

[217] *See generally* J. MASHAW, *supra* note 62; J. MASHAW, C. GOETZ, F. GOODMAN, W. SCHWARTZ, P. VERKUIL & M. CARROW, SOCIAL SECURITY HEARINGS AND APPEALS (1978) [hereinafter cited as MASHAW].

[218] The Privacy Act of 1974 provides for the right to inspect and correct information and references in the file. *See* 5 U.S.C. § 552a(d) (1982). It is impractical to think that a similar process would be grafted onto the detention file review process, but some administrative mechanism for file review upon a threshold showing of error might be feasible.

[219] *See* Goldberg v. Kelly, 397 U.S. 254, 271 (1970).

[220] The Social Security Administration conducted an experiment by using multimember ALJ decision panels. Research concluded that panel decisions are less inconsistent than individual ALJ decisions on the same type of case. *See* MASHAW, *supra* note 217, at 26–28.

The burden of proof and the right to administrative appeal in the parole setting are other procedural issues. The burden of proof is placed upon the detainee to show a continued status of non-violent behavior. This can be a heavy or even impossible burden to discharge; presumably, an absence of specific incidents should be adequate to shift the burden to the INS. As for appeal, the parole panel decision is final after the oral hearing. All that the detainee receives is a written statement of the basis for the decision. Ordinarily, to satisfy prevailing due process standards, that statement would be subject to administrative or judicial review. However, in the detention context the Status Review Plan substitutes an annual review of the decision to detain. Whether this review is a procedurally adequate alternative to administrative appellate review is questionable. In other contexts, where property and liberty interests also are implicated, re-examination has been accepted in lieu of appeal.[222] Since the detention situation involves loss of physical liberty, the need to provide prompt administrative review is more compelling.

Judicial decision raises the final issue of whether the Attorney General, revising INS detention policy to deal with mass asylum, is obliged to do so via the APA's rulemaking procedures. In *Jean v. Nelson*[223] the Eleventh Circuit initially upheld the district court determination[224] that the 1981 INS change from the earlier policy of nondetention was a rule requiring promulgation pursuant to informal rulemaking procedures. The court of appeals panel decision rejected a host of potential exceptions to the rulemaking requirement[225] and forced the INS to engage in rulemaking under protest.[226] Thereafter, the court sitting en banc vacated the panel decision but treated the required rulemaking issue as moot since the INS had already engaged in rulemaking and the new regulations' validity was not being challenged.[227] This decision leaves the required rulemaking issue open, since the INS and the Attorney General can be challenged on the same basis in the future.

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[221] *See* Goldberg v. Kelly, 397 U.S. 254, 271 (1970).

[222] The bar re-examination process has been held to be an adequate alternative to appeal. *See* Whitfield v. Illinois Bd. of Law Examiners, 504 F.2d 474, 478 (7th Cir. 1974).

[223] 711 F.2d 1455 (11th Cir. 1983), *rev'd*, 727 F.2d 957 (11th Cir. 1984) (en banc).

[224] *See* Louis v. Nelson, 544 F. Supp. 973, 981 (S.D. Fla. 1982), *modified sub nom.* Jean v. Nelson, 711 F.2d 1455 (11th Cir. 1983), *rev'd*, 727 F.2d 957 (11th Cir. 1984) (en banc).

[225] The court rejected application of the foreign affairs, interpretative rule, and general statement of policy exceptions to APA rulemaking. *See* Jean v. Nelson, 711 F.2d 1455, 1477–82 (11th Cir. 1983), *rev'd*, 727 F.2d 957, 983 (11th Cir. 1984) (en banc).

[226] *See* 8 C.F.R. § 212.5 (1984); 47 Fed. Reg. 30,044 (1982).

Using rulemaking procedures to develop policy, especially if that policy forecloses issues of importance to affected parties, is desirable. The courts, however, traditionally have been reluctant to force rulemaking upon agencies.[228] This reluctance is especially justified in circumstances in which a change in policy amounts to exercising prosecutorial discretion.[229] The decision to detain rather than to parole as a matter of course involves a degree of discretion that makes a policy change difficult to predict. If policy can be made only by rulemaking, it can likewise be unmade only by a similar process. If rulemaking is mandated, it will unnecessarily constrain detention policy. There is certainly no due process requirement to add rulemaking to whatever informal hearing ingredients are currently available.[230]

6. Discretionary Decisions

The three discretionary decisions under study are drawn narrowly in terms of procedural ingredients, but this narrowness does not make them procedurally inadequate. Suspension of deportation, adjustment of status, and extension of voluntary departure are activities that usually occur at the end of the deportation process;[231] they are often available to relieve deportation's hardships. Thus, these activities are meant not to vindicate rights but to offer occasional relief for extraordinary reasons. The main goal of such relief is to make the decisionmaker aware of the alien's special needs and to provide some assurance that he will render the decision upon the facts asserted and not upon irrelevant, prejudicial, or discriminatory factors.

The governmental interest is clearly on the side of summary decisionmaking. If these discretionary determinations were to be viewed as part of the standard hearing process, the cost in terms of delay to the government and to other aliens would be heavy.[232]

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[227] *See* Jean v. Nelson, 727 F.2d 957, 984 (11th Cir. 1984) (en banc).

[228] *See* NLRB v. Bell Aerospace Co., 416 U.S. 267, 290–95 (1974).

[229] *See* Howard v. Hodgson, 490 F.2d 1194, 1195–97 (8th Cir. 1974).

[230] Due process analysis as currently understood does not extend to the individuals affected by rules the right to participate in their formation. This does not mean, however, that the INS should not be encouraged to use rulemaking in situations where generic issues can be efficiently resolved outside the hearing context. *See infra* notes 363–65 and accompanying text.

[231] An exception occurs in the case of expulsion of former asylum seekers who were applicants for admission at the time asylum was granted. They are subject to exclusion, not deportation, proceedings. *See* 8 C.F.R. §§ 208.15–.16 (1984).

[232] Thousands of these decisions are made annually. In 1980 there were 191,284 adjustment of status decisions alone. *See* 1980 INS STATISTICAL Y.B. 6. Additional

A process allowing those seeking discretionary relief to make a more limited presentation to the decider may be preferable. Such a limitation would be adequate and efficient, so long as there is some check on the regularity of agency behavior.[233]

B. *The Role of Administrative and Judicial Review*

The adequacy of the procedural ingredients provided in the *Goldberg* and *Eldridge* settings was measured against the background of an extensive administrative and judicial review process.[234] Any analysis of procedural adequacy in the immigration context, therefore, must take into account the availability and scope of review. It does not overstate the importance of appellate review to say that its presence or absence can determine the viability of the hearing process itself. Institutional scrutiny can do much to ensure accurate and fair decisionmaking; an opportunity to take a second look at a decision serves as a form of quality assurance. Appellate review, therefore, bolsters the procedural legitimacy of an otherwise summary informal process. Its elimination, or serious curtailment, is a pertinent part of the due process assessment.

1. Administrative Review of Immigration Decisions

The Bureau of Immigration Appeals (BIA) is an established, quasi-independent body within the Department of Justice. Its

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proceedings would have to be added to the current INS backlog of more than 170,000 asylum cases. *See supra* note 70.

[233] This need suggests two constraints. The first constrant is the use of standards and rules to guide agency deciders. The INS has been ambivalent (if not confused) about restricting its discretion by rules or standards. At one time, it proposed listing factors for decision in a variety of discretionary situations, *see* 44 Fed. Reg. 36,187 (1979), but then decided against doing so. This INS failure to articulate standards has been criticized convincingly by Professor Colin Diver. *See* Diver, *supra* note 199, at 92–97. The second constraint is the limited administrative and judicial check over the accuracy of discretionary decisions. In Dunlop v. Bachowski, 421 U.S. 560 (1975), the Court was willing to impose narrow judicial review upon the Secretary of Labor's decision not to bring an unfair labor practice action, but was unwilling to extend any rights to an administrative hearing on the Secretary's decisions. The APA provides for a statement of reasons in all informal action, presumably including that engaged in by the INS. *See* King v. United States, 492 F.2d 1337, 1344–45 (7th Cir. 1974) (parole determinations subject to reasons requirement); 5 U.S.C. § 555(e) (1982); *cf.* Hotel & Restaurant Employees Union, Local 25 v. Smith, 563 F. Supp. 157, 162–63 (D.D.C. 1983) (extended voluntary departure decisions reviewable under due process clause).

[234] The Aid to Families with Dependent Children (AFDC) and Social Security disability systems provide for administrative de novo and appellate review of initial state decisions. The Court in both *Goldberg* and *Eldridge* emphasized that only the procedural adequacy of the pretermination hearing process was being judged. *See* Mathews v. Eldridge, 424 U.S. 319, 333 (1976); Goldberg v. Kelly, 397 U.S. 254, 255 (1970).

function is to review the merits of some, but not all, of the immigration decisions discussed in this Article. Like the immigration judge, the BIA has been criticized for lack of complete independence;[235] however, the BIA's independence meets the limited independence standards due process imposes.[236]

The BIA has jurisdiction to review immigration judges' deportation[237] and exclusion[238] orders. Appeals lie both for the applicant denied relief and for the district director over whose objection relief was granted.[239] The BIA does not review asylum, parole, or discretionary decisions,[240] except as those issues are raised in the course of deportation and exclusion hearings.[241]

Expanded administrative review can burden the decision process. However, assuming increased judicial supervision of informal INS procedures, administrative review may help to assure fair decisions while avoiding expanded judicial review. The interest balancing expressed in *Eldridge* indicates that one cannot ignore the relationship between the formality of hearing procedures and the availability of appellate review. Indeed, the acceptable level of informality may turn partially upon the additional checks against arbitrary decisionmaking that administrative review provides.

That lack of review may lead to judicial intervention is exemplified by parole-detention decisions. Parole-detention of Mariel Cubans is currently conducted under a court ordered due process hearing that mandates procedures far in excess of those required administratively.[242] Certainly, the case for the adequacy of the informal procedures would have been strengthened by the availability of administrative review. However, it is understandable why the BIA has not been involved in the detention review process. First, until recently the policy had been to parole rather liberally,[243] thereby rendering an appellate review process unnecessary. Second, under the Status Review Plan the panel reviews detention decisions annually; this review may be an adequate substitute for administrative appeals.[244] For these reasons, not extending BIA review to detention decisions may be justified. Nevertheless, each informal determination must be explained in terms of the adequacy of both hearing procedures and administrative review.

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[235] *See* Roberts, *Proposed: A Specialized Statutory Immigration Court*, 18 San Diego L. Rev. 1 (1980); *cf. Developments Note*, *supra* note 1, at 1364.

[236] Of course, to the extent that BIA (and immigration judge) independence is further enhanced by proposals for independent agency status, the due process requirements of the initial procedural ingredients might be altered or lessened. *See* Friendly, *supra* note 24, at 1279–80, ranking decider impartiality highest on the list of procedural ingredients.

[237] *See* 8 C.F.R. § 242.21 (1984).

[238] *See id.* § 236.7. However, aliens excluded by reason of mental or physical illness or disability have no right of appeal. *See* 8 U.S.C. § 1226(d) (1982).

[239] The ability of the government to appeal the grant of relief distinguishes the immigration setting from Social Security disability (and AFDC) appeals, in which only the denied claimant is entitled to appeal. This skewing of the appeals process in favor of the claimant amounts to a form of procedural protection, although not one worthy of due process recognition. Certainly, the government's interest in accurate decisionmaking is a value that can be implemented by administrative review.

[240] *See* 8 C.F.R. §§ 208.8, 212.5 (1984).

[241] While the regulations do not distinguish between administrative appeal rights in Refugee Act and section 243(h) situations, the courts have made it clear that the 243(h) claim is "part and parcel of the deportation proceeding." Fleurinor v. INS, 585 F.2d 129, 135 (5th Cir. 1978); *see also* Scanlan, *Asylum Adjudication: Some Due Process Implications of Proposed Immigration Legislation*, 44 U. Pitt. L. Rev. 261, 274 (1983).

In asylum claims under the Refugee Act, the lack of administrative review is more difficult to explain because asylum review is available in the context of deportation and exclusion.[245] Arguably, deportation or exclusion proceedings may be characterized as a form of administrative review of the initial denial of asylum. That assumption, however, has two limits. First, it does not apply to asylum seekers who have had their cases denied abroad by consular officers. For these individuals there is no possibility of appeal. Second, even as to aliens onshore, who are entitled to review of their claims in exclusion or deportation proceedings, it is questionable whether this ultimate review amounts to a timely, efficient resolution of the asylum issue. If an initial administrative appeal could have corrected some obvious error in the asylum decision, thus rendering the second proceeding unnecessary, both individual and government interests would be furthered.

BIA review presently is available over discretionary decisions such as suspension of deportation, adjustment of status, and extention of voluntary departure, but only in the context of review of deportation proceedings. However, there may be advantages to direct review of these discretionary determinations. Until recently some internal administrative review over change of status determinations has been available.[246] It is noteworthy that when it eliminated these appeals, the INS had to overcome objections raising due process concerns.[247]

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[242] *See supra* notes 127–37 and accompanying text.

[243] *See* Jean v. Nelson, 711 F.2d 1455, 1477 (11th Cir. 1983), *rev'd*, 727 F.2d 957 (11th Cir. 1984) (en banc).

[244] *See supra* text accompanying note 222.

[245] *See* 8 C.F.R. §§ 103.5, 236.7 (1984); *supra* text accompanying note 241.

[246] The INS has recently announced regulations eliminating the right to administrative review of denied applications for changes in nonimmigrant status. *See* 48 Fed. Reg. 41,016 (1983) (eliminating 8 C.F.R. § 103(1)(2)(vi) and modifying 8 C.F.R. § 248.3(d)).

To date, the courts have not questioned the lack of administrative review of the record in discretionary decisions; administrative review is, therefore, a matter of agency choice. However, if judicial supervision becomes more interventionist and demands new procedural ingredients, the INS increasingly will be forced to explain why it maintains informal process without direct administrative review. If the agency response is unsatisfactory,[248] certain events are likely to occur: the procedural formality of discretionary decisions will be increased, or the intensity of judicial review will be increased, or both will be increased. Any of these events would seem to be less desirable from the agency's perspective than a strengthened administrative appeal mechanism which could both correct errors in individual cases and enhance quality control of the system generally.

2. Judicial Review of Immigration Decisions

At a time when reviewability of administrative action is widely presumed,[249] the role of judicial review in the immigration setting is increasingly anomalous. Judicial review of deportation orders is available by statute in the courts of appeals exclusively.[250] The scope of review is the substantial evidence standard.[251] Thus, deportation cases are subject to the usual methods of review available in formal administrative proceedings.[252] This review is the extent of traditional judicial review in the immigration context.

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[247] The Service rejected comments from the immigration bar arguing that the change in administrative review would result in a denial of due process:

> The type of procedure necessary to assure due process varies with the nature of the matter being decided and the interests of the affected party. Due process does not require the Service to provide regional appellate review of discretionary denial of an application for a benefit conferred on a nonimmigrant, where the consequences of the denial are relatively minor. Due process requires only a fair, impartial review of the nonimmigrant's application.

48 Fed. Reg. 41,016 (1983).

[248] One justification which the INS offers for not providing administrative review over certain kinds of decisions as a matter of course is that the issues raised are routine and are subject to "internal review" before being issued. *See id.* The Service does provide administrative review where novel or unusually complex issues are presented. *See* 8 C.F.R. § 103.4 (1984). This is a justification of sorts. However, such review is itself discretionary because it is evoked by certification of the initial decider (regional commissioner, district director). Moreover, the participation of a party gaining such review is limited to the submission of a brief on ten days' notice. *See id.*

[249] *See* Dunlop v. Bachowski, 421 U.S. 560, 567 (1975); Abbott Laboratories v. Gardner, 387 U.S. 136, 139–41 (1967); *cf.* Verkuil, *Congressional Limitations on Judicial Review of Rules*, 57 TUL. L. REV. 733, 736–64 (1983) (congressional preclusion of judicial review of administrative action).

[250] 8 U.S.C. § 1105a(a) (1982); *see* Cheng Fan Kwok v. INS, 392 U.S. 206, 208–18 (1968); Foti v. INS, 375 U.S. 217, 217–32 (1963).

[251] 8 U.S.C. § 1105(a)(4) (1982).

[252] Use of the substantial evidence standard in a court of appeals review of a

For the remaining immigration functions under study, access to the courts is usually in the form of district court review by writ of habeas corpus.[253] Asylum, exclusion, and detention decisions typically are reviewed in this manner.[254] Habeas corpus review is constitutionally compelled[255] and comes into play when the applicant is in custody.[256] It obviously fits the immigration setting in which detention is an increasingly prevalent state of affairs.[257] That habeas corpus is a form of constitutional review[258] denotes both its strength and its weakness. Although the writ is available to challenge the legality of all of the immigration functions discussed in this Article,[259] its scope is limited to the minimum that

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deportation order is, in effect, a verification of the formal nature of the underlying administrative process. The APA connects substantial evidence review to formal adjudication. *See* 5 U.S.C. §§ 554, 556–557, 706 (1982).

[253] Judicial review in the district court may be available under 8 U.S.C. § 1329 (1982), but, as a practical matter, it adds nothing to the type of review available in habeas corpus proceedings.

[254] Methods of nonstatutory review such as mandamus, injunction, and declaratory judgment are also available, *see* Louis v. Meissner, 530 F. Supp. 924, 925–30 (S.D. Fla. 1981); W. GELLHORN, C. BYSE & P. STRAUSS, ADMINISTRATIVE LAW 923–37 (7th ed. 1979). Challenges to the standards employed in determining admissibility of aliens have been brought by other methods. *See* Lesbian/Gay Freedom Day Comm. v. INS, 541 F. Supp. 569, 580–83, 587–88 (N.D. Cal. 1982), *vacated in part on other grounds*, 714 F.2d 1470 (9th Cir. 1983) (first amendment challenge). It should be noted that some asylum claims are heard as part of the deportation proceedings. Since judicial review of deportation includes all orders made in the course of the proceedings, Foti v. INS, 375 U.S. 217, 221–32 (1963), asylum claims raised and resolved there are part of the deportation order. As a result of this connection, the courts have held that the substantial evidence scope of review applies to section 243(h) asylum determinations. *See* McMullen v. INS, 658 F.2d 1312, 1316 (9th Cir. 1981). This further distinguishes section 243(h) from Refugee Act asylum determinations. *See supra* note 241.

[255] It also is provided by statute in some immigration functions, such as exclusion. *See* 8 U.S.C. § 1105a(b) (1982).

[256] Custody is defined broadly in the immigration setting to include not only detention but other restraints on liberty, such as conditions placed on parole. *See* Leng May Ma v. Barber, 357 U.S. 185, 188 (1958).

[257] Even discretionary determinations, such as suspension of deportation, can be reviewed where the applicant is in detention. *See* United States *ex rel*. Marcello v. District Director, 634 F.2d 964, 970 (5th Cir.), *cert. denied*, 452 U.S. 917 (1981).

[258] On the differences between constitutional review and judicial review consult Verkuil, *supra* note 249, at 736–43.

[259] Doubts have been raised about whether Refugee Act asylum determinations may be reviewed separately in habeas actions before any review takes place in deportation or exclusion proceedings, but the courts generally have acknowledged such review to be available. *See, e.g.*, Yiu Sing Chun v. Sava, 708 F.2d 869, 873 (2d Cir. 1983). One wonders whether the courts might be more willing to deny review of asylum decisions if they were subject to administrative review. *See supra* text accompanying note 248. In asylum cases involving stowaways, in which no right to an exclusion hearing exists, the courts have granted habeas review more readily. *See* Garcia v. Doneth, 674 F.2d 838, 839–40 (11th Cir. 1982).

the Constitution demands.

Therefore, review of an individual administrative decision's factual support—normally associated with judicial review under the substantial evidence standard and available in deportation cases—is not available generally. The only question asked on review of immigration decisions, and asked with considerable reluctance,[260] is whether the individual action lacked a rational basis.[261] The critical difference between this test and the substantial evidence test, in addition to the intensity of review, is that the former is not meant to inquire into the decision's factual support.[262]

Would it be possible to use the writ of habeas corpus as a basis for reviewing the adequacy of procedures employed in immigration decisions? The question becomes whether constitutional due process rights are validly asserted in immigration decisions—that inquiry is at the core of this study. The issue is twofold: do aliens in some circumstances have liberty or property interests, and, assuming so, what process is necessary to protect those interests? A few courts have held recently that the interests of aliens may rise to a constitutional level and have used habeas corpus to restructure the process.[263]

The availability of habeas review therefore gives access to the courts to those aliens asserting some constitutional injury. But its level of scrutiny is unlikely to be intense enough to write an adequate code of administrative procedure for all of the immigration functions here under study. Thus, the role of judicial review, unless explicitly expanded by Congress, remains a limited source of supervision in the immigration setting.

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[260] *See* Fiallo v. Bell, 430 U.S. 787, 792 (1977) (emphasizing "limited scope of judicial inquiry into immigration legislation"); *see also* INS v. Jong Ha Wang, 450 U.S. 139, 144–46 (1981) (limiting its inquiry into the BIA definition of "extreme hardship" to an abuse of discretion standard).

[261] *See, e.g.*, Bertrand v. Sava, 684 F.2d 204, 211–13 (2d Cir. 1982). The rational basis test can be equated with the more familiar standard of arbitrary, capricious or abuse of discretion. *See* Haitian Refugee Center v. Civiletti, 503 F. Supp. 442, 473 (S.D. Fla. 1980), *aff'd as modified sub nom.* Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982). *But see* Garcia v. Smith, 674 F.2d 838, 841 n.3 (11th Cir. 1982) (arguing against use of an arbitrary and capricious standard).

[262] *See* El-Werfalli v. Smith, 547 F. Supp. 152, 153 (S.D.N.Y. 1982) (Sofaer, J.) ("If the Court finds that the Government acted on a facially legitimate and bona fide reason, its inquiry is complete."). In this sense, the arbitrary and capricious standard implies a more narrow scope of review than that which it has come to assume in the review of administrative rules. *Compare* Pacific States Box & Basket Co. v. White, 296 U.S. 176, 186 (1935), *with* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 103 S. Ct. 2856, 2866 n.9 (1983). *See generally* Verkuil, *supra* note 249, at 743–51.

[263] *See, e.g.*, Fernandez-Roque v. Smith, 557 F. Supp. 690, 695 (N.D. Ga. 1982).

VI. PROPOSED LEGALIZATION, EMPLOYER SANCTION, AND ASYLUM PROCEEDINGS

A. *The Challenges of the Immigration Reform and Control Act*

Congress currently is considering passage of the first comprehensive review of the immigration laws in the last thirty years. The Immigration Reform and Control Act of 1983 (the "Simpson-Mazzoli bill") passed the Senate easily,[264] but stalled on the House floor in 1983.[265] The House finally approved the Act by a 216-211 margin in June 1984.[266]

If this Act becomes law, it will bring about major changes in immigration policy and practice[267] and present at least three situations in which this Article's methodology may be applied usefully. These are, first, the process of legalizing undocumented aliens who can establish that they have lived in the United States for a prescribed length of time; second, the use of civil and criminal sanctions against employers who knowingly employ undocumented aliens in the future; and third, the use of expedited and reorganized procedures surrounding the granting of asylum. These functions are critical to the Act's goal of deterring illegal immigration into this country. The functions also present major procedural challenges that have been left for the Department of Justice and the INS to administer.

Legalization proceedings are expected to be numerous, but only for a limited time. The Senate bill provides that immediate permanent resident status will be conferred upon those aliens who can demonstrate that they have been in the United States continuously since January 1, 1977. Temporary legal status, which can be adjusted to permanent resident status within three years, will be conferred upon aliens who have resided here continuously since January 1, 1980.[268] Aliens will have twelve months during which they may apply for this legalized status. An enormous decision workload is projected for this limited period. The INS has estimated that 2,330,000 aliens will attempt to take advantage of the legalization opportunity.[269] A decision universe of that size, even if much of the work can be done without hearings, imposes monumental burdens upon the administrative process. It is unlikely that the bill that Congress passes will provide clear instructions on how to process and resolve the impending caseload.[270]

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[264] S. 529, 98th Cong., 1st Sess. (1983) (introduced by Senator Simpson), passed the Senate on May 18, 1983. *See Senate Passes Immigration Reform Bill*, 41 CONG. Q. WEEKLY REP. 1006–07 (1983).

[265] H.R. 1510, 98th Cong., 1st Sess. (1983) (introduced by Representative Mazzoli), reported favorably by the House Judiciary Committee on May 5, 1983, *see Immigration Reform Measure Approved by House Judiciary*, 41 CONG. Q. WEEKLY REP. 912–13 (1983). The Speaker of the House initially kept the bill from being voted upon because of objections from the House Hispanic Caucus. *See* N.Y. Times, Oct. 6, 1983, at A1, col. 1.

[266] *See* 2 FED. IMMIGRATION L. REP., June 25, 1984, at 1. The bills are currently being reconciled by Senate and House committees.

[267] The present bills would change the process of legal immigration, the appellate administrative process, and the system of judicial review.

[268] Cubans and Haitians also are given temporary legal status without regard to their date of entry.

The Simpson-Mazzoli legislation establishes a system of employer penalties to discourage the future arrival of illegal aliens. This provision reverses the current law on employer liability for hiring illegal aliens[271] and is politically the most controversial part of the Act. The resulting employer sanction cases are estimated to be significant in number. Although hardly as numerous as the legalization cases, they will continue for a longer time.[272] INS estimates that employer sanction proceedings will generate 20,000 new cases each year; in addition, investigations against employers are expected to generate an additional 69,000 deportation cases each year.[273] The bills do suggest a procedural framework for employer sanction proceedings, providing that either immigration judges or administrative law judges will hear the cases.[274]

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[269] Data on the demand for legalization are hard to quantify. The INS reached its conclusion by assuming that there are 6,000,000 illegal aliens currently in the United States, and that about one-third will take advantage of the legalization program. Of this total, it estimates that 730,000 aliens will apply for permanent resident status and 1.6 million for temporary resident status. *See* INS, DRAFT IMPLEMENTATION PLAN FOR PUBLIC LAW 1 (1982).

[270] Both bills provide that legalization applications may be filed with designated voluntary agencies or state and local governments. The Senate bill adds a $100 processing fee to each application and the House bill provides for criminal penalties for willfully falsifying applications. Unlike the Senate version, the House bill provides for limited administrative review of legalization determinations, but both reject judicial review.

[271] It is a crime to harbor or transport aliens illegally in the United States, but not to employ them. *See* 8 U.S.C. §§ 1323–1324 (1982).

[272] Indeed, to the extent that illegal aliens currently in the United States do not take advantage of the legalization program—and even INS projections leave three to four million people outside the program, *see supra* note 269—they will create a permanent group of illegal workers for potential employers to hire.

[273] INS reaches the 20,000 total by the following reasoning: two-thirds of the six million estimated illegal aliens in the United States work (four million). These four million aliens work for approximately 400,000 employers (ten aliens per single employer). Of the 400,000 employers, five percent are estimated to enter the sanction system annually, resulting in 20,000 employer sanction cases per year. *See* INS, DECISION UNIT JUSTIFICATION—SPECIAL ANALYSIS: IMPACT OF PENDING LEGISLATION FY 1985 BUDGET 31 (n.d.) [hereinafter cited as INS SPECIAL ANALYSIS].

[274] The Senate bill provides for the use of immigration officers, which implies that it would use the immigration judge system as currently constituted within the Department of Justice, *see* S. 529, 98th Cong., 1st Sess. § 122(a) (1983); the House bill provides for administrative law judges under the APA, H.R. 1510, 98th Cong., 1st Sess. § 122(a) (1983). Both bills provide for appeals to be heard by a newly constituted U.S. Immigration Board, which the House bill specifies to be an independent agency within the Department of Justice. *See id.*

The legislation also proposes major changes in asylum adjudication. Employing a concept of summary exclusion, it seeks to identify those seeking asylum at the outset and then speed decisionmaking by using specially trained immigration judges to expeditiously resolve asylum issues. The combination of this new caseload and expedited decision time could easily increase the number of asylum cases fivefold[275] and the need for additional immigration judges by a like amount.[276]

These new decisional responsibilities would impose upon the INS and the Department of Justice, virtually overnight, a caseload approaching the magnitude of the Social Security disability program.[277] The challenge of designing effective procedures in this mass justice setting is formidable.

B. *Designing Legalization Procedures*

Since Congress has not chosen to legislate procedures for legalization, the INS must create an informal process from the few guidelines provided it.[278] Constructing this new informal process will require three steps: first, applying interest analysis to the legalization program; second, looking for procedural analogies in other informal mass decision settings; and third, using the results of the first two steps and the little guidance Congress has offered directly to construct a new legalization decision system.

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[275] *See infra* text accompanying note 346.

[276] *See infra* note 350.

[277] The Social Security disability program considers over 1,250,000 claims for benefits a year and hears about 150,000 cases in the ALJ system. *See* J. MASHAW, *supra* note 62, at 18 (summarizing statistics over several years). The legalization program alone would provide, at least for a short time, a greater number of applications, and the combination of employer sanction, new deportation cases, and asylum claims would produce a greater number of hearings. About 175,000 hearings before immigration judges would result annually from the current decision load (56,000) and the additional cases expected to come into the system (120,000). It is not expected, however, that these cases will be as complicated or as time consuming as disability cases. For example, INS estimates that deportation cases will take only one hour of immigration judge time, whereas asylum and employer sanction cases are expected to take three. *See* INS SPECIAL ANALYSIS, *supra* note 273, at 26, 31, 37. While estimates are difficult to pin down, it is doubtful that many disability cases would take less than a day of SSA-ALJ time.

[278] *See supra* note 270 and accompanying text. Perhaps the only implication that can be drawn from this congressional silence is that legalization need not be placed within the more formal immigration judge/BIA scheme, since Congress has limited that process to resolution of employer sanction and deportation cases. While the use of immigration judges would heighten the formality of the legalization process, given the size and the short-term nature of the decision load, it is understandable why Congress did not mandate immigration judge consideration. Moreover, INS estimates that ten percent of the 2,330,000 anticipated legalization cases will be decided negatively and lead to deportation proceedings. This impact (233,000 cases) would itself more than double the immigration judge caseload. *See* INS SPECIAL ANALYSIS, *supra* note 273, at 26.

1. Interest Analysis in the Legalization Setting

Weighing the interests of illegal aliens in the process of legalization is not easy. On the one hand, these individuals should have low interests since they are in the country illegally. However, many of them have developed equities on their side. They may be long-term residents with strong family and community ties. They also work and pay taxes.[279] Nevertheless, it is clear that illegal entrants are subject to deportation under current law unless they fit within the very narrow existing provision for legalized status.[280] Thus, when Congress offers the legalization program, it does so in its complete discretion.

The foregoing suggests that the individual interests of illegal aliens in legalization procedures—that is, in the nonarbitrary resolution of legalization requests—should approximate current interests in the INS's discretionary decisions. Adjustment of status, suspension of deportation, and extention of voluntary departure are also decisions in which Congress and the INS act in a discretionary capacity to relieve hardship. Legalization achieves an end similar to adjustment of status in which an individual, with government encouragement, voluntarily steps forward to enhance his or her immigration status. Individual interests in legalization procedures therefore share a similar place at the low end of the immigration function scale.

The government interest in the legalization process is also complex. Certainly, given the large number of potential applicants, fast and efficient summary procedures are desirable. However, it is also critical to the program's success that large numbers of eligible aliens come forward. Thus, the perception of fairness is probably more important than it is in discretionary decisions. In short, the decision process must be administered sympathetically as well as generously.[281] The usual INS intake process will be at a great disadvantage in accomplishing this goal. Aliens caught in the system do not perceive the INS as a friendly bureaucrat.[282] To achieve the goals of the legalization program, the decision system must be divorced from INS, or more elaborate guidance mechanisms must be employed than are required by minimum due process.

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[279] H.R. Rep. No. 115, 98th Cong., 1st Sess., pt. 1, at 37 (1983). There is also some feeling that we have attracted undocumented aliens into the United States to work by not imposing employer sanctions and therefore bear some responsibility for their plight. *See* National Interest, *supra* note 1, at 73–74.

[280] Current law provides a "registry" alternative which can be used to legalize undocumented aliens, but it is of limited utility because it requires an alien to demonstrate continuous ties to the United States since 1948. *See* 8 U.S.C. § 1259 (1982). From 1955 to 1979, 43,437 aliens were granted permanent residence under the registry provision. *See* Congressional Research Serv., Proposals to Legalize the Status of Undocumented Aliens in the United States 4 (1983). An amendment moving the registry eligibility to January 1, 1973 has been included in present legislation. *See* H.R. Rep. No. 115, 98th Cong., 1st Sess., pt. 1, at 29, 84 (1983).

[281] On the importance of sympathetic administration, see J. Mashaw, *supra* note 62, at 132–44.

The third *Eldridge* factor, to be balanced with individual and governmental interests, is the value of procedural ingredients to the individual. With legalization most of the issues will turn upon documentary evidence. Efforts to establish length and continuity of stay in the United States would be likely to produce drivers' licenses, telephone bills, cancelled checks, and other objective indicia of required residence,[283] while testimony by neighbors or friends would probably not be very convincing if the documentary evidence were lacking. Thus, the *Eldridge* references to the reliability of written evidence (medical reports in that case) have particular relevance to legalization. Oral hearings with cross-examination seem less necessary to achieve a fair outcome when the primary issues are length and constancy of residence.[284] Moreover, the allocation of the burden of proof could be a useful mechanism to overcome information gaps, and it could do much to reduce or eliminate the need for confrontational hearings.[285]

2. Programmatic and Procedural Analogies: Food Stamps and Pardons

In searching for analogous programs two aspects of legalization seem central: its positive nature, and its size and scope. One government program that closely approximates these two conditions is the food stamp program, administered by the Department of Agriculture (USDA) in cooperation with state and county agencies. With millions of recipients receiving billions of dollars in stamps annually,[286] the size and scope of the food stamp program are comparable to legalization. Moreover, the food stamp program is positive in the sense that it makes efforts to locate and service eligible recipients. It also is administered by application on a self-certification basis.[287] The USDA requires the administering agencies to provide an informal hearing containing the procedural ingredients mandated by *Goldberg* to denied applicants or terminated recipients.[288] It is not difficult to picture the state agencies which administer the food stamp program at the behest of the USDA doing the same for the legalization program at the request of the INS. The advantages of familiar and perhaps even "one-stop" decisionmaking are not inconsiderable.[289]

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[282] *See generally* J. CREWDSON, THE TARNISHED DOOR (1983). In the legalization situation, however, alien distrust of the INS may be misplaced. INS budget planners are working on the assumption that the vast majority of legalization applications will be granted and only ten percent will lead to deportations. *See supra* note 278. In fact, it approximates the denial rate experienced by the Presidential Clemency Board. *See infra* text accompanying note 295.

[283] The Senate bill requires "independent corroboration" of presence or employment in the United States. S. 529, 98th Cong., 1st Sess. § 301(a) (1983).

[284] One issue that might create the need for confrontation is whether the alien "assisted in the persecution of any person" before his or her arrival. *See id*. This is not an issue likely to be raised very often, however, and the allocation of the burden of proof on this question to the government should further limit the need for oral hearings to deal with it.

[285] The proposed legislation is silent on the question of who bears the burden of proof in the legalization context, except that the Senate bill specifies that a duly attested declaration of continued residence by an alien's employer is only a rebuttable presumption of continuous physical presence. *See id*. For the Senate bill's definition of a continuous residence, see *id*.

In addition to the food stamp program, the forgiving moral posture of legalization makes it much like an amnesty program.[290] Legalization reflects a legislative compassion for, and acceptance of, some six million people living permanently within our borders. In many ways, it is reminiscent of the pardon and clemency programs exercised by several Presidents after periods of war.[291] Most recently, this power was exercised by President Ford when he established the Presidential Clemency Board after the Vietnam War.[292] That clemency process provides an instructive analogy to the legalization process.

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[286] In 1981 there were twenty-two million participants in the food stamp program and they received $10.6 billion in benefits. U.S. DEP'T OF COMMERCE, SOCIAL AND ECONOMIC STATISTICS ADMIN., BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE U.S. 129 (1982–1983).

[287] Applicants commence the process by filling out an application attesting to their income and family situations.

[288] Under the Food Stamp Act of 1964, the Secretary of Agriculture is authorized to administer a food stamp program at the request of state agencies. *See* 7 U.S.C. § 2013 (1982). State agencies submit plans for approval that must include provisions for a "fair hearing." *Id*. § 2019(e)(10). The USDA has promulgated regulations describing the content of such hearings. 7 C.F.R. § 273.15 (1984). The hearings are held before state agency officials. They provide most of the *Goldberg* ingredients described above.

[289] Legalized aliens who become permanent residents are entitled to government benefits, such as food stamps, immediately. Temporary residents must wait three years. S. 529, 98th Cong., 1st Sess. § 301(a) (1983); H.R. 1510, 98th Cong., 1st Sess. § 301(a) (1983).

[290] In fact, the term "legalization" is a more recent description of what had earlier been labelled an amnesty program. *See* NATIONAL INTEREST, *supra* note 1, at 79. To some extent, Congress split on the amnesty-versus-legalization question, with the Senate bill requiring a proof of longer residency than the House bill, in order to emphasize that legalization is earned by residence and not awarded as a matter of forgiveness. The concept of amnesty is much more value-laden than legalization, or for that matter, clemency. *See infra* note 292.

[291] Presidents Washington, Lincoln, Truman, and Ford all exercised their pardon power in favor of war resisters and military deserters.

[292] *See* PRESIDENTIAL CLEMENCY BOARD, REPORT TO THE PRESIDENT 1 (1975). The Board drew a distinction between clemency and amnesty, which was important in the Vietnam context, *see id*. at 2, and which may have contributed to the low percentage of applicants.

The Clemency Board was established for a twelve-month period to deal with the more than 113,000 eligible war resisters or military deserters. Each individual eligible for consideration had six months to come forward, and about 21,000 did.[293] This result means that fewer than twenty percent of those eligible took advantage of the program, a percentage of participation that compares unfavorably with the INS estimate of over one-third participation in the legalization program.[294] The Board itself was comprised of individuals from military and civilian life and was meant to be balanced in its composition. It rendered favorable decisions in more than ninety percent of the cases that it heard.[295]

The hearing process was informal and nonadversarial. The legal staff gathered and summarized the applicants' pertinent data and presented it to the Board for decision. Most of these data were the product of written and often official records.[296] The legal staff also received correspondence and oral statements from the applicants or their representatives. The staff attorneys acted neither as counsel for the applicants nor for the Board;[297] they were obligated to maintain a neutral position and to advise applicants that they did not need to submit detrimental information. In this effort the staff attorneys were aided by the Board's power to preserve strict confidentiality of all information submitted.[298] The eighteen-member Board sat on panels of three or four and any panel member dissatisfied with the outcome of a particular case could refer it to the entire Board for reconsideration.[299] That referral was the only administrative review available; applicants had no right to judicial review.

3. Proposed Legalization Procedures: A Synthesis

The proposed immigration bills contain only a few statements that concern legalization procedures, but these statements are instructive. They direct that "qualified organizations" or state and local governments be used to publicize the program and to make initial eligibility determinations.[300] This provision confirms the wisdom of moving the locus of initial decision outside of the INS—an agency which, for obvious reasons, has a negative image with those the legalization process seeks to reach. It is difficult to argue with this assessment.

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[293] *Id.* at xiii.

[294] *See supra* note 269. It may be that the clemency-versus-amnesty aspect of the program deterred many eligible applicants. But the largest category (90,000) were dishonorably discharged AWOL offenders who would not appear to have the same objections of conscience as draft offenders.

[295] PRESIDENTIAL CLEMENCY BOARD, *supra* note 292, at xxiii.

[296] PRESIDENTIAL CLEMENCY BOARD, *supra* note 292, at 85–87.

[297] PRESIDENTIAL CLEMENCY BOARD, *supra* note 292, at 87.

[298] PRESIDENTIAL CLEMENCY BOARD, *supra* note 292, at 93.

[299] PRESIDENTIAL CLEMENCY BOARD, *supra* note 292, at 92.

[300] S. 529, 98th Cong., 1st Sess. § 301(a) (1983).

This provision does not necessarily mean, however, that resort to private groups is the best way to administer the program, even in its early stages. The fact that some organizations, notably religious agencies, already have a close relationship with aliens makes those agencies a good publicity medium. However, using volunteer agencies as deciders is more problematic. Whenever the government tries to turn over its decision functions to private hands, it must face challenges to the validity and objectivity of the resulting decisions. Such practices are rarely successful.[301] There are also due process problems with the exercise of government responsibilities by private parties and additional establishment clause problems where the groups have religious affiliations.[302]

The government would find it difficult to discharge its responsibilities through private deciders. Even volunteer agencies with a well-deserved reputation of service to the alien community would be confronted with challenges to their objectivity should they be assigned the task of administering or deciding eligibility for legalized status.[303] Moreover, a need would exist for administrative review of these private decisions. While the House bill contemplates such review,[304] much of what the volunteer agencies initially decided might be undone or duplicated. In these circumstances it may be more efficient for the Attorney General to turn the administrative and decision functions over to state and local governments; these governments, with their experience in programs such as the food stamp program, are familiar with the client population and experienced with mass justice decisionmaking.[305] Volunteer agencies might more profitably provide publicity and perhaps representation for aliens entering the legalization process.[306]

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[301] For example, the USDA long has used volunteer farmers to assist in the allocation of crop subsidies. The process, while unusual, has been accepted without complaint by those involved. *See* Verkuil, *supra* note 14, at 788–89. *But see* Gibson v. Berryhill, 411 U.S. 564, 578–79 (1973) (professional licensing board); Carter v. Carter Coal Co., 298 U.S. 238, 288–316 (1936) (price fixing commission); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529–42 (1935) (National Industrial Recovery Act).

[302] *See* Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) (delegation of power to veto liquor license applications to schools and churches violates establishment clause; due process issue not reached).

[303] The agencies might not undertake the task in the first place. There is serious question within the religious service community whether undertaking administration of the legalization program might compromise or jeopardize the long-term relationship of trust with their constituents.

[304] *See supra* note 270.

[305] The state and local governments will be receiving federal funding in any event to cover the costs in public benefits occasioned by the legalization program.

Another alternative would be for the government to form a "Presidential Legalization Board," much like the Presidential Clemency Board. This board could be formulated under the Advisory Committee Act[307] and contain, in addition to government officials, prominent figures, including heads of volunteer agencies and religious organizations, known to and knowledgeable about undocumented aliens. The appointment of the board would serve to publicize the availability of the legalization program and to encourage participation. If the board followed the Clemency Board's actions, using legal staff to present cases and a full board to review panel decisions, its decisions could be rendered either in final form or as recommendations to the Attorney General. In either case, the decisions would be free from judicial review.[308] Such a board also may need to have the power to keep all files confidential, a power granted to the Clemency Board but not now a part of the legalization process.[309] This confidentiality would help ensure fair treatment of the aliens subject to this informal, but admittedly one-sided, process. It also should encourage more eligible aliens to participate.

The disadvantages of a temporary board system would be largely managerial and economic. To put in place a new mechanism to review the onrush of legalization claims, on ninety days' notice,[310] would challenge even the best organized bureaucracy. Moreover, since the INS already has a structure in place that is familiar with the uses and abuses of documentary presentations, overlooking this source of trained decisionmaking talent would be costly.

For these reasons, most plans currently locate legalization decision responsibility in the INS. It may be that a hybrid system, using INS officials for initial decisions subject to administrative review by a temporary legalization board, would best serve the present needs for efficiency, fairness, and the perception of fairness. Some effort to assure the affected class that its interests will be overseen by a noninstitutional entity should do much to encourage potential applicants, and those organizations that represent them, to come forward and participate in the legalization program. For the program to work best for both the individual and government requires a process that is carefully tailored to the extraordinary size and time pressures presented. These considerations argue for at least limited use of a temporarily established, single-mission board, with the powers necessary to publicize, to oversee, and ultimately to resolve—subject to Attorney General review—the millions of claims on the horizon.

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[306] Veterans' organizations (American Legion, VFW, etc.) have long played an analogous representational role with regard to those seeking benefits from the Veterans Administration. *See* Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis*, 27 STAN. L. REV. 905, 914–15 (1975).

[307] 5 U.S.C. app. § 1 (1982).

[308] The decisions would be free from judicial review so long, of course, as they did not lead to deportation, in which case full administrative and judicial review would be available.

[309] *See* ASSOCIATION OF THE BAR, CITY OF NEW YORK, IMMIGRATION REFORM AND CONTROL ACT OF 1983, at 21 (1983) (recommending confidentiality of all legalization materials).

[310] The immigration bills provide for a ninety-day start-up period before the twelve-month legalization time begins to run.

C. *Employer Sanction Proceedings*

The proposed immigration bills provide for a regime of graduated civil and criminal penalties to be levied against employers who knowingly hire undocumented aliens.[311] These sanctions are seen by many as more important than tighter controls at the border to deter illegal immigration.[312] They also present strong interests in terms of the *Eldridge* due process balancing test.

The individual employer has an interest in procedures surrounding civil and criminal penalties. Individual interests of this degree necessarily call into play formal administrative and judicial procedures as a matter of due process.[313] The government interest lies, as usual, with efficient procedures. Given the established individual interests involved, however, the government has little to gain by seeking informal process.

The subjective nature of much of the proof that would be offered in sanction cases determines the value of additional procedures. While there would be some documentation involved—

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[311] *See* H.R. 1510, 98th Cong., 1st Sess. § 101(a)(1) (1983) (unlawful to "hire or to recruit or refer for a fee or other consideration" an alien who is known to be unauthorized for employment). Service of a citation on the offending party by the Attorney General is the first penalty and amounts to a warning that continued violations will result in further penalties, graduated as follows: first offense, civil penalty of $1,000 (per unauthorized alien); second, civil penalty of $2,000; subsequently, a fine of $3,000 and imprisonment for more than one year. *Id.* The Senate bill varies the penalties but does not change this essential configuration. In addition, the employer is required to attest, under penalty of perjury, that he examined the questioned employee's passport, Social Security card, or other specified documents. S. 529, 98th Cong., 1st Sess. § 101(b) (1983).

[312] *See* NATIONAL INTEREST, *supra* note 1, at 59: "The Commission has concluded that the success of any campaign to curb illegal migration is dependent on the introduction of new forms of economic deterrents."

[313] *See* Wong Yang Sung v. McGrath, 339 U.S. 33, 41–45 (1950); Verkuil, *supra* note 169, at 321–22 (trial type procedures should be limited to imposition of sanctions). The open issue is whether that process demands an APA qualified administrative law judge. *See infra* notes 316–29 and accompanying text.

passport, social security cards, etc.—it is unlikely in the majority of cases that written proof, in the *Eldridge* sense, would render additional procedures unnecessary. The central issue in many of these proceedings will be whether the employer complied "in good faith" with the verification provisions,[314] an issue inherently subject to oral proof and process.

These considerations make it difficult to place employer sanction proceedings anywhere but near the top of the formal administrative process scale. Since employers have not themselves been the direct target of previous immigration laws, their inclusion in the new legislation will be subject to the closest judicial scrutiny. In these circumstances, attempts to employ informal procedures to resolve employer sanction cases very likely would be counterproductive.[315]

1. The Formality of the Proceedings—Immigration Judge or Administrative Law Judge?

Since there are few arguments in favor of using the informal process to resolve employer sanction cases, the only procedural issue in controversy is how formal the formal process must be. The present legislative proposals are ambivalent on this issue. The House bill requires APA administrative law judge (ALJ) hearings;[316] the Senate bill approves the use of the immigration judge system.[317]

The decider independence issue is especially sensitive in the context of employer sanctions. Whereas there is little doubt that the immigration judge structure satisfies the due process standards of independence for decisions about aliens, the structure must be examined more closely when those normally outside the reach of the system are to be brought within it. This is especially true where criminal penalties are involved. In the system that is most analogous to the proposed employer sanction program, the OSHA employer penalty program,[318] ALJ's are used with review by an independent agency outside of the Department of Labor, the Occupational Safety and Health Review Commission (OSHRC).[319] When one considers just how controversial the OSHA inspection and penalty system is,[320] even with trial and review in a totally separate agency, serious challenges to the proposed immigration employer sanction program are easy to visualize.[321]

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[314] *See* H.R. 1510, 98th Cong., 1st Sess. § 101(a)(1) (1983). In effect, the good faith provision requires the government to produce independent proof that the employer knew the alien was unauthorized for employment. *See* ASSOCIATION OF THE BAR, CITY OF NEW YORK, *supra* note 309, at 5–6.

[315] In analogous situations where informal procedures have been used to sanction businesses, such as the retailer disqualification procedures of the Food Stamp Act and regulations, 7 C.F.R. § 278.6–.8 (1984), the administrative determination has been followed by trial de novo in the federal district court. This kind of process is counterproductive in the sense that it invites more formality than would the initial use of a formal administrative proceeding.

[316] H.R. 1510, 98th Cong., 1st Sess. § 101(a)(1) (1983).

[317] S. 529, 98th Cong., 1st Sess. § 101(a)(1) (1983).

[318] The Occupational Safety & Health Act of 1970 provides for a graduated series of civil and criminal penalties to be imposed by the Secretary of Labor for of-

The decider independence issue involves the trade off between a lesser degree of impartiality, because of the presence in many cases of former INS officials as immigration judges,[322] and the need for administrative efficiency.[323] The objections based on decider partiality could be addressed in some measure by a formal process having less than independent agency status. Both the House and the Senate bills create an appellate administrative mechanism, the United States Immigration Board, although the House goes further than the Senate by establishing this body as an independent agency within the Department of Justice.[324] Creating this Board as a statutory entity within the Department of Jus-

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fenses ranging from nonserious violations (up to $1,000 discretionary), to serious violations (up to $1,000 mandatory), to willful or repeated violations ($10,000 fine). 29 U.S.C. § 666 (1982). Not only is the system of penalties similar to that proposed for employer sanctions in the immigration area, *see supra* note 311, but the use of inspections and the discovery of violations is likely to present comparable issues as well.

[319] *See* 29 U.S.C. § 661(j) (1982).

[320] *See* Marshall v. Barlow's Inc., 436 U.S. 307, 311–25 (1978) (applying fourth amendment search warrant requirements to OSHA inspections); Atlas Roofing Co. v. OSHRC, 430 U.S. 442, 449–61 (1977) (upholding administrative criminal and civil penalty scheme against sixth and seventh amendment challenges).

[321] For example, there could be a clash between the modified fourth amendment warrant requirements for locating illegal aliens near the border and the inspection of persons who employ allegedly illegal aliens within the same geographic area. *Cf.* United States v. Martinez-Fuerte, 428 U.S. 543, 556–64 (1976) (warrantless search by roving patrol violated fourth amendment); Almeida-Sanchez v. United States, 413 U.S. 266, 272–75 (1973) (stopping vehicles at checkpoint near Mexican border is consistent with fourth amendment).

[322] *See Developments Note*, *supra* note 1, at 1364–65.

[323] *See Joint Hearings Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary, and the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 329 (1983) (statement of William French Smith) ("[A]bsence of accountability . . . would only compound existing management problems.").

[324] H.R. 1510, 98th Cong., 1st Sess. § 122(a) (1983). The primary difference between the House and Senate versions of the U.S. Immigration Board is who appoints its members. In the House version it is the President; in the Senate version it is the Attorney General. Since the President, in the usual course of appointments, relies on the Attorney General for advice, one wonders what is actually gained by making the U.S. Immigration Board an independent agency. The more important considerations are that both bills create the Board as a statutory entity (whereas the BIA is currently the creature of Department of Justice regulations alone) and underscore its independence with a removal only for cause protection. *See also* S. 529, 98th Cong., 1st Sess. § 122(a) (1983). The Senate bill also allows the Attorney General, if the national interest requires, to have cases certified to him for review. *Id.* This latter power of

tice would insulate its members from some of the controls heretofore exercised by the INS and the Attorney General and would give a greater appearance of impartiality.[325] In these circumstances it is fair to ask whether more than a marginal improvement in impartiality could be achieved by shifting from the present, statutory system to a new, independent agency/ALJ system.

Furthermore, the Attorney General's management objections to the House bill's independent agency idea are not to be dismissed lightly.[326] The new immigration legislation would add enormously to the workload of the Department of Justice and the INS. Making the Immigration Board an independent agency would deprive the Attorney General of the power to review and to reverse (subject to judicial review) the handful of crucial decisions meant to establish national policy.[327] This consequence would further complicate the management responsibilities inherent in the new legislation.

Of course, that an independent ALJ poses management difficulties may only suggest that he is potentially free to be more objective in his decisions. In the immigration setting, however, Congress and the courts have long acquiesced in executive policy control via the Attorney General.[328] Therefore, it may not be necessary or desirable to move abruptly from an executive dominated decision system to a fully independent one. Viewed from this more general perspective, the modified independence approach of the Senate bill may be the better way to meet the competing demands of fairness and efficiency in the employer sanction situation. Moreover, to allow the employer sanction cases to cause the restructuring of the entire decision process for deportation, asylum, and exclusion cases creates the potential for bureaucratic delay and disorganization.[329]

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final administrative review is lost to the Attorney General by the independent agency concept of the House bill.

[325] In addition, expanding the selection register for immigration judges will reduce the INS prosecutorial bias of new judges. There is evidence that this has begun to happen already. The Chief Immigration Judge, William Robie, reports that none of the four newest immigration judges are former INS officials. Interview with William Robie, Chief Immigration Judge (Dec. 14, 1983). This reduction in bias should be especially significant if a large number of new judges are added. The Senate bill establishes seventy new immigration judge positions, but by some predictions many more than that will be needed. *See infra* note 350.

[326] *See supra* note 323. There are also objections based on budgetary factors. *See* Department of Justice, Statement of David L. Milholland Before the Comm. on the Judiciary, Subcomm. on Immigration and Refugee Policy, U.S. Senate 4 (1981).

[327] *See supra* note 324.

[328] After all, it was on this very issue that Congress reversed the Supreme Court's pronouncements in the *Wong Yang Sung* case. *See supra* note 23.

[329] A compromise may be to allow formal ALJ hearings for employer sanction

D. *Asylum and Summary Exclusion Procedures*

The current backlog of asylum cases exceeds 170,000.[330] This situation undoubtedly influenced Congress to favor a streamlined process for asylum determinations. The process that Congress is considering has three essential components: use of a summary exclusion process to exclude without hearing those aliens who have no reasonable basis to obtain entry and who have not applied for asylum (undocumented aliens);[331] use of specially trained immigration judges to render expedited asylum decisions;[332] and narrowing of administrative and judicial review.[333] Each component would work significant changes in present practice.

The summary exclusion provisions grant immigration officers the power to exclude without hearing applicants whose claims they determine to be without merit.[334] Delegating final authority to the officer is meant to clear the system of manifestly baseless claims. Lacking review, the proposal raises the potential for abuse; but as long as it applies to aliens making no cognizable claim for entry into the United States, it does not violate any constitutionally protected interests. Interest analysis suggests that applicants for admission, and nothing more, do not possess liberty or property interests worthy of constitutional protection.[335] It is only when they allege more—usually, in this setting, a claim to asylum—that liberty or property interests become relevant.

The difficult question with summary exclusion is whether the process is adequate to distinguish reliably between those who do and those who do not present protected interests. The bills provide for the establishment of procedures to ensure that an alien is not excluded without an inquiry into his reasons for seeking entry;[336] this inquiry is designed to bring an asylum claim to the fore. However, that the immigration officer's method of inquiry is unchecked and may be subject to abuse is problematic. Since an

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cases, but not to extend the use of ALJ's to the vast run of formal immigration decisions. Employer sanction cases could be distinguished since they involve a population usually not subject to INS jurisdiction.

[330] *See supra* note 70.

[331] S. 529, 98th Cong., 1st Sess. § 121(b)(1) (1983); H.R. 1510, 98th Cong., 1st Sess. § 121(b)(1) (1983).

[332] S. 529, 98th Cong., 1st Sess. § 124(a)(1) (1983); H.R. 1510, 98th Cong., 1st Sess. § 124(a)(1) (1983).

[333] S. 529, 98th Cong., 1st Sess. § 123(a)(5) (1983); H.R. 1510, 98th Cong., 1st Sess. § 123(a)(9) (1983).

[334] In effect, this authorizes immigration officers to treat undocumented aliens at our shores much like consular officers treat applicants abroad. The exclusion hearing currently available to undocumented entrants would be denied in the interests of expediting the case load.

[335] *See supra* note 41 and accompanying text.

[336] S. 529, 98th Cong., 1st Sess. § 121(b)(3) (1983).

applicant seeking asylum may have a protected statutory interest under the Refugee Act of 1980, a single decider has an enormous amount of discretion if his or her decision is nonreviewable.[337] Still, it is sensible to assume that those who have a serious asylum claim to assert will do so at the critical point of entry. How far one need go to coax asylum claims out of otherwise unresponsive applicants is debatable.[338] A compromise would be to provide some limited administrative review of the immigration officer's initial decision to exclude by means of either an established quality control procedure or an administrative review process. The House bill provides for limited administrative review of summary exclusion decisions.[339]

If an applicant indicates to an immigration officer his or her intention to apply for asylum, he or she is to be given a hearing before an immigration judge who is specially trained in "international relations and international law."[340] The hearing before this judge is to be "nonadversarial and informal."[341] It is difficult to see how this directive could be carried out in practice, since the bills also provide for procedural ingredients such as cross-examination, oral presentation of evidence, confrontation, and the right to retain an attorney. These ingredients will undoubtedly create an adversarial environment. Perhaps the reference to nonadversarial decisionmaking is intended to give the special immigration judge some power to control and participate in the hearing process.[342]

Much of what the proposed legislation seeks to accomplish with the new asylum hearings is innovative and creative. The new hearings, including those that are a part of deportation proceedings, contain no fewer procedural ingredients than the current asylum hearings.[343] The use of specially trained judges, many of whom would be newly recruited from outside the INS, cannot help but enhance the qualifications as well as the impartiality of the principal asylum decisionmakers.

The asylum claimant is entitled to a hearing within forty-five days, and a decision is required to be rendered within ninety days after the hearing.[344] The purpose of this strict statutory time limitation is obviously to end the increasing backlog of asylum cases. However, this expedited process challenges the decision system in several ways. First, the current time between asylum application and the completion of immigration judge hearings is eighteen months.[345] How a decrease in decision time from eighteen months to 135 days will be accomplished is difficult to understand. Second, the new asylum legislation would increase the immigration judges' asylum workload fivefold annually, from 6,600 to 33,300 cases.[346] This dramatic increase in the number of cases would seem to hamper any attempt to decrease disposition time.

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[337] *See* ASSOCIATION OF THE BAR, CITY OF NEW YORK, *supra* note 309, at 24.

[338] *See* Note, *supra* note 102, at 905–08.

[339] H.R. 1510, 98th Cong., 1st Sess. § 121 (1983).

[340] *Id.* § 124(a)(1); S. 529, 98th Cong., 1st Sess. § 124(a)(1) (1983). The House bill makes the specially trained official an administrative law judge. The use of ALJ's in this context will require the Office of Personnel Management to establish a special register.

[341] S. 529, 98th Cong., 1st Sess. § 124(a)(1) (1983). The House bill does not contain this language.

[342] Social Security ALJ's long have exercised this power. *See* Richardson v. Perales, 402 U.S. 389, 400 (1971).

[343] *See supra* text accompanying notes 175–200.

Concerning the timing of decisions, the legislation assumes a reduction of six months from the present time by eliminating State Department BHRHA opinions from the asylum process.[347] Since the use of these opinions was shown to be problematic in the procedural ingredient analysis,[348] there is much, in addition to expediting decisions, to recommend eliminating the opinions as the dominant source of advice about human rights conditions and the applicant's fear of persecution.[349] However, such a move would reduce the current asylum decision time to only one year. To reduce the time for decision it will be necessary to add immigration judges in numbers far beyond the fifty or so who comprise the present system. Depending upon whose estimate one accepts, there could be a need for from eighty to over 400 new immigration judges.[350] Statistics such as these suggest that on the horizon is a new corps of administrative judges that could rival the number of ALJ's deciding Social Security disability cases. The management challenges this development presents—recruitment, training, and implementation—are unparalleled. When, and if, these new judges are successfully integrated into the decision system, their numbers will have transformed it. An optimist would look for reduced complaints about both the timeliness and quality of immigration decisions. A skeptic would worry that strict statutory time limits would have a perverse effect upon decision quality or the INS's ability to control the flow of illegal aliens into the country.[351] Thus, statutory time limits upon decisionmaking introduce an entirely new set of management problems.

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[344] H.R. 1510, 98th Cong., 1st Sess. § 124(a)(1) (1983).

[345] *See* INS SPECIAL ANALYSIS, *supra* note 273, at 37.

[346] *Id.*

[347] *Id.* at 38. The opinions apparently take an average of six months to be received.

[348] *See supra* text accompanying notes 186–91.

[349] The Senate bill requires that the State Department be notified about asylum applications, but states that the proceedings shall not be delayed to await the Department's comments. S. 529, 98th Cong., 1st Sess. § 124(a)(1) (1983). It may be, therefore, that some comments will be timely received by the immigration judges, and their appropriate use in the proceedings will still have to be determined by the immigration judge.

[350] There are currently fifty-one immigration judges who decide asylum cases twenty percent of their time (i.e., 10.2 asylum judge work years per year). Under the Senate bill, the decision time must be reduced from twelve months to forty-five days. That will mean either that the existing judges must become eight times more efficient (an unrealistic proposition) or that eight times more judges must be employed (a more likely scenario). Consequently, there will be a need for about eighty new immigration judges. This is the estimate provided by the Department of Justice, Executive Office of Immigration Review. *See* INS SPECIAL ANALYSIS, *supra* note 273, at 38. But if the work load is also expected to increase fivefold, then the total number of immigration judges must also be increased by that amount. Therefore, under the Senate version the number of judges needed to decide immigration cases could exceed 400. The House bill, by liberalizing the asylum decision times somewhat (from forty-five to 135 days), permits a smaller increase in immigration judges to occur. However, the

Finally, judicial and administrative review of asylum decisions are to be expedited and channeled. Asylum claims heard and denied before the specially trained immigration judges will be reviewed administratively before the newly constituted United States Immigration Board. The appellate process is subject to strict time constraints,[352] and judicial review is limited.[353] The bills also restrict an alien's freedom to raise asylum issues in exclusion or deportation cases by limiting an alien to one application for asylum, absent a clear showing of changed

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number should still be at least three times that of the current number of immigration judges. Moreover, by requiring ALJ's, the House bill also would add to the enormous problems associated with bringing that number of new judges on line. Both bills also require judges to be trained in international relations and international law, another likely logistical problem.

[351] If time limits for asylum decisions are not observed, it will be difficult for the INS to detain aliens whose time for prompt decision has run; *cf.* White v. Mathews, 559 F.2d 852, 858–60 (2d Cir. 1977) (imposing time constraints upon Social Security disability determinations that trigger the award of benefits if not met).

[352] The bills provide precise times for administrative appeals from immigration judge decisions (fifteen days in the Senate bill, twenty days in the House bill) that replace current "timely" appeal standards. S. 529, 98th Cong., 1st Sess. § 122(b) (1983); H.R. 1510, 98th Cong., 1st Sess. § 122(a) (1983). The bills also reduce the current six months' time to file judicial appeals from deportation orders down to forty-five (Senate) or sixty (House) days. S. 529, 98th Cong., 1st Sess. § 123(a)(1) (1983); H.R. 1510, 98th Cong., 1st Sess. § 123(a)(3) (1983). The House bill gives the immigration board sixty days to decide cases after appeal is filed. H.R. 1510, 98th Cong., 1st Sess. § 122(a) (1983).

[353] Either the claimant or the government may seek judicial review of asylum orders in the court of appeals, but the orders must be upheld unless they are in excess of jurisdiction, unconstitutional, or arbitrary and capricious. S. 529, 98th Cong., 1st Sess. § 123(a)(5) (1983); H.R. 1510, 98th Cong., 1st Sess. § 123(a)(9) (1983). The bills also provide for individual or multi-party habeas corpus petitions. This review is narrower than that provided in deportation cases, which, under the Senate bill, was changed from the present "reasonable, substantial and probative" evidence to "substantial" evidence. S. 529, 98th Cong., 1st Sess. § 123(a)(4) (1983). It is hard to believe that any narrowing in the scope of review was intended from this word change.

circumstances.[354] Thus, an alien will no longer be automatically entitled to obtain a second decision on the asylum issue before an immigration judge. Court of appeals substantial evidence review of an asylum issue, raised a second time in exclusion or deportation proceedings, will be limited to a review of the record created during the initial determination.

This restriction on the review of asylum cases reflects a considered congressional judgment upon both the substance and procedure of asylum claims. It also demonstrates that the administrative process can be used effectively with judicial review to shape the decision that is rendered. Under the new asylum system, an alien is entitled to one careful decision on the substance of his or her claim before a exceptionally qualified official, the specially trained immigration judge or ALJ. This investment of decision resources at the outset—replacing immigration officers with specially trained immigration judges or ALJ's—is intended to reduce the decision costs of judicial appeals and multiple asylum claims. It is desirable to carefully shape the administrative process to meet the particular needs of the decisions before it. Adjustments in the formality of the administrative process should allow for more efficient and expedited decisionmaking thereafter.

VII. Recommendations and Conclusions

At the outset this Article stated two purposes: to evaluate immigration procedures both from a due process perspective and from the vantage point of good administrative practice. The first inquiry is easily satisfied, because there are only a few areas in which valid constitutional questions arise. The second inquiry is much more speculative and perhaps a little presumptuous. Nonetheless, there appear to be substantial areas in which general administrative law principles can yield useful suggestions for change. As immigration law and practice are increasingly entering the mainstream of administrative law and procedure, these recommendations should be easier to accept. Accordingly, a summary of several suggestions for reform follows.

A. *Due Process Constraints Upon Immigration Procedures*

The due process questions in present immigration practice arise largely in connection with notice requirements in asylum and exclusion and with the hearing requirements relating to detention of excludable aliens. In asylum determinations the one seeking asylum is not assured of notice of the right to apply for asylum, creating an adequacy of notice problem; in the exclusion situation, the alien denied entry is given only a few hours to prepare for his hearing, creating a timely notice of hearing problem.

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[354] S. 529, 98th Cong., 1st Sess. § 124(a)(1) (1983); H.R. 1510, 98th Cong., 1st Sess. § 124(a)(1) (1983).

In terms of adequacy of notice, the issue is to what extent an immigration official must inform an undocumented alien requesting entry at the border or at a consular office abroad that he or she may make an asylum claim. In a situation in which the individual due process interests are low, perhaps even nonexistent,[355] the only issue should be whether the initial applicant has been given an opportunity to raise the asylum claim. As long as the immigration inspectors permit this assertion, and probe behind it if it is poorly articulated,[356] no additional due process burden need be placed upon the entry process. The INS should be free to conclude that expansive notice at the point of entry could only encourage frivolous assertions of asylum that would burden the decision process and penalize colorable claims with delay and detention. This conclusion has been made in the summary exclusion provision of the Immigration Reform and Control Act;[357] it should satisfy due process analysis.

The length of notice for exclusion hearings is, however, a different matter. Assuming an entrant has a colorable claim to enter the country, it is difficult to endorse a hearing that gives fewer than twenty-four hours' notice, especially when legal representation is often unavailable. While speed is important in these matters, and detention pending a hearing is often a problem, it is hard to accept any hearing date that is set on less than three days' notice, absent express waiver by the alien's counsel.

Concerning due process in detention hearings, the INS is currently caught between the procedures it created in the Status Review Plan[358] and that ordered by the district court in *Fernandez-Roque v. Smith*.[359] While the INS may not have designed the perfect procedure for these cases, the judicialized process imposed by the district court is excessive by any due process standard currently employed. The detention hearing contains more formality than that demanded even by *Goldberg*, the case that *Eldridge* took pains to limit to its facts. Here the actual question should be whether the Status Review Plan, as applied to all detainees, satisfies due process. The procedural weaknesses of the plan relate to the internal review mechanisms and the lack of administrative review. There is currently no method whereby a detainee may correct material that is in his file, yet this file forms the basis of the initial review. It also appears that the initial two reviewers of the detainee's file can also conduct the oral hearing later. If the detainee had a right to correct his file, and other reviewers were used in the oral hearing, there would be no constitutional infirmity with these or other aspects of the Status Review Plan.

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[355] *See supra* text accompanying notes 46–47.

[356] *See supra* text accompanying notes 180–85.

[357] *See supra* text accompanying notes 334–39.

[358] The INS designed the Status Review Plan in response to judicial concern about the plight of Mariel Cubans held in detention in Atlanta. Currently it is limited only to Mariel Cubans; its provisions have not been extended to other aliens in detention, such as Afghans and Iranians.

[359] 567 F. Supp. 1115 (N.D. Ga. 1983); *see supra* text accompanying notes 127–37.

The lack of administrative review is more problematic. Currently, annual review of the file substitutes for immediate administrative review. This technique of correcting error has survived due process challenges in other contexts, notably the bar re-examination process, but it is harder to justify when physical liberty is at stake.[360] Therefore, the availability of prompt administrative review, preferably by the BIA, should be incorporated into the Status Review Plan.

Finally, it should be remembered that since the detainee is in custody, judicial review by writ of habeas corpus is also available. One of the issues before the district court in a habeas corpus proceeding would be denial of due process. The presence of constant due process supervision should make the INS especially careful with its informal process.

B. *Recommended Improvements in Immigration Procedures*

A series of procedural changes could be made to improve immigration practice, even though the changes may not be required by present due process notions. Improvements are possible in the use of BHRHA reports, in the role of rulemaking, and in the availability of administrative review.

1. The Use of BHRHA Reports

Currently, State Department BHRHA reports are used for exactly the wrong reasons. Immigration judges in deportation or exclusion cases use the reports for advice on whether an individual applicant is entitled to asylum. Although the judge is free to disregard them, the reports are undoubtedly very persuasive. Their use compromises the applicant's right to confront the report's author, who is not present. Although this system may not be a denial of procedure sufficient to violate due process, it unnecessarily undermines the procedural quality of the hearing process. The better use of BHRHA reports, as Judge Friendly suggested in

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[360] *See* Lassiter v. Department of Social Serv., 452 U.S. 18, 25 (1981) (interest in personal freedom triggers due process rights).

Zamora v. INS,[361] is to restrict them to advice on the general human rights conditions in the country at issue.

Under the Immigration Reform and Control Act, BHRHA reports are meant to play a less central role in asylum determinations because cases are not to be held pending their receipt. However, this expedition requirement does not resolve the problem of the proper use of the reports once they are received. To clarify their proper use requires a statement of policy from the Department of Justice or the Chief Immigration Judge. That policy should restructure the use of the reports to provide general background on conditions prevailing in a particular country rather than specific advice about the merits of an individual applicant's case.

2. The Role of Rulemaking

Currently, the APA rulemaking requirements for immigration functions are in disarray. One court has left unresolved whether the Department of Justice must engage in rulemaking when it changes policy, specifically detention policy.[362] This is an ill-advised role for rulemaking.[363]

There are several areas in which the use of rulemaking could improve the process of immigration adjudication. The first involves the BHRHA reports. If the reports were used as general statements of country-wide human rights conditions, as suggested above,[364] then they would become much more valuable and accurate if they were written after input was received from relevant public and private entities. The INS could engage in such rulemaking with the aid of the State Department.

A second use of rulemaking would be to help determine what factors are to be considered in making discretionary decisions under the Act. The statutory standards for adjustment of status, for example, are not adequate to guide discretion and therefore need to be refined.[365] Persistent failure to do so imposes costs on the eligible class, whose applications may be treated unequally, and upon the administrative system, which risks increased judicial supervision due to a failure to articulate standards. One example of this problem in a related setting is the holding of the Eleventh Circuit en banc in *Jean v. Nelson*.[366] There, the court remanded for district court consideration the issue of whether the INS had properly exercised the discretion to parole or detain granted by Congress to the Attorney General.[367] The presence of rules for exercising discretion in these matters likely would have reduced or eliminated the court's concern with the potential abuse of discretion alleged by the detained Haitians.

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[361] 534 F.2d 1055 (2d Cir. 1976); *see supra* note 193.

[362] *See supra* text accompanying note 227.

[363] At least, this is ill-advised for mandatory rulemaking. On the other hand, the INS had demonstrated a historical reluctance to engage in rulemaking even when it might be advantageous to do so. *See* Diver, *supra* note 199, at 92–97.

[364] *See supra* notes 192–200 and accompanying text.

[365] *See* Sofaer, *supra* note 143, at 369–70.

[366] 727 F.2d 957 (11th Cir. 1984) (en banc).

3. The Advantages of Administrative Review

Increased administrative review can serve as a deterrent to the much more disruptive prospect of increased judicial review. In an era in which large numbers of immigration cases are reaching the courts, often via writ of habeas corpus, the tendency for the judiciary to redesign the heretofore overlooked procedures of the INS is increasing. A sound administrative review process helps the agency gain the courts' confidence and thereby lessens the intensity of judicial supervision.

Candidates for increased administrative review are not difficult to locate. One example is review of initial asylum determinations. Currently, asylum claimants whose cases are determined under the Refugee Act are not governed by the same procedural ingredients as those who have their denied claims later reheard in deportation or exclusion proceedings. This procedural deficiency, lack of oral hearing,[368] is itself questionable. When it is coupled with lack of direct administrative review, it can only encourage the courts to intervene directly in the initial asylum determination—especially when the denied applicant is being detained. Prompt administrative review would reduce the courts' tendency to intervene early, before the deportation process is complete, and would also serve as a significant quality control device over the work of initial deciders. With a summary asylum procedure forthcoming, administrative review should be an increasingly significant administrative technique.

C. *The Future of Immigration Law*

There can be no doubt that immigration law has been moved to center stage. It will not relinquish that position in the future, no matter what Congress does with the current Simpson-Mazzoli proposals. The problems those bills address are not going away. Our society must plan for increasing pressures upon our borders from those throughout the world who seek to improve their lives.

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[367] *Id.* at 978–79.

[368] *See supra* text accompanying notes 175–79 (right to present oral evidence unavailable under Refugee Act).

The pressures to assimilate both legal and illegal aliens will continue to present major social and administrative problems.

The courts' role in supervising appropriate INS procedures is likely to expand. While it is not yet clear how much judicial supervision will do to change existing procedures for deciding immigration cases, it seems inevitable that constant contact, through habeas corpus petitions as well as ordinary judicial review, will bring the courts closer to the process. In these circumstances, one can expect procedural improvements to occur by administrative initiative also. Fortunately, the level of recommended changes is within the capacity of the INS and the Department of Justice to achieve.

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